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MIDNIGHT RULEMAKING: SHEDDING SOME LIGHT

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

FEBRUARY 4, 2009

Serial No. 111–2

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

47–033 PDF WASHINGTON : 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
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MIDNIGHT RULEMAKING: SHEDDING SOME LIGHT

WEDNESDAY, FEBRUARY 4, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 11:10 a.m., in room 2141, Rayburn House Office Building, the Honorable Steve Cohen (Chairman of the Subcommittee) presiding.

Present: Representatives Cohen, Watt, Maffei, Franks, Coble, Issa, Smith, and King.

Mr. COHEN. This hearing of the Judiciary Committee's Subcommittee on Commercial and Administrative Law will now come to order.

Without objection, the Chair will be authorized to declare a recess of the hearing.

I would like to begin by welcoming everyone to the first hearing of the Subcommittee in the 111th Congress. In particular, I wish to extend warm regards to the Ranking Member of the Subcommittee, Mr. Franks, who I look forward to working with. Pretty much look forward to working with all the Members of the Subcommittee on both sides of the aisle. And would like to be welcoming our new Member, Mr. Maffei, who is not here yet.

I will now recognize myself for a short statement.

Despite the fact that many aspects of the Bush administration were winding down operations after the November 4, 2008 election, administrative agencies were ramping up their rulemaking.

A flurry of regulatory activity went on between the November presidential election and inauguration day, with the former Administration attempting to make a final impact.

This midnight regulation period is a time without political accountability, where controversial actions will not cost the Administration's party votes.

Under the cover of darkness, the Bush administration used the midnight regulatory period to promulgate numerous regulations that run counter to statutory mandates and the public interests.

Other Administrations, Democrat, as well, have done the same, and each are wrong.

Midnight rulemaking has been criticized as an effort of an outgoing Administration to tie the hands of the next Administration. While the tactic of flooding the Federal Register at the end of an

Administration has been used by Presidents of both parties, these regulations recently experienced through this Bush administration have been particularly troubling.

I have both procedural and substantive concerns about the Bush administration's use of midnight rulemaking. Regulatory experts across the political spectrum agree that the hurried process of midnight rulemaking leads to inherently flawed policy.

During the end of the Bush administration, agencies reportedly cut corners and administrative procedure by rushing regulations through the system without proper regulatory review.

In the case of many of the most significant rules, the public comment period was abridged. Significant public comments were ignored, and acceptable rulemaking practices were tossed aside.

The Administration's desire to make it more difficult to revoke controversial rules led to other questionable tactics.

In an effort to ensure that the rules would go into effect prior to inauguration day, the Administration reportedly categorized several significant rules as minor, as opposed to major, so that their effective dates would be 30 days after publication in the Federal register rather than 60 days.

A memo issued by then White House Chief of Staff Joshua Bolton in May 2008 announced the end of midnight regulations, stating that except in extraordinary circumstances, final regulations should be issued no later than November 1, 2008.

Nevertheless, the Bolton memorandum was brushed aside by the Bush administration, and dozens of controversial regulations went well beyond that deadline.

These included regulations on the environment, civil rights, workplace safety, opportunities to study medical marijuana, abortion rights, regulatory preemption, and online gambling.

Instead of implementing midnight regulations only in extraordinary circumstances, midnight regulations were used as parting gifts to favorite industries of political interests.

As several of our witnesses will recount today, the impact of midnight regulations on individuals, businesses, workers, science and the environment is profound.

When regulations jeopardize public health, safety and welfare, Congress has a duty to respond. This hearing today will explore whether the Congressional Review Act, the appropriations process or an approach like Mr. Nadler's legislation, H.R. 34, is the best way to proceed.

Although we are transitioning to a new era, Congress and the American people have an obligation to examine and rectify wreckage left behind by the Bush administration, including those egregious midnight regulations.

For the comfort of the minority party, I want them to know that I plan to introduce and will introduce into the record, without objection, a statement from a very much nonpartisan and, I think, conservative group, the Competitive Enterprise Institute, that specifically requests that all of our actions look in a bipartisan manner toward this Administration and future Administrations and makes sure that what is good for the goose is good for the gander.

And I certainly concur in that and would like to enter the Freedom Works letter of February 3 into the record, as well as a state-

ment from Earth Justice, that was asked to be a witness, but was unable to be included in our list of witnesses, and include its statement, with unanimous consent, into the record.

[The information referred to follows:]

Chairman Steve Cohen
Subcommittee on Commercial and Administrative Law
1004 Longworth House Office Building
Washington DC 20515

February 3, 2009

Dear Chairman Cohen:

We're concerned about midnight rulemaking. As representatives two groups that question many types of government regulation, we have enthusiasm for the particulars of some of the Bush administration's last-minute rules while maintaining doubts about others. We agree, however, that presidential administrations on their way out of office should issue new regulations carefully, deliberately, and meagerly.

The rulemaking process itself needs to follow rules and respect America's democratic institutions. The Administrative Procedure Act of 1946 establishes a regulatory process that includes opportunity for public comment, review, and investigation of new regulations. Ultimately, however, enormous power rests with the regulators themselves. The people, through their votes, provide a check on unwise rulemaking. When a departing administration issues regulations, it does so without this check and, in some cases, may do so against the will of the people.

The act of midnight rule making should not know partisan or even ideological lines. Administrations of both parties have issued numerous last-minute rules and all of these rules have served to erode the check that the people maintain on rulemaking power.

As you inquire into midnight rulemaking by the Bush administration, you should pay attention to the last-minute rules issued by other administrations. This is not a partisan issue, no matter how desperately people from both parties would like it to be. If and when you consider legislation intended to give the current administration enhanced powers to review, suspend, and modify rules issued during the waning days of the previous administration, you should write the legislation in such a way that it becomes a permanent part of the United States Code and, thus, applies to all future administrations.

Administrations of both parties have violated the spirit of the rulemaking process by issuing midnight rules. Congress can and should act to enhance the review, oversight, and accountability of the rulemaking process during the waning days of all administrations.

Yours truly,

Eli Lehrer
Senior Fellow
The Competitive Enterprise Institute

Wayne Brough
Vice President and Chief Economist
FreedomWorks

STATEMENT OF EARTHJUSTICE
BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
HON. STEPHEN I. COHEN, CHAIRMAN

HEARING ON "MIDNIGHT RULEMAKING: SHEDDING SOME LIGHT"

SUBMITTED BY:
BEN DUNHAM, ASSOCIATE LEGISLATIVE COUNSEL
SUSAN HOLMES, SENIOR WASHINGTON REPRESENTATIVE
SEAN BABINGTON, LEGISLATIVE ASSOCIATE
JOAN MULHERN, SENIOR LEGISLATIVE COUNSEL

FEBRUARY 4, 2009

Thank you Chairman Cohen, Ranking Member Franks, and Members of the Committee for holding this important oversight hearing today. On behalf of Earthjustice, we appreciate the opportunity to submit, for the record, written testimony about the widespread environmental damage that will be caused by the Bush administration's so-called "midnight regulations" if Congress and the new administration do not undo or overturn these actions.

Earthjustice is a non-profit public interest law firm dedicated to defending the right of all people to a healthy environment and to protecting the magnificent places, natural resources, and wildlife of this earth. We bring about far-reaching change by enforcing and strengthening environmental laws on behalf of hundreds of organizations, coalitions and communities. Founded in 1971 as the Sierra Club Legal Defense Fund, every year Earthjustice represents, without charge, hundreds of public interest clients, large and small, in order to reduce water and air pollution, prevent toxic contamination, safeguard public lands, and preserve endangered species and wildlife habitat.

We hope to draw the Committee's – and the Congress' – attention to some of the "worst-of-the-worst" of the midnight, anti-environmental regulations adopted by the Bush administration. These rule changes are unnecessary and unwise policy give-aways to various polluting industries that will, if not reversed, increase the devastation of one of the country's most diverse ecosystems and home to generations-old Appalachian communities, threaten already imperiled species, increase air and water pollution, and threaten public health now and for generations to come.

Destroying Appalachian Streams

One of the most environmentally destructive end-of-administration rulemakings is the effective repeal of the Stream Buffer Zone Rule, a 1983 regulation that has long prohibited surface coal mining activities from disturbing areas within 100 feet of

permanent and seasonal streams unless there will be no adverse effect on water quality or quantity. The new rule, finalized and published in the Federal Register on December 12, allows coal companies to place massive valley fills and waste impoundments directly into streams – thereby removing the "buffer" from the Buffer Zone rule, and doing so especially for those coal mining activities that are the most damaging to streams.

For years, federal agencies have looked the other way as the coal industry has been allowed to blast away the tops of mountains to reach thin seams of coal in an extremely destructive form of strip mining known as mountaintop removal. Already, mountaintop removal mining has flattened more than 500,000 acres of forested land in Appalachia and permanently buried 2,000 miles of streams, destroying sources that feed drinking water supplies and support fish and other aquatic life. This damage was done by coal mining companies in defiance of the Stream Buffer Zone Rule, which required a safety zone around streams to prevent this very kind of activity.

The Stream Buffer Zone was issued during the Reagan administration to implement the 1977 Surface Mining Control and Reclamation Act, which directs federal agencies to "minimize disturbances and adverse impacts of the [coal mining] operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable." 30 USC § 1265(b)(24). The Bush administration's new rule allows coal companies to ignore the 100' buffer and dump their waste right on top of streams, as long as they try to "minimize" the harm caused.

Before the rule could be finalized in the waning days of the Bush administration, the Environmental Protection Agency (EPA) had to give its approval to the change the Interior Department's Office of Surface Mining (OSM) was advocating. This is because, under the federal surface mining statute, EPA must give its written concurrence to any strip mining regulation that could affect water quality. When it enacted this section of the strip mining law, Congress was concerned about direct or even potential conflicts between air or water quality standards and mining activities allowed by OSM, and it believed that the EPA concurrence procedure would be used to prevent such conflicts. The 1977 House Report contains a section entitled "Relation of H.R. 2 to Other Laws" that states, in relevant part:

> The committee felt that the requirement for the Secretary of the Interior to obtain the concurrence of the Administrator of the Environmental Protection Agency is necessary to insure that any environmental requirement of this act is consistent with the environmental programs and authorities of EPA and, in particular, those programs authorized under the Clean Air Act, as amended, and the Federal Water Pollution Control Act, as amended. Specifically, the Secretary must obtain the Administrator's concurrence in the coal surface mining regulations and requirements under the environmental protection and State program approval

> provisions of the bill, as well as the final approval of any State program. The EPA has been directed by the Congress to insure the environmental well-being of the country. EPA has established water quality standards, air quality standards, and implementation and compliance requirements for the coal mining and processing industry, and issues permits to the industry to insure appropriate pollution abatement and environmental protection. The committee concluded that because of the likeness of EPA's abatement programs and the procedures, standards, and other requirements of this bill, it is imperative that maximum coordination be required and that any risk of duplication or conflict be minimized. H. Rep. No. 218, 95th Cong., 1st Sess. 142 (1977) (emphasis added).

The gutting of the Stream Buffer Zone clearly implicated the Clean Water Act: OSM was proposing to delete the "no adverse effect" test contained in the 1983 rule as well as eliminate the 100-foot buffer to allow valley fills and other waste disposal to occur directly in and on top of the streams. Therefore, EPA concurrence was required. But to give its written concurrence, EPA had to determine that removing the buffer from the Stream Buffer Zone would not violate the Clean Water Act – a factual and legal conclusion that EPA should have found difficult to make since the agency's own studies show massive water quality violations downstream from heavily mined sites containing waste disposal fills and impoundments.

One of the more recent studies, conducted last summer by EPA Region 3, showed significant downstream water quality impairments in the surveyed area. This in-depth monitoring study by EPA staff clearly showed that coal mining operations in southern West Virginia watersheds are "strongly related to downstream biological impairment," including diminished biodiversity that otherwise characterizes unmined Appalachian streams and pronounced adverse effects on stream chemistry. [1] The authors concluded that "[t]he severity of the impairment rises to the level of violation of water quality standards (WQS) when states use biological data to interpret narrative standards."[2]

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[1] Gregory J. Pond *et al.*, *Downstream Effects of Mountaintop Coal Mining: Comparing Biological Conditions Using Family- and Genus-Level Macroinvertebrate Bioassessment Tools*, 27 J. N. AM. BENTHOL. SOC'Y, 717-37 (July 8, 2008) (emphasis added).

[2] For a review of state standards, *see, e.g.* TENN. COMP. R. & REGS. 1200-4-3-.003(3)(g) (2008) ("The waters shall not contain substances or a combination of substances … which, by way of either direct exposure or indirect exposure through food chains, may cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction), physical deformations, or restrict or impair growth in fish or aquatic life or their offspring."); W. VA. CODE R. 47-2-3.2i (2008) ("no significant adverse impact to the chemical, physical, hydrologic, or biological components of aquatic ecosystems shall be allowed"); 401 KY. ADMIN. REGS. 5:031 §§ 2(1)(d), 4(1)(f) (2008) ("Surface waters shall not be aesthetically or otherwise degraded by substances that: … [i]njure, are chronically or acutely toxic to or produce adverse physiological or behavioral responses in humans, animals, fish and other aquatic life…" and "[t]otal dissolved solids or specific conductance shall not be changed to the extent that the indigenous aquatic community is adversely affected.").

This study actually won an EPA award for excellence. But in the end, EPA ignored the study's "excellent" findings – and its legal responsibilities under the Clean Water Act – in order to rubberstamp OSM's final changes to the stream buffer rule. Then-EPA Administrator Stephen Johnson also ignored the views of coal state Governors Phil Bredesen of Tennessee and Steven Beshear of Kentucky, as well as Kentucky Attorney General Jack Conway, and members of Congress including Representatives Ben Chandler and John Yarmuth all of whom wrote to Johnson asking him not to sign off on the repeal of the stream buffer zone rule. Given the adverse effects that valley fills and other waste disposal caused by mountaintop removal clearly inflict upon water quality – destroying all other uses and standards protected under the Clean Water Act – EPA should not have concurred with the rule change.

The gutting of the Stream Buffer Zone rule, as disturbing as it is in its own right, is the culmination of a series of regulatory actions by the Bush administration aimed at subordinating protections for the nation's waters and ecosystems to the interests of big coal, clearing the way for expansion of mountaintop removal, the most intrusive and destructive of all mining practices. For example, in 2002 EPA and the U.S. Army Corps of Engineers repealed a 25-year-old Clean Water Act regulatory prohibition on dumping waste material in streams in an attempt to stop citizen challenges to valley fills.[3]

Mountaintop removal coal mining is destroying streams, communities, and lives in Appalachia at an alarming rate, in direct conflict with the provisions Congress enacted in the 1970s to curb this type of extreme environmental abuse. According to one estimate, mountaintop removal mines involved forty-four permits covering 9,800 acres throughout the 1980s, yet in a nine-month period in 2002 alone, federal and state agencies issued permits for mountaintop removal mines to flatten and destroy an area covering 12,540 acres.[4] Mountaintop removal and other large scale surface mining operations already have been authorized by permitting authorities to destroy nearly 2,000 miles of Appalachian streams and more than 1,000 square miles of forested mountain terrain. Indeed, according to the DEIS issued with OSM's proposed rule, without more stringent environmental protections, more than 1000 miles of streams will be added to this toll by 2012. Valley fills will turn a huge area of this country – over 2200 square miles of a unique, biologically diverse, forested, stream filled, mountainous region – into a barren wasteland forever. Yet, instead of imposing more stringent regulations – or even just enforcing the laws on the books – the Bush administration did the exact opposite,

[3] Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of a Fill Material," 67 Fed. Reg. 31129 (May 9, 2002).

[4] Burns, Shirley Stewart (2005), "*Bringing Down the Mountains: the Impact of Mountaintop Removal Surface Coal Mining on Southern West Virginia Communities, 1970-2004,*" Ph.D. dissertation, West Virginia University.

repealing longstanding environmental safeguards to facilitate the destruction of Appalachia.

Weakening the Endangered Species Act

On December 16, 2008, the Fish and Wildlife Service and National Marine Fisheries Services published new ESA rules to eliminate scientific oversight and scrutiny for many actions of the federal government. Under the revised law, federal agencies will be allowed to go forward with actions that may affect threatened or endangered species without obtaining the review of the expert wildlife agencies to ascertain the full impacts on the species.

The administration raced through this rule change by allowing only 30 days for public comment, failing to do a full environmental analysis under NEPA, spending fractions of minutes reviewing individual comments and failing to respond in any detailed or meaningful way to the public concerns, and misrepresenting the rule as making "relatively minor procedural changes" in "some very narrow situations," alleging that the rule was only meant to given some guidance on the "thorny" problem of global warming.

This new rule strikes at the heart of the ESA: the duty imposed on all federal agencies to ensure that their actions will not contribute to extinction. Consultation with federal wildlife agencies is the mechanism for making sure that federal agencies heed this mandate by: (1) making certain that the best available science is used; (2) serving as a check on the action agencies as they advance their primary mission rather than protect endangered species; and (3) developing alternatives and mitigation to protect species and their habitat. Consultation has been the Act's most effective and successful safeguard. Some examples of where oversight by the wildlife agencies has proven essential include:

- NMFS found "overwhelming evidence" that three pesticides are likely to jeopardize listed salmon and steelhead, including for 14 uses that EPA would have approved unilaterally under self-consultation.

- The Services' recent review of self-consultations under the national fire plan revealed that the program has been a failure. Far fewer than half of the self-consultations (19 out of 50) used the best available science. The shortcomings included failing to identify the action, the impacted area, all endangered species, and related projects also affecting the species. Eight of the self-consultations failed to meet any of the criteria for a valid consultation.

- NMFS disagreed with the Bureau of Reclamation assertion that water withdrawals from the Klamath River would not adversely affect endangered salmon, made a jeopardy call, and imposed minimum flows for salmon migration.

The midnight rule effects at least three key elements of ESA consultation: the threshold for consultation, consultation with wildlife agencies, and global warming.

First, for decades, ESA consultation has been required for any federal agency action that "may affect" a listed species or its critical habitat. This "may affect" threshold is an integral part of the overall goal of the ESA to be precautionary in favor of species and habitat protection; it is spelled out in the Act's legislative history and codified in ESA regulations adopted in 1986. In many respects, the midnight regulation jettisons this "may affect" threshold and erects higher hurdles before a consultation will even be required.

Among the new requirements, the agency would need to have "clear and substantial information" showing that its action is an "essential cause" of effects to listed species and these effects: are "more than just likely to occur," are not uncertain, are capable of meaningful identification and detection, can be considered in conjunction only other actions that will occur in the particular area of the project. Another insidious affect of these new rules is to undermine the ability to understand and mitigate the cumulative affect of actions.

This is not a precautionary standard appropriate for deciding whether an action must undergo consultation or can proceed without scrutiny. It introduces new concepts that have no commonly accepted meaning and requires a level of scientific certainty and close causal connection before species can receive the protection of consultation with the experts. Now, such consultation will often not occur at all – particularly since the determination will be made by agencies that may know little about the species at risk and have other goals on their primary agenda. Contrary to the ESA's direction, it puts the judgment calls in the hands of the action agencies that do not have protecting species as their missions, thus tilting the burden of proof <u>against</u> protecting species.

Second, even in instances where an action may adversely affect species of habitat, the midnight rule authorizes agencies to proceed unilaterally without ESA consultations with the wildlife agencies. The old regulations authorize informal consultations that can entail informal give-and-take, but require the wildlife agencies to sign-off on potentially harmful projects in writing using the best science. The new regulation allows agencies to shut out the wildlife agencies even for actions that still require consultation under the new higher thresholds. If the wildlife agency has not made its findings for a project within 60 days (with a possible 60-day extension), the other agency may go forward without consultation, regardless of the potential impacts to species or habitat.

The ability to proceed unilaterally after 60 days might lead the action agency to minimize the information provided and downplay the impacts.

Third, the midnight rule exempts global warming from the ESA by fiat. The Services try to characterize the midnight rule changes not only as minor and ministerial but necessary to address the "difficult" problem of global warming. This is simply an excuse for broader changes as outlined above; in truth, the rule changes are unnecessary even with respect to the "problem" of global warming. The Services' arguments on this point are particularly unavailing since the new rule seeks to codify "the Service's current view that there is no requirement to consult on greenhouse gas (GHG) emissions' contribution to global warming and its associated impacts on listed species (e.g., polar bears)." The new rule makes this pronouncement even if the action involved directly and significantly contributes to global warming – for example, a regulation impacting GHG emissions from the largest emitters, such as coal-fired power plants.

The science and causal connections will not always be certain, but ESA consultations routinely confront multiple threats and uncertainties. Using global warming as an excuse to weaken the ESA across the board is a recipe for massive extinctions.

The ESA makes the best science, not politician's desires, the determinant of whether an action must undergo consultation, is likely to cause jeopardy or degrade critical habitat, and warrants mitigation. The courts have repeatedly turned back attempts to focus only on immediate, local, or certain impacts. All too often, it is impacts that may seem uncertain or harmful only in the aggregate (along with other factors such as degraded conditions and multiple threats) that put species in peril. Federal agencies cannot narrow their inquiry and miss the real-world impacts of their actions on endangered species. Yet that is what the midnight ESA regulation tells them to do.

Deregulating Hazardous Waste

Two related actions in the waning days of the Bush administration exempted nearly two million tons of hazardous waste annually from the strict environmental and public health safeguards in the Resource Conservation and Recovery Act (RCRA). The larger of the two rulemakings – Revisions to the Definition of Solid Waste – exempts more than 1.5 million tons of hazardous waste from RCRA whenever the waste generator claims that they plan to recycle the waste.[5] The second – the Expansion of the Comparable Fuels Exclusion – exempts more than 100,000 tons of hazardous waste that can be burned for fuel under certain conditions.[6]

Prior to the enactment of RCRA in 1976, chemical companies, pharmaceutical manufacturers, and other generators of hazardous waste disposed of their waste either by

[5] EPA, Revisions to the Definition of Solid Waste, 73 Fed. Reg. 64667, 64668 (Oct. 30, 2008).
[6] EPA, Expansion of RCRA Comparable Fuel Exclusion, 73 Fed. Reg. 77955 (Dec. 19, 2008).

burying, burning, or storing it on-site, or by shipping it off-site to an unregulated company that would dump, burn, or store it at another location, rarely with any safeguards to ensure proper disposal of the waste. Decades of unregulated dumping led to hundreds of sites across the country where people and the environment were repeatedly exposed to toxic chemicals and other carcinogens. In one of the most famous examples of the dangers of unregulated hazardous waste, a chemical company in Niagara Falls, New York buried more than 21,000 tons of hazardous waste in Love Canal. Over the next several decades, the surrounding community experienced a "disturbingly high rate of miscarriages," according to EPA, and birth defects including children born with extra rows of teeth, eye deformities, and varying degrees of mental retardation.

Congress passed RCRA in 1976 to address this growing public health threat and the public's concern about it. Under the law, hazardous waste became subject to strict "cradle-to-grave" regulations to ensure that every ounce of hazardous waste was accounted for and did not come into contact with human beings or get released into the environment. While there remains room for improvement in the handling of hazardous waste, RCRA has largely succeeded in preventing unscrupulous or careless companies from exposing the public to dangerous wastes.

But EPA's recent rulemakings dealt a serious blow to RCRA and pose a serious threat to public health and the environment across the country. Collectively, there are two major problems with these rules: first, they greatly increase the risk that people or the environment will be exposed to hazardous waste; second, they do not even accomplish their purported goal of significantly increasing recycling and cutting cost for hazardous waste-generating companies.

By exempting certain classes of hazardous waste from RCRA, these two rule changes allow hazardous waste generators to undertake do-it-yourself hazardous waste recycling or hazardous waste burning. Or, if the generator cannot process the waste on-site, they can ship it off-site, as most generators do. But, under the new rules, instead of shipping hazardous waste to a RCRA-permitted facility that is subject to strict regulation and oversight, a waste generator can instead ship their waste to a low-cost, fly-by-night waste handler that would be subject only to minimal rules and oversight, with the generator themselves left to verify the safety of their own operation. Even where hazardous waste generators choose to continue to use established, professional hazardous waste handlers, the lack of regulation and oversight will increase the temptation to take shortcuts that could endanger worker and public health. In short, these rules take us back to the pre-RCRA days of Love Canal.

Hazardous waste recyclers that are licensed under RCRA are far less likely to harm public health and the environment than those that are not subject to RCRA. In the lead-up to proposing the hazardous waste recycling exemption, EPA identified 208 cases of

damage to human health or the environment from hazardous waste recycling; of those 208 cases, only nine (4%) occurred at RCRA permitted facilities.[7] A large majority of the damage cases occurred in operations that were already exempted from RCRA's strict oversight.[8] Exempting millions more tons of hazardous waste would only increase damage to public health and environment.

EPA denied a Congressional request for a similar study of waste spills or accidents involving hazardous waste burning. But Earthjustice obtained from EPA the identities of 86 facilities that would likely begin burning hazardous waste with RCRA safeguards. Nearly 90% of the facilities have been subject to RCRA corrective action, which is EPA's remedial program designed to address releases of hazardous waste from operating facilities. The vast majority of these facilities have shown that they cannot be trusted to handle hazardous waste safely. Now this new rule allows these facilities to burn waste without RCRA safeguards, even though EPA stated in the proposed rule that hazardous waste "can pose greater hazard when stored than comparable fuel, and…must be burned under the specified burner conditions...."[9]

At first glance, each of these rules appears to have some justification: recycling hazardous waste and using hazardous waste in place of fuel. But one point needs to be made very clear: these rules would increase recycling and fuel recovery by only a small fraction. According to EPA's own numbers, hazardous waste recycling would increase by only 1.1% under the new rule.[10] The reason for these meager benefits is simple – hazardous waste recycling and fuel recovery is already happening on a large scale, but only under the strict regulations RCRA that ensure recycling and fuel recovery is done safely. Of the more than 180,000 tons of combustible hazardous waste that are exempted from RCRA under the new waste burning exemption, only 34,000 tons is not currently being burned for fuel recovery.[11] So with only a minimal increase in recycling and fuel recovery, these new rules have taken hazardous waste handling out of the hands of professionals working at RCRA-permitted facilities and put it in the hands of unlicensed, fly-by-night operators. At the same time, the rules remove the strict oversight provided by RCRA and instead trust the hazardous waste generators to ensure the safe disposal of the waste.

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[7] EPA, *Assessment of Environmental Problems Associated with Recycling of Hazardous Secondary Materials*, available at http://epa.gov/osw/hazard/dsw/abr-rule/env-prob.pdf

[8] *See* Sierra Club comments to Revisions to the Definition of Solid Waste, Docket ID EPA-HQ-RCRA 2002-0031, Appendix A.

[9] Expansion of RCRA Comparable Fuel Exclusion, 72 Fed. Reg. 33311 (proposed June 15, 2007).

[10] *Regulatory Impacts Analysis for USEPA's 2007 Supplemental Proposed Revisions to the Industrial Recycling Exclusions of the RCRA Definition of Solid Waste* at 16.

[11] EPA, Expansion of RCRA Comparable Fuel Exclusion, Proposed Rule, 72 Fed. Reg. 115, June 15, 2007.

Another justification given for the rule changes is cost savings to industry, but that is another false argument. Several industry trade associations lobbied the Bush administration to convince them to forgo numerous overdue non-discretionary rulemakings and instead devote their resources to these rollbacks of hazardous waste regulations. Those trade associations represent thousands of hazardous waste generators that will save money by avoiding the use of RCRA-licensed waste handlers. However, EPA's analysis of the rules show that the cost savings to hazardous waste generating industries would be minimal, and those savings would often come at the expense of other American businesses. Further, the actual cost of these rules is probably a net negative for the country because EPA failed to account for the inevitable accidents, health care costs, and cleanup costs that occur when hazardous waste regulations are rolled back.

In part because these rules would not significantly increase recycling, EPA estimates that the total cost savings of the rules are approximately $23 million per year for the waste burning exemption and as little as $95 million per year for the waste recycling exemption, spread over as many as 5600 companies.[12] That is an average of less than $17,000 per facility – a tiny fraction of the revenue that flows through many of these multi-million dollar companies. Even worse, the Government Accountability Office estimates that future annual savings from the waste recycling exemption could fall as low as $19 million.[13] That is nearly two million tons of hazardous waste deregulated for as little as $42 million a year, spread over thousands of companies.

But much of these meager cost savings for hazardous waste generators would come at the expense of RCRA-licensed waste handlers and other parties. For the hazardous waste burning exemption, EPA found the following:

> Hazardous waste commercial incinerators and cement kilns are projected to experience negative distributional impacts associated with this action. These effects include revenue losses for both groups, plus fuel replacement costs for commercial kilns. Revenue losses to commercial incinerators are estimated at $3 million/year, while commercial kilns may experience combined revenue and fuel replacement losses of approximately $13.5 million per year. These impacts represent between one and 1.7 percent of the total estimated annual gross revenues for these sectors.[14]

In addition to providing only minimal increases in beneficial re-use of hazardous waste and extremely small costs savings for polluting industries, these rules will likely cost the country financially in the long-term. The evidence cited above demonstrates an elevated

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[12] EPA, Revisions to the Definition of Solid Waste, 72 Fed. Reg. 14172 (proposed March 26, 2007).
[13] GAO, November 7, 2008 letter to Congress re: Environmental Protection Agency: Revisions to the Definition of Solid Waste.
[14] Expansion of RCRA Comparable Fuel Exclusion, Proposed Rule, 72 Fed. Reg. 33320, June 15, 2007.

risk of hazardous waste releases when non-RCRA licensed facilities are allowed to handle hazardous waste. Facilities that operate outside of RCRA are also more likely to rely on taxpayer dollars to clean up their accidents. In EPA's study of hazardous waste recycling accidents, the agency found that 82% of the contaminated sites needed public funds for cleanup, in whole or in part, under state or federal Superfund programs. Although EPA's analysis did not gather costs on all of the damage cases, it did examine the cost of cleanup for 89 sites. For 20% of these sites, cleanup costs exceeded $5 million, and most exceeded $1 million. These numbers indicate that the meager cost savings to industry from this regulatory rollback is far lower than the cost that will borne by taxpayers for cleaning up after the fact. Most of the damage cases involving RCRA-permitted recycling facilities were cleaned up in whole or in part by the licensed entity, often because of consent decrees or financial assurance requirements in their RCRA permit.[15] Keeping hazardous waste recycling in the hands of permitted professionals not only protects workers handling the waste and reduces the likelihood of a hazardous waste accident, it helps defray the cost of clean-up when accidents do occur.

EPA's guiding principle is supposed to be to protect public health and the environment. These rules turn that principle on its head by arranging a slight increase in profits for a few companies at the expense of other companies, public health, the environment, and the American taxpayer. Vacating these rules should be at the top of any environmental to-do list for Congress and the new administration.

Demonstrating Disregard for Our Nation's Public Lands

The Bush administration's final flurry of last-minute rulemakings also have potentially catastrophic implications for some of our nation's most treasured public lands. The Department of Interior finalized rules that govern a commercial oil shale leasing program on 1.9 million acres of public lands spread across three states (Colorado, Wyoming and Utah) in the West and finalized a rule that eliminated Congress' authority to protect treasured public lands in emergency situations under the Federal Land Policy and Management Act (FLPMA) of 1976. Both rules were written and finalized to make sure they took effect just days before President Obama took office, thereby making it more difficult for his administration to undo them.

On November 18, 2008, the Department of the Interior finalized rules that govern and promote commercial leasing and production of oil shale on 1.9 million acres of public land in Colorado, Utah, and Wyoming. This action was taken against the advice of the non-partisan RAND Corporation, despite the concerns of the Environmental Protection Agency, Fish and Wildlife Service, and other Interior agencies, and despite opposition

[15] EPA, *Assessment of Environmental Problems Associated with Recycling of Hazardous Secondary Materials.*

from western governors, Members of Congress, affected communities, and many others. These rules lock in lax environmental safeguards and low royalty rates designed to kick-start an industry that has never proven to be commercially viable or environmentally sustainable, and that could significantly degrade air, water, and wildlife resources across three states, not to mention produce nearly 50% higher lifecycle greenhouse gas emissions than conventional oil.[16] The Interior Department is rushing development of a commercial oil shale leasing program in a manner that solely benefits industry – at the expense of taxpayers, the environment and sound policy.

We should provide a little background on oil shale: the commercial leasing and production of oil shale reserves in the western United States has been discussed as a potential source of liquid fuels for more than one hundred years. However, time and time again, the economics of production have precluded commercial production. Most recently, the fledgling oil shale industry in western Colorado collapsed in 1982 when the price of crude oil dropped significantly. Exxon Mobil, the company spearheading the project, laid off 2,000 workers overnight and left the western Colorado economy in ruins. This debacle moved oil shale to the back burner until Vice President Cheney's Energy Policy Task Force and the Energy Policy Act of 2005 (EPAct).

EPAct contained a lengthy provision (Section 369) which authorizes both an oil shale research, development and demonstration (RD&D) program and a commercial leasing program.[17] It was an arbitrary and politically-motivated timetable outlined in the 2005 Energy Bill that led to the recent issuance of the new – and deeply flawed – regulations governing the leasing of oil shale on November 18, 2008. For example, the BLM is required by statute to ensure a fair market value return to taxpayers for resources it leases but fails to do so under these rules. Moreover, these rules include inadequate environmental standards for the conduct of commercial oil shale operations on future federal leases.

Furthermore, following the publishing of the rule governing commercial leasing on November 18, the Bush administration rammed through a host of other significant oil shale-related policy decisions, including expanding the size of future RD&D tracts to an acreage large enough to support a commercial production operation[18] (thereby making an RD&D lease a "pocket" commercial lease), rescinding a land withdrawal put in place by

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[16] A. R. Brandt (2008). Converting Oil Shale to Liquid Fuels: Energy Inputs and Greenhouse Gas Emissions of the Shell in Situ Conversion Process. *Environmental Science Technology.*

[17] P.L. 109-181 et seq. The Act also requires establishment of a Strategic Unconventional Fuels Task Force to advance development of unconventional sources of liquid fuels like oil shale and coal-to-liquids. We feel it is inappropriate and counterproductive for the federal government to actively advocate for development of liquid fuels that are known to be significantly greater contributors to global warming than conventional oil and gasoline.

[18] BLM press release, Jan. 14, 2009.

President Hoover to protect large acreages of the land in question, and publishing an addendum to current RD&D leases that locks in provisions of the November rule – regardless of Congress' or the administration's future attempts to rectify the rule's deficiencies.[19] Under these addenda, which were negotiated in secret and at the midnight hour, taxpayers stand to lose millions, if not billions, of dollars of foregone royalties. The DOI Inspector General should immediately launch an investigation into how these addenda were developed, negotiated, and agreed upon – at best, this giveaway is an abuse of the public's trust and, at worst, involved shortcutting administrative and legal requirements that must be subject to the light of day.

In addition to the Bush administration's egregious irresponsibility and betrayal of the public trust on the oil shale issue, they also managed to sneak in a midnight regulation that threatens the crown jewel of our National Park System – the Grand Canyon. A rash of claimstaking around the Canyon in recent years has raised the prospect of extensive uranium mining on public lands adjacent to the Canyon. The former Governor of Arizona, Janet Napolitano (now Secretary of Homeland Security), members of the public, major water utilities which draw from the potentially impacted watershed, conservation organizations and the National Park Service itself all raised concerns about the impact of such operations on the Park ecosystem and water resources of this special area. The Superintendent of the Park, for example, has noted that more than a third of the Canyon's species could be impacted by radioactive and toxic releases associated with uranium mining.

In the face of continued claimstaking and absent any serious analysis or action by the BLM, the House Natural Resources Committee acted to protect the Park. In June, the Committee exercised its right under Section 204(e) of the Federal Land Policy and Management Act (FLPMA) to notify the Secretary of its resolution declaring an emergency and the need for an immediate, emergency withdrawal of approximately one million acres surrounding the Grand Canyon. In contravention of FLPMA and the BLM's own rules, the Department has not acted on that resolution and as a consequence has been sued by several organizations.

In what appeared to be a direct reaction to the authorizing committee's successful use of section 204(e) to protect these lands around the Canyon, the Bush administration finalized a rule to rescind Congress' power to make these types of emergency withdrawals in the future.[20] The rule, proposed on the Friday afternoon before Columbus Day weekend, was only open to public comment for just 15 days – the epitome of a midnight rulemaking.

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[19] BLM press release, Jan. 16, 2009.
[20] 73 Fed. Reg. 74039 (Dec. 5, 2008).

These two Bush administration midnight regulations, affecting nearly 2 million acres of pristine wildlands and one of our most iconic natural treasures, represent the final acts of an administration that completely abdicated its responsibilities to protect our nation's public resources for the benefit of the people and future generations. Over and over again the public saw their will ignored, science maligned, and our cherished national heritage sold off to the highest bidder. Unfortunately, the physical damage done will leave its mark on the landscape for decades to come; and the statutory and regulatory directives that caused this damage may be difficult and cumbersome to undo.

Doing More Damage to Public Health and the Environment

Mr. Chairman, the immediate and long-term implications of the regulatory rollbacks we have just discussed are enormous, but even this is not the whole story. In the last few weeks of the Bush administration, a slew of other anti-environmental regulations and policies were also adopted. Among them are rules easing water pollution limits on factory farms, exempting factory farms from reporting emissions of toxic gases from animal waste, allowing power plants to expand and increase annual emissions without installing additional pollution controls, and opening nearly nine million acres in Utah to oil and gas leasing, among others.

Earthjustice has challenged several of these midnight regulations in court, and we are confident that, ultimately, many if not all of the rules we have challenged will be judged to be illegal. But litigation can take years, and much irreversible damage will be done while these cases are pending. Congress and the Obama administration have a variety of legislative and regulatory tools that can be used to reverse these anti-environmental midnight regulation much more quickly and with more certainty. Earthjustice urges you to use these tools to undo these last-minute give-aways to polluting industries that have come at the expense of the American public. We stand ready to work with this Committee and the rest of Congress to achieve the goal of restoring these important environmental protections.

Thank you.

Mr. COHEN. With those preliminary remarks, I would like to recognize my colleague, Mr. Franks, the distinguished Ranking Member of the Subcommittee, and whose Cardinals came close to a Super Bowl championship, for his opening remarks.

Mr. FRANKS. Well, thank you, Mr. Chairman. I am just grateful to be here this morning. I am grateful to be here with you as the Subcommittee on Commercial and Administrative Law meets for the first time.

I want to congratulate you on becoming the Chairman of this Subcommittee, and I want to warmly welcome our witnesses, if it so happens, and certainly welcome the opportunity to begin our consideration of the administrative law issues during this Congress.

The Commercial and Administrative Law Subcommittee spent next to no time on administrative law last term. The Subcommittee spent more time on commercial law, but still that is not what absorbed the majority of the Subcommittee's attention.

Instead, the Subcommittee spent the greatest portion of its time on bashing the Bush administration and the Bush administration's Department of Justice.

Mr. Chairman, I hope today that we can turn a new page and that Presidents of both parties and Presidents in most modern Administrations, of course, we recognize that they have promulgated an increased number of regulations during their final months in office.

In fact, it was Jimmy Carter whose Administration's end-of-term activity gave birth to the phrase "midnight regulations." And President Clinton published even more.

The George W. Bush administration, looking back on the Clinton debacle, took some concerted and constructive steps to introduce order into the end-of-term process.

It called for all new regulations planned for the last part of its tenure to be proposed by June 1, 2008 and it called for all of these regulations to be promulgated by November 1, 2008.

The Bush administration's policy provided for exceptions and some exceptions, in the end, were made. But on the whole, the process was more orderly than the chaos that attended the final days of the Clinton administration.

Accordingly, I hope we won't spend our time on bashing the Bush administration for doing less of what all recent Administrations have done. Let us instead devote ourselves to the more important task.

Presidents are elected for 4 years, and unless we are to craft prohibition for all regulatory activity during a second term, we should use this hearing as an opportunity to begin to build upon the improvements to the regulatory process that the Bush administration undertook, building on the improvements of previous Administrations.

Let us, therefore, ask how can we reform the entire regulation-writing process, because midnight regulations are just one symptom of a dysfunctional and outdated administrative law system governed by the 63-year-old Administrative Procedure Act.

Throughout the process of writing regulations, we need to improve procedures. We need to ensure, first, universal and better

cost-benefit analyses; sounder science; more transparency; better public participation; more negotiated rulemaking; rights of the Fed to support e-rulemaking; stronger review of the agency's regulatory development processes; and, an end to the proliferation of supposedly nonbinding guidance that seeks to make an end run on the requirements of rulemaking.

These are just some of the improvements that we can make to the rulemaking process that governs so much of the Federal Government's lawmaking activity.

If we can progress on these improvements, we will reduce the controversy over end-of-administration rulemaking by bringing more transparency and objectivity into the entire rulemaking process, no matter when it occurs during the course of any Administration.

Other reforms include improving our review of agency regulations under the Congressional Review Act, and, of course, above all, Congress can dedicate itself anew to writing clearer, more detailed and more definitive statutes.

In this way, Congress can better exercise the policymaking authority entrusted to it by the Constitution and not transfer that authority excessively to administrative agencies, which are accountable only to the people in indirect ways through the President or, in the case of so-called independent agencies, even more indirectly.

In the 108th and the 109th Congresses, we considered those topics so important that we embarked on a new special project, the Administrative Law Process and Procedure Project for the 21st Century.

This project generated a number of good proposals. We have yet to conclude our important work in this area. Yet, the 21st century marches on, Mr. Chairman, and the burden of regulations imposed under an outdated system grows.

And so, sir, again, I am glad that we are here today and that the topic of administrative law is the first of which we turn in this term. And I hope that this will be a fruitful field of bipartisan endeavor in this term, and I look forward to working with you.

Thank you.

Mr. COHEN. I thank the gentleman for his statement.

Without objection, other Members' statements, opening statements, will be included in the record.

And I want to assure the gentleman, as I did in my opening statement, that I do want this to be bipartisan and to look at the future to all Administrations.

[The prepared statement of Mr. Franks follows:]

PREPARED STATEMENT OF THE HONORABLE TRENT FRANKS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA, MEMBER, COMMITTEE ON THE JUDICIARY, AND RANKING MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Mr. Chairman, it is a pleasure to be here with you today as the Subcommittee on Commercial and Administrative Law meets for the first time in the 111th Congress. I extend a warm welcome to our witnesses. And I welcome the opportunity to begin our consideration of administrative law issues during this Congress.

The Commercial and Administrative Law subcommittee spent next to no time on administrative law last term. The Subcommittee spent more time on commercial law, but still, that is not what absorbed the majority of the Subcommittee's atten-

tion. Instead, the Subcommittee spent the greatest portion of its time on bashing the Bush Administration and the Bush Administration's Department of Justice.

Mr. Chairman, I hope that today we can turn a new page. Presidents of both parties, and Presidents in most modern administrations, have promulgated an increased number of regulations during their final months in office.

In fact, it was President Jimmy Carter whose administration's end-of-term activity gave birth to the phrase "midnight regulations." And President Clinton published even more.

The George W. Bush Administration, looking back on the Clinton debacle, took some concerted and constructive steps to introduce order into the end-of term process. It called for all new regulations planned for the last part of its tenure to be proposed by June 1, 2008. And it called for all of these regulations to be promulgated by November 1, 2008.

The Bush Administration's policy provided for exceptions, and some exceptions, in the end, were made. But on the whole, the process was more orderly than the chaos that attended the final days of the Clinton Administration.

Accordingly, let's not spend our time bashing the Bush Administration for doing less of what all recent administrations have done. Let us instead devote ourselves to a more important task. Presidents are elected for four years, and unless we are to craft a prohibition on all regulatory activity during a second term, we should use this hearing as an opportunity to begin to build upon the improvements to the regulatory process that the Bush Administration undertook, building on the improvements of previous administrations. Let us therefore ask: "How can we reform the entire regulation-writing process?" Because midnight regulations are just one symptom of a dysfunctional and outdated administrative law system, governed by the 63-year-old Administrative Procedure Act.

Throughout the process of writing regulations, we need to improve procedures. We need to insure:

- universal and better cost-benefit analysis;
- sounder science;
- more transparency;
- better public participation;
- more negotiated rulemaking;
- widespread "e-rulemaking;"
- stronger review of the agencies' regulatory development processes; and
- an end to the proliferation of supposedly non-binding "guidance" that seeks to make an end run on the requirements of rulemaking.

These are just some of the improvements that we can make to the rulemaking process that governs so much of the federal government's law-making activity. If we can make progress on these improvements, we will reduce the controversy over end-of-administration rule-makings by bringing more transparency and objectivity to the entire rule-making process, no matter when it occurs during the course of any administration.

Other worthy reforms include improving our review of agency regulations under the Congressional Review Act. And, of course, above all, Congress can dedicate itself anew to writing clearer, more detailed, and more definitive statutes. In this way, Congress can better exercise the policy-making authority entrusted to it by the Constitution—and not transfer that authority excessively to administrative agencies accountable to the people only indirectly through the President or, in the case of so-called independent agencies, even more indirectly.

In the 108th and 109th Congresses, we considered these topics so important that we embarked on a special project, the Administrative Law, Process, and Procedure Project for the 21st Century. This project generated a number of good proposals. We have yet to conclude our important work in this area. Yet the 21st Century marches on, and the burden of regulations imposed under an outdated system grows.

So Mr. Chairman, again, I am glad that we are here today, and that the topic of administrative law is the first to which we turn this term. I hope that this will be a fruitful field of bipartisan endeavor this term, and I look forward to working with you.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, CHAIRMAN, COMMITTEE ON THE JUDICIARY, AND MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Let me first thank Steve Cohen, the new Chairman of the Subcommittee on Commercial and Administrative Law, for holding this timely hearing on the issue of so-called "midnight rules."

No issue within the Subcommittee's jurisdiction is now more important. Regulations issued during the final weeks of the Bush Administration may have a lasting impact on the environment, on civil liberties at home and abroad, on the wages and working conditions of U.S. workers, on highway safety, and on many other matters of concern to the American people.

We will hear from seven distinguished and knowledgeable witnesses at today's hearing. I'm interested in hearing their views on the following three issues:

First, is the Bush Administration's record on midnight rulemaking subject to criticisms that its predecessors' records are not? In particular:

- Did the Bush Administration strategically issue midnight rules in an attempt to avoid meaningful public and Congressional scrutiny of its controversial policies?
- Did the Bush Administration's midnight rulemaking depart from well-established regulatory practices and procedures?
- Did the Bush Administration's midnight rulemaking favor special interests over the public interest, in a way that earlier administrations' midnight rules did not?

Second, when and why should we be concerned about midnight rules—whether they spring from a Democratic or a Republican administration? Is midnight rulemaking an undesirable way to make public policy?

And third, should Congress pass legislation governing midnight rulemaking? Or does Congress already have at its disposal effective tools to deal with objectionable midnight rules, including resort to the Congressional Review Act and appropriations restrictions? If legislation is needed, what particular form should it take? I especially look forward to hearing Jerry Nadler's views on that last question.

Thank you, again, Chairman Cohen.

Mr. COHEN. I am now pleased to introduce the witness for our first panel for today's hearing, the Honorable Representative Jerrold Nadler.

Congressman Nadler represents New York's 8th congressional district, which includes Manhattan's west side below 89th, and I guess down to the battery; also, areas of historic Brooklyn.

Congressman Nadler was first elected to the House in 1992, after serving 16 years in the New York State Assembly. In 2004, he was elected with a resounding 80 percent of the vote.

Throughout his career, he has championed civil rights, civil liberties, efficient transportation, and a host of progressive issues, such as access to health care, support for the arts, and the protection of the Social Security system.

He is a voice for the voiceless. In his roles as an assistant whip and a senior Member of both the House Judiciary and Transportation Committees, Congressman Nadler has the opportunity on a daily basis to craft and shape the major laws that govern our country.

He currently serves as Chairman of the Constitution, Civil Rights and Civil Liberties Subcommittee of Judiciary, which considers all proposed constitutional amendments and deals with such issues as freedom of expression, religious freedom, privacy, due process, civil rights, reproductive choice, and lesbian, gay, bisexual and transgender rights.

Thank you for your willingness to participate in today's hearing.

And although I am sure you know the procedure, I will go over it for the benefit of our other witnesses.

Without objection, your written statement will be placed into the record, and we would ask that you limit your oral remarks to 5 minutes. We have a lighting system with a green light, which is for go. At 4 minutes, it turns yellow, which is like the 2-minute mark in the NFL. Then at the 5-minute mark, you get a red light, which means you are about at the end of your testimony.

After each witness has presented his or her testimony, Subcommittee Members will be allowed to ask you questions, subject to the 5-minute limit.

After Mr. Nadler testifies, we might have votes, and we are going to try to take into consideration Mr. Kennedy's schedule and have him, without any objection, be our first witness and have questions of him so he can make an airplane and have time to catch a fast train. Get me a ticket back to New York.

Mr. Nadler, will you proceed with your testimony?

TESTIMONY OF THE HONORABLE JERROLD NADLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. NADLER. Thank you, Mr. Chairman, Ranking Member Franks, and my fellow Members of the Judiciary Committee.

I appreciate the opportunity to testify before you today on this very important issue.

The problem of midnight rules is not a new one, but the practice is prone to abuse and undercuts our democratic process.

That is why, on the first day of this Congress, I reintroduced the Midnight Rule Act, H.R. 34, which would allow incoming agency heads to prevent rules adopted within the last 3 months of the previous Administration from going into effect.

This legislation lays out an approach to enable an incoming President to deal with midnight rules without tying him up for months or years and preventing him from implementing his agenda or her agenda.

When the President rushes to finalize regulations in advance of an incoming Administration, especially during the lame-duck period, that President binds the hands of his successor for 6 months to as long as 2 years.

This can be accomplished with minimal political accountability by the outgoing President or by the President's party, whose members hope to retain some of their jobs.

In this way, midnight rules differ from other executive actions, such as executive orders, which the new President can change, if he wishes, upon assuming office.

The conduct of the outgoing Bush administration has highlighted the problem in several ways. First, the Bush administration rushed many rules through the process at an accelerated pace. This was facilitated by a memo issued by the White House chief of staff, Josh Bolton, on May 9, 2008.

It instructed agencies to finalize regulations by November 1, enabling the outgoing Administration to put in place regulations just prior to the swearing in of the new President.

The results of the Bolton memo are clear. In October and November of last year, Federal agencies submitted 30 "major rules," that is, those with an economic impact of at least $100 million each, to the Government Accountability Office.

During the same period in 2007, that number was only 13. This represents an increase over 1 year of 130 percent.

Similarly, the number of significant rules submitted to the Office of Information and Regulatory Affairs September 1, 2008 and December 31, 2008 represents an increase of 102 percent in the same period in 2007, 190 significant final rules as opposed to 94 such rules the year before.

Second, lack of accountability in its waning weeks enabled the Administration to adopt the highly controversial rules on family planning, endangered species and global warming, that may not have passed muster in the more public debate. But since there was no more public accountability, no election to look forward to, they could do what they wanted and bind the hands of the new Administration.

Finally, these midnight rules allow the Administration to extend its policies well into the next Administration, despite the fact that the voters voted to move in a new direction.

The Midnight Rule Act would address this problem in several ways. It would give a new agency head a limited period of time to review and act on regulations adopted in the final 90 days of a President's term.

The new agency head would have 90 days after being confirmed to his office or her office to disapprove a midnight rule by publishing a statement of disapproval in the Federal Register and sending a notice of disapproval to the congressional Committee or Committees of jurisdiction.

In order to address emergencies, limited exceptions are provided in cases of an imminent threat to health or safety, enforcement of criminal laws, implementation of an international trade agreement, and national security.

Congress could revoke some of these rules under the Congressional Review Act. However, the Congressional Review Act requires individual votes on each rule.

Given the sheer number of midnight rules issued by the Bush administration or perhaps by Administrations in the future, this would require more time than Congress has available, while we are trying to pass an economic recovery package, finalize FY 2009 appropriations bills, and prepare for a new budget for the upcoming fiscal year.

Most importantly, this proposal would place a check on midnight rules. The American people have a right to hear the views of candidates for President and other offices on very important issues, and then to be governed by the choice that they make in the election, and not to be governed by the dead hand of the choice they made 4 or 8 years earlier.

The American people are entitled to alter the direction of their government based on new circumstances or even to change their minds, if they wish. That is why we have a new presidential election every 4 years, and that is why the policies of the old outgoing

Administration should not be permitted to continue and to bind the new incoming Administration for 6 months to 2 years.

I have received many helpful comments and suggestions on ways to clarify this legislation and I hope to work with my colleagues to fine-tune it.

The core policy is that the will of the electorate should not be frustrated in effectuating new policy by the old Administration. Voters have a right to debate critical issues in the selection of their representatives and to have their choices implemented after the electoral process is finished.

Thank you again for the opportunity to testify today and I look forward to working with you all to comprehensively address this problem in the days ahead.

[The prepared statement of Mr. Nadler follows:]

PREPARED STATEMENT OF THE HONORABLE JERROLD NADLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Thank you, Mr. Chairman, Ranking Member Franks, and my fellow members of the Judiciary Committee. I appreciate the opportunity to testify before you today on this very important issue.

The problem of midnight rules is not a new one, but the practice is prone to abuse and undercuts our democratic process.

That is why, on the first day of this Congress, I reintroduced the Midnight Rule Act, H.R. 34, which would allow incoming Agency heads to prevent rules adopted within the last three months of the previous administration from going into effect.

This legislation lays out an approach to enable an incoming president to deal with midnight rules—that is, rules finalized, or which took effect, at the very end of his predecessor's term—without tying up the new president for months or years trying to implement his agenda.

The 22nd Amendment to the Constitution limits a president to two terms in office. Midnight rules can be abused to allow a president to reach into a third term without any accountability.

Past presidents have used the final weeks of their terms to take actions, or advance policies, that would be politically difficult prior to an election. It is a tradition going back to the earliest days of the Republic.

When a president rushes to finalize regulations in advance of an incoming administration, especially during the lame duck period, that president binds the hands of his successor for six months to as long as two years. This can be accomplished with minimal political accountability by the president—who is leaving office—or by the president's party, whose members hope to retain their jobs.

In this way, midnight rules differ from other executive actions, such as executive orders, which a new president can change upon assuming office.

The conduct of the outgoing Bush administration really highlighted the problem in several ways.

First, the Bush administration rushed many rules through the process at an accelerated pace. This was facilitated by a memo issued by the White House Chief of Staff, Josh Bolten, on May 9th, 2008. It instructed agencies to finalize regulations by November 1st, enabling the outgoing administration to put in place regulations just prior to the swearing-in of the new President.

The results of the Bolton memo are clear. In October and November of 2008, federal agencies submitted 30 "major rules" (those with an economic impact of at least $100 million), to the Governmental Accountability Office. During the same period in 2007, that number was only 13. This represents an increase of 130%.

Similarly, the number of "significant rules" submitted to the Office of Information and Regulatory Affairs increased by 102% between September 1, 2008 and December 31, 2008 over the same period in 2007 (190 significant final rules as opposed to 94 such rules the year before).

Second, the lack of accountability in its waning weeks enabled the Bush administration to adopt highly controversial rules that may not have passed muster in a more public debate.

These midnight rules adopted by the Bush Administration will, among other things, curtail access to family planning services, and even to information about reproductive health options; weaken enforcement of the Endangered Species Act with respect to federal projects which might threaten endangered species; allow the agen-

cies to bypass reviews of global warming and potential ecological impacts; and allow mining companies to dump toxic waste without concern for environmental harm.

Finally, these midnight rules allow the Administration to extend its policies well into the new administration despite the fact that the voters have voted to move in a new direction.

The Midnight Rule Act would address this problem in several ways.

It would give a new agency head a limited period of time to review and act on regulations adopted in the final 90 days of a president's term. The new agency head would have 90 days after being appointed to disapprove a midnight rule by publishing a statement of disapproval in the Federal Register, and sending a notice of disapproval to the congressional committees of jurisdiction.

In order to address emergencies, limited exceptions are provided in cases of an imminent threat to health or safety, enforcement of criminal laws, implementation of an international trade agreement and national security.

Congress could revoke some of these rules under the Congressional Review Act. However, the CRA would require individual votes on each rule. Given the sheer number of midnight rules issued by the Bush Administration, this would require more time than Congress has available while we are trying to pass an economic recovery package, finalize FY2009 appropriations bills, and prepare for a new budget for the upcoming fiscal year.

The Midnight Rule Act would give the new administration the opportunity to review carefully the last minute handiwork of its predecessor. Rulemaking is, in the first instance, a function of the executive. Congress and the courts would still retain their authority to act as a check on the executive.

Most importantly, this proposal would place a check on midnight rules. The American people have a right to hear the views of candidates for president and other offices on these very important issues and then to be governed by the choice they made in the election, and not by the dead hand of a choice they made four years earlier. The American people are entitled to alter the direction of their government based on new circumstances, or even to change their minds. That is why we have a new presidential election every four years.

I have received many helpful comments and suggestions on ways to clarify this legislation, and I hope to work with my colleagues to fine tune it.

The core policy is that the will of the electorate should not be frustrated in effectuating new policy. Voters have a right to debate critical issues in the selection of their representatives and to have those choices realized though the electoral process.

Thank you again for the opportunity to testify today, and I look forward to working with you all to comprehensive address this problem in the days ahead.

Mr. COHEN. Well, I thank the gentleman for his statement.

The Chair does not have a question of Mr. Nadler and would entertain questions from the Subcommittee. If not, we could proceed to have the second panel come forward and Mr. Kennedy could give his remarks first, and then he could catch his airplane.

Without objection, can we let Mr. Nadler go?

Mr. NADLER. Thank you.

Mr. COHEN. Let my person go. Thank you.

If the second panel would come up, we are going to forego the traditional introductions of the entire panel for purposes of trying to accommodate the airplane schedule that Mr. Kennedy has, introduce him, have his statement and have questions from the panel.

Our second witness is Robert F. Kennedy, Jr. Mr. Kennedy is credited with leading the fight to protect New York City's water supply, but his reputation as a resolute defender of the environment stems from a litany of successful legal actions.

The list includes winning numerous settlements for Riverkeeper, prosecuting governments and companies for polluting the Hudson River and Long Island Sound, arguing cases to expand citizen access to the shoreline, and suing treatment plants to force compliance with the Clean Water Act.

Mr. Kennedy acts as chief prosecuting attorney for Riverkeeper. He also serves as senior attorney for the National Resources Defense Council. And I may say his name, in addition to the polar bear, forced me to write a check occasionally. And is the President, also, of the Waterkeeper.

At Pace University School of Law, he is a clinical professor and supervising attorney at the Environmental Litigation Clinic in White Plains, New York.

Earlier in his career, he served as assistant DA in New York City; published several books, including "The Riverkeepers" (1997), with John Cronin. His articles have appeared in *The New York Times, The Atlantic Monthly, The Wall Street Journal, Esquire, The Village Voice, The Washington Post,* et cetera.

He has been on radio, "Air America," with "Ring of Fire." And he is the father of six children, and he hopes to leave an earth similar to the one that he has had the opportunity to inhabit.

Mr. Kennedy, thank you for coming to our Subcommittee.

TESTIMONY OF ROBERT F. KENNEDY, JR., CHAIRMAN, WATERKEEPER ALLIANCE

Mr. KENNEDY. Thank you, Mr. Chairman, and all the Members of the Committee and my fellow panelists. Thanks for taking into account my travel schedule.

I have filed extensive comments with the Committee, going through the dozens of midnight regulations passed by the Bush administration over the past couple of months that impact the environment.

I am going to focus on four of those today very, very quickly, because these are regulations that we think should be seriously considered by your Committee and by Congress for review under the Congressional Review Act.

Also, we strongly support the passage of Congressman Nadler's proposed legislation, which could deal with some of these problems.

Very briefly, the Endangered Species Act waiver, which waives the Endangered Species Act requirement for the Pentagon, for the Energy Department, for all other government agencies to engage in consultations with National Marine Fisheries and Fish and Wildlife Service when they are going to engage in an action that is going to harm one of these species.

Number two, the hazardous waste regulation, which exempts three million tons of most highly toxic hazardous waste from regulation under RCRA. It is clear that this is going to significantly damage public health if we allow this to continue.

Number three, the CAFO rules. CAFOs are factory farms, the worst single polluters of water in America today. They produce 500 million tons of waste every year.

Smithfield Foods has one facility, called the Circle Four, in Utah, which has 850,000 hogs. It produces more waste than all the human beings in New York City combined every day.

New York City has spent about $20 billion building sewage treatment plants to treat its waste so that it doesn't pollute the Hudson River and its environs. Smithfield simply dumps that waste into the environment. It is illegal. They have been able to corrupt public officials in order to get away with this.

They cannot produce a pound of pork or a pound of bacon or a pork chop cheaper and more efficiently than a family farmer, a traditional farmer, unless they break the law, unless they shift their cleanup costs to the public. Their cleanup costs are much greater than those that accrue on traditional farms.

The "Raleigh News and Observer," in 1993, won the Pulitzer Prize for a five-part series that showed how factory farmers had corrupted virtually every relevant official in the state to get them to overlook the pollution from these facilities.

Their whole business contemplates illegal behavior and their capacity to avoid enforcement of that. They were easily able to do that during the Bush administration, which was willing to overlook this illegal and corrupt behavior that was damaging communities, the environment, putting family farmers out of work.

Now, the Bush administration has institutionalized that lack of enforcement through this bill.

Finally, the buffer zone rule, and this, to me, is the most important one, Mr. Chairman. This is the rule that is the last barrier that imposed any controls at all on mountaintop removal.

A couple of weeks ago, I flew over to Cumberland and I saw—if the American people could see what I saw in West Virginia and eastern Kentucky, there would be a revolution in this country.

We are literally cutting down the Appalachian Mountains, these historic landscapes where Daniel Boone and Davy Crockett roamed, with these giant machine called draglines, which are 22 stories high.

I flew under one of them in a Piper Cub. They cost a half billion dollars and they practically dispense with the need for human labor, which indeed is the point.

I remember a conversation I had with my father when I was 14 years old, during the 1960's, when he was fighting strip mining in Appalachia. And he said to me, "They are not just destroying the environment, but they are permanently impoverishing these communities, because there is no way that they can regenerate an economy from these landscapes that are left behind."

And he said, "They are doing it so they can break the unions," and that is exactly what they did. When he told me that, there were 140,000 unionized mine workers in West Virginia digging coal out of tunnels in the day. Today, there are fewer than 11,000 miners left in the state. Almost none of them are unionized, because the strip industry isn't—they are taking more coal out of West Virginia than they were in 1968.

The only difference is back then, at least some of that money was being left in the state for salaries, for pensions, for reinvestment in the communities. Today, it is all going straight up to Wall Street to the corporate headquarters of Massey Coal, Peabody Coal, Arch Coal, and the big banking houses, like Bank of America and Morgan, which own these operations.

Ninety-five percent of the coal in West Virginia are owned by out-of-state operations, mainly on Wall Street. They are liquidating the state for cash, using these giant machines, 2,500 tons of explosives that they detonate every day in the state of West Virginia, the equivalent of a Hiroshima bomb once a week.

They are blowing the tops off the mountains to get at the coal seams beneath. Then they take the rock, debris and rubble and they plow it into the adjacent river valley.

The bury the rivers, they flatten the hollows. They have already buried, according to EPA, 1,200 miles of rivers and streams. They have cut down the 460 biggest mountains in West Virginia.

By the time they get done, within a decade, they will have flattened an area the size of Delaware.

It is all illegal. You cannot, in the United States, take rock, debris and rubble and dump it into a waterway without a Clean Water Act permit, and you could never get a permit to do such a thing.

So we sued them, the environmental community, Joe Lovett, Kentuckians for the Commonwealth, in front of a conservative republican Federal judge, Judge Charles Haden. And Judge Haden said the same thing I did.

In the middle of that hearing, Judge Haden questioned the Corps of Engineers colonel who had allowed all this to happen and said to him, "This is obviously illegal. How could you let this happen?" And the Corps colonel said to him, "I don't know, Your Honor. We just kind of oozed into it."

And Judge Haden ended that hearing by giving us a complete victory by banning all mountaintop mining, saying it is illegal from day one and it is illegal today, and he enjoined all of it.

Two days from when we got that decision, lobbyists for Massey Coal and Peabody Coal met in the back door of the Interior Department with Stephen J. Griles, Gale Norton's first deputy chief, who was a former lobbyist for Massey Coal and Peabody Coal, and who is now serving a 10½ month jail sentence, and they rewrote one word, the interpretation of one word of the Clean Water Act, the definition of the word "fill," to change 30 years of statutory interpretation to effectively overrule Judge Haden's decision and allow mountaintop mining, allow the disposal of rock, debris, rubble, garbage, any solid material into any water body of the United States in all 50 states today.

One barrier that we were left with after this destruction that happened from the Interior Department because of Griles was the stream buffer rule that said you can't dispose of the stuff within 100 feet of a perennial or ephemeral stream.

These are the most important streams, because they feed the whole watershed.

That law was left in place. And as a favor to the industry, in the last days of the Bush administration, this White House, which was the indentured service for the worst of the worst of the worst of these polluters, simply got rid of that rule, the last barrier to cutting down the entire Appalachian Mountains.

Let me just say one final thing. During the Pleistocene ice age, where my home is in Mount Kisco, New York, it was under two miles of ice and the rest of North America was turned into tundra, with no trees left.

The last refuge for those trees, they all retreated into one place, which was the Appalachian Mountains of West Virginia and eastern Kentucky. That is where they survived the ice age.

And when the ice withdrew, all of the forests in North America were reseeded from Appalachia. That is why it is the richest forest on earth, the richest ecosystem, temperate ecosystem on the face of the earth, because it is the only one that survived the ice age.

And today, these companies, out of greed and ignorance, are doing or accomplishing what the glaciers couldn't do, which is flattening those mountains and stealing our forests, and this Congress ought to do something about it.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Kennedy follows:]

PREPARED STATEMENT OF ROBERT F. KENNEDY, JR.

Testimony of Robert F. Kennedy, Jr.

Senior Attorney, Natural Resources Defense Council
Chairman, Waterkeeper Alliance

Before the Subcommittee
on Commercial and Administrative Law,
Committee on the Judiciary
U.S. House of Representatives

Midnight Rulemaking: Shedding Some Light

February 4, 2009

Thank you Mr. Chairman and Members of this Committee for the opportunity to testify today. My name is Robert F. Kennedy, Jr., and I am the Chairman of the Board of Waterkeeper Alliance, a non-profit, international organization of community advocates dedicated to protecting our waters and the communities that depend upon them. A large part of our mission involves advocating for effective administration and enforcement of environmental laws. I am testifying this morning on behalf of our members in the United States. I am also a senior attorney with the Natural Resources Defense Council, a non-profit organization dedicated to protecting wildlife and wild places and to ensuring a healthy environment for all life on earth.

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

Waterkeeper Alliance, OMB Watch, Center for American Progress, and other organizations tracked the surge in last-minute rulemakings that the Bush Administration either finalized or sought to finalize in their waning days in office. According to OMB's website, 85 regulations were undergoing EO 12866 regulatory review at the time that President Obama assumed office. OMB completed review of a further 69 in the last two months of the Bush presidency. Twenty-one of these rules, both in review and final, were from EPA alone, and several of these have direct or indirect ramifications for our nation's water quality.

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

Stream Buffer Zone Rule

Perhaps the most dramatic assault upon America's waters occurs in the Appalachian Mountains, where entire mountain tops are blasted off and dumped into stream and river valleys so that coal companies can access coal reserves in the cheapest possible manner. This practice, known as Mountaintop Removal Mining has have buried or damaged more than 1,200 miles of irreplaceable headwater streams. What's left is a wasteland. Well over 400,000 acres of the world's most productive and diverse temperate hardwood forests have already disappeared, and it is predicted that that figure could increase to 1.4 million acres - 2,200 square miles - by the end of the decade if nothing is done to limit this practice. Since the first days of the Bush Administration, EPA, the Army Corps of Engineers and the Department of the Interior's Office of Surface Mining took every possible step to make this destruction easier.

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

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

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

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

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

Over the past two decades, the rise in the number of factory farms (CAFOs) and concentration of the livestock industry has given rise to significant environmental and community health problems in rural America. Modern, industrialized agriculture is the number one cause of water quality impairment in the United States. Factory farms, or Concentrated Animal Feeding Operations (CAFOs), are a big part of this problem. According to EPA, agricultural operations that confine livestock and poultry animals generate about 500 million tons of animal waste annually or three times more waste than humans generate each year. USEPA, *National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs)*, 68 Fed. Reg. 7176, 7180

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

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

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

EPA's new approach actually exempts almost all CAFOs from a requirement to apply for NPDES permits; only those that determine, based on the results of an unreviewed, unguided analysis that they discharge or "propose to discharge" are required to obtain permits. The vast majority of CAFOs can be expected to hide behind the myth that since they have no outlet pipes directly flowing into nearby rivers or streams, that they are "non discharge" facilities. As a result, few CAFOs will apply to state agencies or EPA for NPDES permits. In fact, CAFO operators are given the option of taking a further step, of "self-certifying" that their facilities do

not and will not discharge. This "no discharge certification" gives them a certain degree of immunity against prosecution in the likely event that they discover an "actual discharge."

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

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

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

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

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

As discovered by Representative Waxman this past July, EPA identified a dramatic drop in its own enforcement cases in the two year after the *Rapanos* decision. According to a memo drafted by EPA Assistant Administrator for Enforcement Granta Nakayama, EPA regions decided not to pursue formal enforcement in 304 separate instances where there were potential CWA violations because of jurisdictional uncertainty. In addition, the regions identified 147 instances where the priority of an enforcement case was lowered due to jurisdictional concerns. Finally, the regions indicated that lack of CWA jurisdiction has been asserted as an affirmative defense in 61 enforcement cases since July 2006. In total, between July 2006 and July 2008, the *Rapanos* decision or the Guidance negatively affected approximately 500 enforcement cases.

In one notable instance where the reach of the Act was unduly limited, the Corps' Southwest Regional Office determined that only portions of the Los Angeles River were within the

jurisdiction of the Clean Water Act. See James L. Oberstar, Henry A. Waxman, Letter to Hon. John Paul Woodley, Ass't. Sec'y. of the Army, Civil Works, Aug. 7, 2008, available at http://transportation.house.gov/Media/File/press/TNW.pdf. While EPA later responded to massive public pressure by reviewing the Corps determination, many of the nation's waters have not been so fortunate. *See id.*

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

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

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

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

Department of Interior Oil Shale Leasing Rule

One of the more egregious midnight regulations – a rule governing commercial leasing and production of oil shale on two million acres of public land in Colorado, Wyoming and Utah – was issued on November 18, 2008. This rule hastens the process for opening two million acres

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

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

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

The fate of this rule is vitally important because commercial development of oil shale on public land, using public resources, is bad for the environment, bad for taxpayers, and inconsistent with our need for a clean energy future for our nation. As the Department of the Interior (DOI) readily acknowledges, oil shale development will compromise the region's scarce water supplies, degrade sensitive wildlife habitats, and further alter local communities already impacted because of unprecedented oil and gas drilling. Impacts would also be felt nationally and globally as oil shale production would generate significantly more global warming pollution than conventional gasoline production. We are encouraged by recent statements by the new Secretary of the Interior, Ken Salazar about the Obama Administration's stance on this unnecessary and potentially destructive rule. In a roundtable meeting with reporters last week, Secretary Salazar described the rule as not being "the wise thing to do at this point in time because we have so many questions that still have to be answered." Without answers to these questions, Secretary Salazar stressed that "it made no sense to move forward with a commercial oil shale leasing program," and promised to closely review this and other midnight actions of the Bush administration.

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

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

CAFO CERCLA/EPCRA Exemption

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

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

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

Construction and Development Effluent Limitations Guidelines

Stormwater pollution, particularly from construction sites and new developments, is the fastest growing source of water quality impairment in the country. Excessive sediment is the leading cause of impairment of the Nation's waters (United States Environmental Protection Agency, 2000). In 1998, approximately 40 percent of assessed river miles in the U.S. were impaired or threatened from suspended and bedded sediments (United States Environmental Protection Agency, 2000). Construction activity is a major source of anthropogenic sediment loads to water

resources and a significant source of pollutants to adhere to sediment particles, including nutrients that cause eutrophication. An estimated 80 million tons of sediment enter receiving waterbodies each year from construction sites (Goldman et al., 1986, cited by United States Environmental Protection Agency, 2002).

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

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

EPA's short-sighted proposal neglects to require developers to adopt low impact development, or better site design, approaches to reducing stormwater, many of which dramatically reduce stormwater while saving builders money and recharging local aquifers. By failing to think and act progressively, EPA has set back by decades our collective efforts to rein in this most serious threat to water quality and undercut important economic growth opportunities. We encourage all members of the House to convey their disappointment that EPA has chosen to disregard this significant and growing threat to our nation's waters, and to stress the need for meaningful measures to control stormwater runoff from newly developed areas.

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

Perchlorate Standards for Drinking Water

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

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

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

Uranium Mining Near the Grand Canyon

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

The immediate effect of this rule is to allow a British company to explore for uranium within three miles of the lookout point over the south rim of the Canyon, and potentially will allow dozens of mines to be developed in the area. This region still suffers from a legacy of past generations of uranium mines, and local residents oppose further mining in and around their communities. Mining in the region could pose a grave threat to the quality of the Colorado River and other regional lakes and streams. The Interior Department flouted these concerns by rushing the rule through with almost no opportunity for the public to have a voice, once again favoring the interests of a friendly industry over the public.

Again, thank you very much for inviting you to testify before the Committee this afternoon. As you have heard during today's hearing, the last months of the Bush Administration were spent cementing preferences for industry while undermining or delaying protections for our waterways and communities. While we look forward to a far more environmentally protective approach from the current Administration, the Bush legacy of depredation will take decades to undo. This effort will require concerted regulatory and Executive actions, as well as leadership from members of this House and the Senate. I encourage this Committee to further review the impacts of the Bush Administration's last-minute regulations, and to carefully consider all legislative and appropriations responses available to the Congress.

Endangered Species Act

For over 35 years, the Endangered Species Act (ESA) has provided unparalleled protections for our nation's wildlife, plant species, and the ecosystems that support them. Not only have hundreds of species been rescued from extinction, but our proven ability to recover a species to the point where they no longer require special protections under the ESA is an astounding achievement in itself. Both components provide the true essence of the Act.

The last eight years have greatly diminished the effectiveness of the ESA in protecting our wildlife, with the final blow coming in December when the Bush Administration announced final rules that dramatically undercut the ESA by allowing agencies with no expertise in conservation to decide for themselves whether a proposed action would adversely affect a threatened or endangered species. *See* 73 Fed. Reg. 76,272 (December 16, 2008). Under Section 7 of the ESA, federal agencies are required to work with the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) when proposing an action to insure that it will not jeopardize the existence of a species or adversely change or destroy habitat critical to the species. (See generally Defenders of Wildlife's Jamie Clark's December 11, 2008 testimony before the House Select Committee on Energy Independence and Global Warming.) This has been one of the Act's most successful provisions as it forces other agencies to balance the need for species preservation with their other objectives.

The Bush administration midnight ESA rule severely undermines the ability of experts at the FWS or the NMFS to protect our plant species and wildlife. It allows agencies to avoid Section 7 consultation altogether for any action the agency unilaterally decides will have "inconsequential, uncertain, unlikely, or beneficial affects" on wildlife. (*Defenders of Wildlife Factshee: Endangered Species at Risk).* Agencies already have the ability to make such

determinations, but they must be done with the approval of FWS or NMFS. The importance of FWS and NMFS oversight is to ensure that the protection of endangered or threatened species is not overrun by other priorities the proposing agency, such as the Energy or Defense Department, may have for a planned action. The specialists at FWS and NMFS have the expertise to shed light on the negative effects of an agencies action that may not be obvious to non-experts. Allowing an agency to substitute its own judgment on conservation issues that it knows very little about in lieu of a Section 7 consultation will not be sufficient to ensure that wildlife and their habitat are receiving necessary protections.

Several environmental groups, represented by NRDC and Earthjustice, have challenged the weakened ESA rule in court, for unlawfully exposing America's most vulnerable plants and animals to new threats by allowing conflicted federal agencies to self-consult about potential project impacts on endangered species. In a major break from typical national environmental policy, no environmental impact statement has been conducted. *See NRDC Press Release, Groups Fight to Save the Endangered Species Act, December 1, 2008.* Several states, led by California, later filed a similar to lawsuit to stop these regulations. Other state parties to that suit are Oregon, Connecticut, Delaware, Massachusetts, Maryland, New Jersey, New York, and Rhode Island.

Congress has also moved to overturn these regulations. On January 16, 2009, Congressman Nick Rahall led twelve other members in introducing a resolution under the Congressional Review Act to overturn these regulations.

This is exactly the type of action that is needed to restore the integrity of the Endangered Species Act. These last-minute rules were just the shameful culmination of eight years worth of efforts by the Bush administration to significantly weaken the Endangered Species Act. Congress and the Obama administration must act quickly to restore the Act to its full intent. Congress should enact legislation that will restore the protections of the ESA, particularly for Section 7 consultation and the definitions of what constitutes a threatened or endangered species. The ESA has protected hundreds of plants and animals from the brink of extinction, and must be preserved to do so for future generations.

EPA Air Pollution Rules

The Bush administration issued a handful of harmful rules under the Clean Air Act prior to leaving office, with one of those rules actually taking legal effect on January 20, 2009. The Clean Air Act rulemaking in question governs so-called fugitive emissions – those that cannot reasonably pass through a stack or vent. In this rule, EPA weakened the Act's "new source review" permitting program by allowing industrial sources and other polluters to ignore fugitive emissions that under prior, stronger law had to be included in determining whether a facility is a "major source" subject to Clean Air Act control programs. EPA acknowledges that the regulatory relief extends to power plants, petroleum refineries, chemical manufacturers, and mining and agri-business operations. Indeed, EPA's weakening rule change effectively will exempt mines and factory farms from important Clean Air Act regulations. See generally 73 Fed. Reg. 77,882 (Dec. 19, 2008).

As my NRDC colleague, John Walke, correctly predicted in December 11 testimony before the Select Committee on Energy Independence and Global Warming, EPA adopted another harmful Clean Air Act rule that allows emissions increases from oil refineries, chemical plants, and other major industrial polluters to escape review and control, by artificially separating – and thereby ignoring – emissions increases that occur at multiple pieces of equipment at a facility. See generally 74 Fed. Reg. 2376 (Jan. 15, 2009). The influential National Association of Clean Air Agencies, representing the country's state and local air pollution control officials, had urged EPA not to adopt this weakening rule at all, objecting that the rule change was "likely to encourage virtually unilateral economic decision-making on emissions increases and project aggregation by sources, with the result that [air pollution control] requirements are triggered less often and air quality may be adversely affected."

The rule is slated to become legally effective on February 17, 2009, but it is also subject to the request in the January 20, 2009 memorandum from White House Chief of Staff Rahm Emanuel asking agencies to "consider extending for 60 days the effective date of regulations that have been published in the Federal Register but not yet taken effect." We believe it is important for the new administration to extend the effective date of this rule with an eye toward abandoning the rule altogether, and returning to the stronger air pollution control practices that were long in place before the Bush administration's weakening rule.

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

EPA Global Warming Actions

On December 18, 2008, former EPA Administrator Stephen Johnson issued a memorandum declaring, unilaterally without any opportunity for public notice and comment, that officials reviewing permit applications by utilities to build new coal-fired power plants cannot consider the plants' global-warming CO_2 emissions. The specific intent of this action was to circumvent the natural consequences of a recent decision rendered by EPA's Environmental Appeals Board ("EAB"), so as to avoid any notice and comment on this issue. *See In re: Deseret Power Electric Cooperative*, PSD Appeal No. 07-03 (EAB Nov. 13, 2008).

In that case, the EAB had held that EPA's regional office in Denver wrongly concluded that existing EPA interpretations precluded a determination that CO_2 is a pollutant "subject to

regulation" under the Clean Air Act. The EAB rejected the Region's argument that EPA had historically interpreted the phrase to mean only regulations that limit emissions, and remanded the permit back to the Region to "reconsider whether or not to impose a CO_2 BACT limit in light of the [EPA's] discretion to interpret, consistent with the CAA, what constitutes a 'pollutant subject to regulation under [the CAA].'"

In the December 18 memorandum, Administrator Johnson asserted disingenuously that the EAB's decision has thrown the entire Clean Air Act permitting program into confusion, and clarity was required — in the form of his new and deregulatory interpretive rule contained in the memorandum. Johnson declared that pollutants for which the Clean Air Act and/or EPA regulations require only monitoring and reporting, CO_2 in particular, are excluded from being considered "subject to regulation" under the Clean Air Act. His approach to addressing this problem, however, illegally side-stepped proper administrative procedures, and adopted a position that is substantively at odds with the Clean Air Act.

The former Administrator's pronouncements were a new substantive interpretation at odds with prior agency interpretations and the plain language of the statute. EPA has never before expressed this untenable interpretation of the Act, and to do so in a midnight memorandum, without the opportunity for public comment, was wholly inappropriate.

The substantive position in the Johnson memorandum is also legally bankrupt. In *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007), the U.S. Supreme Court concluded, among other things, that greenhouse gas emissions (including CO_2) are pollutants under the CAA. Moreover, CO_2 is already "regulated" under the Act, specifically in monitoring, recordkeeping and reporting provisions of Clean Air Act section 821; so CO_2 is already "subject to regulation" for purposes of Clean Air Act regulation and the law's permitting program.

The Bush administration's last minute abuse in issuing this memorandum is the culmination of eight years of inaction, evasion and irresponsibility concerning the greatest environmental threat of our time, global warming. It was not enough for the Bush administration to break the President's 2000 campaign pledge to reduce CO_2 emissions from coal-fired power plants; not enough to repudiate international climate treaties and damage the United States' relations with other countries; not enough to oppose Clean Air Act authorities it already possessed by fighting all the way up to the Supreme Court, in order to shackle those authorities under the prior administration and future ones. It was not enough for the Bush administration to watch CO_2 pollution from coal-fired power plants increase from the start of the administration to the finish, with annual CO_2 pollution from coal-fired power plants higher by over 170 million tons in 2007 than in 2001.

No, the Bush administration felt the irresponsible need to rush out a memorandum on December 18, 2008, in a desperate attempt to insulate these same coal-fired power plants from controlling their CO_2 pollution *and* to try to tie the hands of the incoming Obama administration – all to block responsible and required global warming solutions under the Clean Air Act.

Environmental groups including NRDC have petitioned the new administration to reconsider and reject Johnson's illegal interpretation, at the same time that they have filed a lawsuit seeking to

overturn the memorandum in court. In the name of tackling the critical challenge of global warming from the biggest source of those emissions domestically, coal-fired power plants, it is essential that the Obama administration abandon the Johnson memorandum and make clear that new coal-fired power plants must control their CO_2 pollution.

EPA Hazardous Waste Rules

In October 2008, the Bush administration issued a final regulation that exempted over 3 billion pounds of hazardous waste from protective regulation under the Resource Conservation and Recovery Act (RCRA). See generally, EPA, Revisions to the Definition of Solid Waste, 73 Fed. Reg. 64,668 (Oct. 30, 2008). The final rule became effective on December 29, 2008.

As noted by the environmental organization, Earthjustice:

> Under the new rule, EPA estimates that as much as 1.5 million tons of waste that is currently defined as hazardous will now be considered innocuous enough to be stored, transported, or processed by unlicensed and barely supervised companies. More than 5,000 facilities will take advantage of the loophole, including chemical companies, pharmaceutical manufacturers, and the industrial waste industry.[1]

The Bush administration rule allows over 3 billion pounds of hazardous waste to be exempted from RCRA hazardous waste regulation if the waste generator claims it is being recycled. The reality is that most hazardous waste that can be recycled is already being recycled, but by RCRA-licensed and closely supervised operators. Under the new rule, recycling takes place outside of RCRA, with hazardous waste generators periodically certifying that they are shipping to legitimate recyclers. EPA's rule replaces the protective regulation intended by Congress with self-regulation.

And unfortunately, the Bush administration rammed this terrible rule out so that it would take legal effect just before the Obama administration took office. Accordingly, the rule is not covered by the January 20 Emanuel memo that would offer the possibility of extending the rule's effective date. Nonetheless, this harmful rule must be a top priority for reversal by the Congress and Obama administration.

In another harmful hazardous waste rule, the Bush administration adopted a rule that reclassified over 200 million pounds of hazardous waste as "fuel," allowing it to escape RCRA's comprehensive regulation. Here is how Earthjustice rightly characterized this Bush administration action:

> Under this new rule, facilities across the country will be allowed to handle and burn certain hazardous wastes in their boilers instead of shipping those wastes to RCRA-licensed waste handlers for incineration. EPA justified deregulating the waste by claiming that emissions from burning the waste are "likely" not to differ from emissions from burning fossil fuels. 72 Fed. Reg. at 33289. EPA freely admitted, however, that

[1] EPA, Revisions to the Definition of Solid Waste, 72 Fed. Reg. 14171-14218 (proposed March 26, 2007).

> even when "burned even under good combustion conditions, emissions of hazardous organics may be somewhat higher than those from burning fossil fuel." *Id.* at 33,292. Cancer-causing benzene is among the substances EPA found to be higher in ECF emissions. *Id.*

With both of these hazardous waste regulatory abuses, EPA has abdicated the basic statutory purpose of RCRA, to "promote the protection of health and the environment." Congress expected EPA to adopt a "cradle to grave" approach to the regulation of hazardous waste because of the increased environmental and health risks from such substances. But with two last-minute, cynical re-definitions of "hazardous waste," the Bush administration exempted nearly 3.6 billion pounds of hazardous waste from protective RCRA regulation *each year*. Congress and the Obama administration must not allow these abuses to stand.

ATTACHMENT 1

November 20, 2007

David Hartos
Office of Surface Mining Reclamation
and Enforcement
Appalachian Region
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Pittsburgh, PA 15220

Office of Surface Mining Reclamation and Enforcement
Administrative Record
Room 252 SIB
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Re: Comments on Proposed Rule and Draft EIS on Excess Spoil Minimization/Stream Buffer Zones, 72 Fed. Reg. 48678, 48890 (August 24, 2007), RIN 1029-AC04, Docket Nos. OSM-2007-0007 and OSM-2007-0008; OSM-EIS-34.

Dear Mr. Hartos:

On behalf of the West Virginia Highlands Conservancy, Sierra Club, Ohio Valley Environmental Coalition, Coal River Mountain Watch and Waterkeeper Alliance[1], we submit these comments in opposition to the proposed rule.[2] Earthjustice also joins in these comments. The proposed rule is another in a series of actions by the Bush Administration to gut long-standing safeguards against the wholesale burial and pollution of streams in Appalachia by the coal mining industry. In May 2002, the U.S. Army Corps of Engineers (the Corps) repealed a 25-year-old prohibition on dumping waste material in streams. 67 Fed. Reg. 31129. In October 2005, the Office of Surface Mining (OSM) weakened its oversight of state mining programs, by

[1]The members of the Waterkeeper Alliance are the Altamaha Riverkeeper, Animas Riverkeeper, Assateague Coastkeeper, Black Warrior Riverkeeper, Black Water/Nottoway Riverkeeper, Cape Fear Coastkeeper, Casco Baykeeper, Catawba Riverkeeper, Choctawhatchee Riverkeeper, Colorado Riverkeeper, Cook Inletkeeper, Delaware Riverkeeper, Detroit Riverkeeper, Emerald Coastkeeper, French Broad Riverkeeper, Grand Traverse Baykeeper, Great Salt Lakekeeper, Hackensack Riverkeeper, Housatonic Riverkeeper, Hudson Riverkeeper, Hurricane Creekkeeper, Inland Empire Waterkeeper, Kansas Riverkeeper, Klamath Riverkeeper, Lake George Waterkeeper, Lower Mississippi Riverkeeper, Lower Neuse Riverkeeper, Lower Susquehanna Riverkeeper, Milwaukee Riverkeeper, Mobile Baykeeper, Nantucket Soundkeeper, New Riverkeeper, NY/NJ Baykeeper, North Sound Baykeeper, Ogeechee-Canoochee Riverkeeper, Orange County Coastkeeper, Pamlico-Tar Riverkeeper, Peconic Baykeeper, Prince William Soundkeeper, Russian Riverkeeper, San Diego Coastkeeper, Santa Barbara Channelkeeper, Santa Monica Baykeeper, Saranac Waterkeeper, Savannah Riverkeeper, Severn Riverkeeper, Shenandoah Riverkeeper, South Riverkeeper, St. Clair Channelkeeper, St. Johns Riverkeeper, Tualatin Riverkeepers, Upper Chattahoochee Riverkeeper, Upper Neuse Riverkeeper, Upper St. Lawrence Riverkeeper, Waccamaw Riverkeeper, Western Lake Erie Waterkeeper, West/Rhode Riverkeeper, West Virginia Headwaters Waterkeeper, Willamette Riverkeeper and Youghiogheny Riverkeeper.

[2] We also incorporate by reference our April 23, 2004 comments on the prior proposed rule and our January 5, 2004 comments on the MTM/VF DEIS.

making federal takeovers for state violations of federal law discretionary rather than automatic. 70 Fed. Reg. 61194. Also in October 2005, the Administration released its final Programmatic Environmental Impact Statement on Mountaintop Mining/Valley Fills in Appalachia (PEIS), which proposed no meaningful mining reforms or limitations on valley fills. 70 Fed. Reg. 62102. Now, OSM proposes to gut the stream buffer zone (SBZ) rule, the most important safeguard under the Surface Mining Control and Reclamation Act (SMCRA) for protecting streams. Taken together, these actions can only accelerate the pace of mountaintop removal mining and valley filling, which has already destroyed 1,200 miles of Appalachia's streams and 387,000 acres of its forests.

The proposed rule would eliminate the standing prohibition against mining within 100 feet of streams if it will have an adverse effect on water quantity, water quality, and other environmental resources of the stream. In its place, the proposed rule would merely ask coal operators to "minimize" harm to the extent possible. This is an open invitation to industry to ignore a rule that, as a practical matter, has been routinely abused and violated as federal and state regulators looked the other way.

For the reasons discussed below we believe that the proposed changes are unwise, inconsistent with the objectives of SMCRA and the requirements of the Clean Water Act, and supported by a draft environmental impact statement ("DEIS") that is facially inadequate. We request that OSM withdraw its proposal and instead retain and enforce the existing requirements regarding the protection of streams. Our detailed analysis and comments on the proposed changes follow.

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I. OSM's Proposed Revision of the SBZ Rule Is Arbitrary and Capricious and Violates SMCRA

A. OSM's Proposal Contradicts Its Prior Interpretation of the Existing Rule

In the preamble, OSM reviews the history of the 1983 buffer zone rule and claims that it has consistently "applied" that rule to allow valley fills and other stream incursions. 72 Fed. Reg. at 48892, 48895. In the DEIS, OSM goes even further and states that "[n]either OSM nor the State SMCRA regulatory authorities have interpreted or implemented the stream buffer zone rule as an absolute prohibition of [sic] placement of excess spoil material fills or any other surface mining activity within the stream buffer zone." DEIS, pp. 72-73. These statements are clearly intended to create the impression that the current proposal is consistent with all past practices and interpretations, and that there is no shift in agency thinking.

In fact, however, the proposed rule is a reversal of OSM's prior interpretation of SBZ requirements. When it promulgated the existing SBZ rule in 1983, OSM chose to protect intermittent and perennial streams because they were recognized to be especially significant in establishing the hydrologic balance. OSM stated that the buffer zone rule was designed "to protect streams from sedimentation and gross disturbances of stream channels caused by surface coal mining and reclamation operations." 48 Fed. Reg 30312 (June 30, 1983). OSM further stated that "intermittent and perennial streams generally have environmental-resource values worthy of protection under Section 515(b)(24) of the Act." Id. In the MTM/VF PEIS (p. II.C-34), OSM and the other participating federal agencies admit that one of the principal purposes of the stream buffer zone regulation is to "minimize gross disturbances to the prevailing hydrologic balance, fish and other biologically important plants and animals that may live in the streams or riparian zones adjacent to the streams."

In his 1999 ruling interpreting the existing SBZ rule, Judge Haden, Chief Judge of the District Court for the Southern District of West Virginia, ruled that "[n]othing in the statute, the federal or state buffer zone regulations, or the agency language promulgating the federal regulations suggests that portions of existing streams may be destroyed so long as (some other portion of) the stream is saved." Bragg v. Robertson, 72 F. Supp.2d 642, 651 (S.D.W.Va. 1999). Further, Judge Haden stated:

> When valley fills are permitted in intermittent and perennial streams, they destroy those stream segments. The normal flow and gradient of the stream is now buried under millions of cubic yards of excess spoil waste material, an extremely adverse effect. If there are fish, they cannot migrate. If there is any life form that cannot acclimate to life deep in a rubble pile, it is eliminated. No effect on related environmental values is more adverse than obliteration. Under a valley fill, the water quantity of the stream becomes zero. Because there is no stream, there is no water quality.

Id. at 661-662. The Court pointed out the obvious: "Valley fills are waste disposal projects so enormous that, rather than the stream assimilating the waste, the waste assimilates the stream. The Court holds that placement of valley fills in intermittent and perennial streams violates

federal and state water quality standards by eliminating the buried stream segments for the primary purpose of waste assimilation." Id. at 662. Moreover with valley fills, "[t]his concentration of industrial waste is mortal to animal or aquatic life in the stream segment buried. Existing stream uses are not protected, but destroyed. These effects are inconsistent with State and federal water quality standards." Id. at 663. It is important to note that, while Judge Haden's ruling was overturned on jurisdictional grounds, the substance of his ruling was not addressed by the Court of Appeals. See Bragg v. West Virginia Coal Ass'n, 248 F.3d 275 (4th Cir. 2001).

In their brief on appeal in Bragg, OSM, EPA and the Corps expressly agreed with Judge Haden's interpretation of the SBZ rule:

> [Judge Haden] correctly found that SMCRA's stream buffer zone rule. . . prohibits the burial of substantial portions of intermittent and perennial streams beneath excess mining spoil. The elimination of substantial intermittent or perennial stream segment [sic] necessarily causes adverse environmental effects, as it eliminates all aquatic life that inhabits those stream segments. As the district court rightly concluded, the elimination of entire stream segments and all the life they contain plainly causes environmental harm. Accordingly, the district court correctly granted summary judgment on plaintiffs' buffer zone claims.

Brief for the Federal Appellants, 4th Cir., No. 99-2683, April 17, 2000 (hereafter "U.S. Br."), p. 2, Attachment 1 (emphasis in original).[3] Additionally, these agencies stated that the District Court correctly held:

> [T]hat valley fills in intermittent or perennial streams may be authorized under the buffer zone rule only if the permitting agency finds that they will not adversely affect the environmental resources of the filled stream segments. WVDEP has acknowledged that it has routinely approved valley fills in intermittent and perennial streams without making the findings called for by the buffer zone rule for the stream segment filled. The district court correctly rejected the arguments that WVDEP was not required to make the buffer zone findings, holding that the findings required by the buffer zone rule must be made for the filled stream segments and not at some point downstream from the valley fills; and (2) findings made by the Corps under the CWA section 404(b)(1) guidelines are not a substitute for the buffer zone findings.
>
> The district court also correctly. . .[held]. . .that the burial of substantial portions of intermittent or perennial streams in valley fills causes adverse environmental impact in the filled stream segments and therefore cannot be authorized consistent with the buffer

[3] In the 2004 proposal, OSM suggested that the DOJ brief is "not consistent with our historic interpretation" and that OSM never agreed with it or approved it. 69 Fed. Reg. at 1039-40. That is a bold-faced lie. DOJ told the Fourth Circuit that "Attorneys for EPA and OSM are identified on the cover of the federal appellants' brief as being 'of counsel' to this appeal, and the position taken in the brief for the federal appellants represents the unified position of the federal agencies." Federal Appellants' Opposition to the Motion of the Intervenor-Defendants to Strike the Brief of the Federal Appellants and to Dismiss Appeal No. 99-2683, p. 2, Attachment 2

> zone rule. The uncontested evidence demonstrates that the burial of substantial portions of intermittent or perennial causes adverse environmental effects to the filled stream segments, as such fills eliminate all aquatic life that inhabited those segments.

Id. at 24-25. OSM, EPA and the Corps further stated that "valley fills that disturb intermittent or perennial streams may be approved only if there is a finding that activity will not adversely affect the environmental resources of the filled stream segment." Id. at 41.

In a May 22, 2000 letter (Attachment 3), Acting OSM Director Kathrine Henry adopted the same position that "the stream buffer zone waiver findings must be made not only for segments downstream of the fill, but also for each segment of an intermittent or perennial stream in which excess spoil is placed." In its 2004 proposed rule, OSM admitted that this brief and this Acting Director's letter took the position that the rule applied to valley fills. 69 Fed. Reg. at 1040. However, in its 2007 proposed rule, OSM conveniently omits this material and instead cryptically cross-references it as an "additional discussion of litigation and related matters." 72 Fed. Reg. at 48896.

Now OSM has completely reversed this position and would totally exempt valley fills, waste impoundments and other stream incursions from the rule. Id. at 48907; DEIS, p. S-2. When an agency reverses its position, its burden of justification increases. In such cases, "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." Motor Vehicle Mfrs. Assn. v. State Farm Mut., 463 U.S. 29, 42 (1983). OSM has failed to rationally justify its complete about-face from the position it took in the Bragg case. Indeed, OSM has failed to even consider the alternative of enforcing the rule as written and as OSM interpreted it in the Bragg case.

B. OSM's Proposal Violates Congressional Intent to Protect the Environment, Including Streams

The first stated purpose of SMCRA is "to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. § 1202(a). As the House Report on the 1977 bill explained:

> A basic tenet underlying this legislation is the principle that environmental protection and reclamation, at a minimum meeting the standards in this act, are a coequal objective with that of producing coal. The continued selection of mining techniques by engineers whose primary objectives are the most efficient removal of the overburden and transport of the coal is not sufficient to be fully responsive to the purposes and intent of the act.

H. Rep. No. 218, 95th Cong., 1st Sess., p. 96 (1977). Congress recognized the environmental hazards posed by the valley fills associated with mountaintop removal mining: "Serious problems are presented . . . by operations using head-of-the-hollow or valley fill. For such operations, it is uncertain whether spoil can be placed in an environmentally sound manner." Id. at 157 (quoting Sec. of the Interior Cecil Andrus), reprinted in 1977 U.S.C.C.A.N. 593, 688. See

also id. at 615 ("[S]ome mountaintop removal operations have caused serious environmental problems in the Appalachian area. The key cause of these problems has been the 'valley' fill or 'head-of-the-hollow' fill techniques utilized to dispose of excess spoil material."). Congress concluded that valley fills "should be limited to the minimum and that strong spoil placement standards are needed to insure that there will be no offsite damages." Id. at 688-689 (quoting Sec. of the Interior Andrus); see also Cong. Rec. 33,314 (Oct. 9, 1973) (statement of Sen. Jackson) (stating that the disposal of spoil from mountaintop removal mining may be authorized only if fills satisfy "very carefully determined conditions precedent").

The text of SMCRA establishes the "strong spoil disposal standards" required for surface coal mining, including mountaintop removal mining. Several environmental performance standards govern the conditions under which surface mining, including associated spoil disposal, may be authorized. Pursuant to those standards, surface mining operations may be authorized only if the permitting authority finds (1) that the mining operations will "minimize disturbances and adverse impacts . . . on fish, wildlife, and related environmental values"; (2) that "no damage will be done to natural watercourses"; (3) that the excess spoil will be placed in an area that "does not contain springs, natural water courses or wet weather seeps unless lateral drains are constructed from the wet areas to the main underdrains in such a manner that filtration of the water into the spoil will be prevented"; and (4) that the disposal "is compatible with the natural drainage patterns and surroundings." 30 U.S.C. §§ 1265(b)(10), (22), (24); § 1265(c)(4)(D).

SMCRA mandates that mining operations must "minimize the disturbance to the prevailing hydrologic balance at the mine site and in associated offsite areas." 30 U.S.C. § 1365(b)(10). By specifying that mining disturbances such as valley fills should minimize environmental harm "at the mine site," Congress expressed its intent to protect streams where the disturbances occur, i.e., in the footprint of proposed valley fills. By specifying that mining disturbances should minimize environmental harm "in associated offsite areas," Congress sought to protect affected downstream areas. Furthermore, applying the buffer zone rule to the filled stream segment advances the purpose of the rule, which was enacted to "protect stream channels" (44 Fed. Reg. 15176), and also advances the general purpose of the standards established under SMCRA, which were promulgated "to ensure that all surface mining activities are conducted in a manner which preserves and enhances environmental and other values in accordance with the Act." 30 C.F.R. § 816.2.

OSM repeatedly cites only one of SMCRA's thirteen purposes as the defining standard for issuing regulations under that statute. DEIS, pp. 20, 24-25; 72 Fed. Reg. at 48897, 48908, 48909-10, 48911. That one seeks to "strike a balance between protection of the environment and . . . the Nation's need for coal as an essential source of energy." 30 U.S.C. § 1202(f). OSM ignores two other purposes that seek to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations" and "assure that surface coal mining operations are so conducted as to protect the environment." Id., § 1202(a), (d). Thus, OSM skews its analysis of SMCRA in favor of resource development to the detriment of the environment.

Furthermore, OSM uses other sections of SMCRA to set up and demolish a strawman argument. OSM argues that, because § 1265(b)(22)(D) mentions placing spoil where "natural water courses" are present, Congress did not intend to create an "absolute prohibition" on placing any mining spoil in streams. 72 Fed. Reg. at 48893-94, 48908. That is true. However, it does not follow from this proposition that all Congress expected was for OSM to "minimize" the placement of mining spoil in streams. OSM uses the "minimize" concept in § 1265(b)(24) as the regulatory standard for defining the maximum amount of environmental protection that it is required to provide. OSM assumes that placing any amount of mining spoil in streams is acceptable so long as the amount is "minimized" "to the extent possible." OSM then concludes that this "minimization" standard strikes the only "balance" that Congress could have intended in SMCRA, and that no other alternative measures to protect the environment need be considered.. This ignores Congress' two other purposes to "assure" that the environment is protected from the "adverse effects of surface coal mining." Congress did not rule out other measures in addition to fill minimization if those measures are needed to ensure protection of the environment.

C. OSM's Proposal Is Based on a Flawed DEIS

1. The DEIS Fails to Consider All Reasonable Alternatives

In its DEIS, OSM considered only five alternatives in detail: (1) take no action and retain the existing rules, which OSM interprets to allow mining in the SBZ; (2) adopt the proposed excess spoil and SBZ rules, which allows mining in the SBZ; (3) adopt the 2004 SBZ rule, which also allows mining within the SBZ; (4) change only the excess spoil rule; and (5) change only the SBZ rule. DEIS, pp. 17-18. Thus, these alternatives all allow mining in the SBZ without any restrictions except the minimization of excess spoil. OSM did not consider any alternatives that restrict mining in the SBZ. OSM did not consider the alternative of enforcing the SBZ as written and as Judge Haden and OSM interpreted it in 1999 and 2000. Furthermore, OSM did not consider any alternatives that would limit the downstream effects of valley fills (including changes in stream chemistry, temperature, and flow), even though those effects are known to be significant and adverse.

OSM summarily rejected ten alternatives without any detailed analysis. These alternatives would restrict valley fills by type of stream (ephemeral, intermediate or perennial), fill size (area or volume), watershed size (from 35 to 640 acres), stream length (200 to 2000 linear feet), or the percentage of streams filled in a watershed. DEIS, pp. 19-26. OSM uses two types of arguments to dismiss these alternatives: (1) lack of statutory authority; and (2) insufficient scientific data. Id. Neither argument has merit.

First, OSM erroneously assumed that considering any other alternatives or adding any other measures to protect the environment would result in an "absolute prohibition" on either stream-filling or coal mining, and would therefore be contrary to Congressional intent. DEIS, pp. 20-21. However, it is obvious that limitations on valley fills are not necessarily an all-or-nothing proposition. Size, area, length or volume restrictions can be set at intermediate amounts between nothing and unlimited development. It is also clear that restricting fill size does not necessarily prohibit all mining. The size can be restricted based on the amount of watershed, the

amount of stream length, or the type of stream that is buried. Cumulative limits based on the amount filled in a larger watershed or region are also possible. An analysis of past NWP 21 authorizations in West Virginia shows that many mines were able to operate without placing fill in intermittent or perennial streams, or both. See Stream Loss Table, below. Thus, stricter environmental measures could still allow substantial amounts of coal mining to continue.

Second, OSM erroneously assumes that, without more scientific information, no limits are possible or appropriate. This is the same argument that was made in the October 2005 PEIS, and OSM references that document to support its decision. DEIS, pp. 24-26. The primary argument advanced in the PEIS for rejecting fill alternatives was that there was insufficient information at that time to draw a "bright line" that works in every situation, and variations between streams and watersheds made it difficult to apply any "bright line" to differing individual situations. The PEIS stated that "[s]cientific data collected for this EIS do not clearly identify a basis (i.e., a particular stream segment, fill or watershed size applicable in every situation) for establishing programmatic or absolute restrictions that could prevent 'significant degradation.'" PEIS, p. II.D-8. The PEIS therefore posited that since one general rule does not apply in every situation, there is no basis for applying any general rule at all, and the only alternative is to apply a "case-by-case" analysis to every individual situation. PEIS, pp. II.D-1 to II.D-9. The perfect is the enemy of the good, as the PEIS sets up each individual restriction like a straw man and then knocks it down by saying that one problem or another makes it inapplicable in certain situations. Id.

This rationale is not a sufficient basis for eliminating alternatives from analysis under NEPA. "[W]hile inconclusive evidence may serve as justification for not *choosing* an alternative, here it cannot serve as a justification for entirely failing to 'rigorously explore and objectively evaluate *all* reasonable alternatives.'" The Fund for Animals v. Norton, 294 F. Supp.2d 92, 110 (D.C. Cir. 2003). In addition, the historical record demonstrates that OSM's claims of insufficient statutory authority and insufficient information are merely a pretext. In fact, OSM refuses to consider more environmentally-protective alternatives because it made a political calculation to protect the coal industry at the expense of the environment.

The 2001 preliminary draft of the PEIS on mountaintop mining/valley fills, which was drafted by the Clinton Administration, considered three action alternatives that restricted valley fills to ephemeral or intermittent streams and retained the SBZ rule. Attachment 4, pp. ES-6, IV-1. Different versions of these same alternatives were present in later drafts until June 2002. For example, a March 2002 draft stated:

> The most significant distinction between the four alternatives is how each one addresses Issue 1, "Direct loss of streams and stream impairment." The question of what portions of a stream can be legally filled under SMCRA authority was central to the *Bragg v. Robertson* lawsuit. The District Court decision in that case established that the SMCRA stream buffer zone regulations at 30 CFR 816.57 and 817.57 do not allow mining activities (including valley fills) within 100 feet of intermittent or perennial streams. The Fourth Circuit Court of Appeals later vacated the District Court's decision, but on grounds unrelated to the applicability of the stream buffer zone rule. Because of the

> atmosphere of regulatory uncertainty surrounding this issue, and the importance of allowable valley fill size to mine viability and environmental impacts, the agencies developed the EIS alternatives around it. Each alternative proposes different changes to regulatory programs that determine the allowable extent of stream loss through valley filling. The amount of valley filling that is allowable will affect the amount of mining that can occur, which in turn will determine the environmental and economic consequences of selecting a given alternative.

Attachment 5, Att., p. 5 (emphasis added). The Proposed Agenda for a June 18, 2002 Steering Committee meeting describes the four alternatives as follows:

Table IV-1 Mountaintop Mining / Valley Fill EIS Alternative Summary	
Alternative A	No changes to the SMCRA and CWA programs in effect in 1998
Alternative B	Depending on the outcome of a detailed, permit-by-permit baseline data collection; thorough, site-specific, significant adverse impact analyses; and, consideration of alternatives for avoidance and minimization, valley fills could be allowed in ephemeral, intermittent, and perennial stream segments. Mitigation of unavoidable impacts would require in-kind replacement of aquatic functions and values within the watershed.
Alternative C	Valley fills could be located in ephemeral and intermittent streams. Permit-by-permit baseline data collection and site-specific alternatives analyses would be required (although not necessarily as rigorous as in Alternative B) to demonstrate that avoidance and minimization were considered. Mitigation options for unavoidable impacts would be somewhat more varied and thus more flexible than under Alternative B.
Alternative D	Valley fills could be located only in the ephemeral portion of streams. Permit-by-permit baseline data collection would be more limited than under Alternative B, and alternative analyses would demonstrate that minimization of downstream or indirect impacts were considered. Mitigation could include compensation in lieu of in-kind replacement of lost aquatic function and value.

Attachment 6, Proposed Agenda, p. 7. Thus, these alternatives would have restricted valley fills depending on the type of stream.

When the Bush Administration took office, Deputy Secretary of the Interior J. Steven Griles directed OSM to "refocus" the PEIS to "focus on centralizing and streamlining coal mine permitting" and impact "minimization." 10/5/01 Griles Letter, p. 1, Attachment 7. As a result, the fill-restricting alternatives were abandoned and replaced by process alternatives that merely reshuffled the procedural responsibilities between the various agencies. All of them had the same or very similar environmental impacts and merely sought to streamline permit processing. See 1/5/04 WVHC Comments on the PEIS, pp. 3-6. The final PEIS states that "[a]ll alternatives

... are based on process differences and not directly on measures that restrict the area of mining." PEIS, p. IV.G-3. The PEIS further admits that "[t]he environmental benefits of the three action alternatives are very similar." Id., p. II.B-13.

The paper trail for the PEIS shows how this happened. On June 18, 2002, members of the Steering Committee on the PEIS met to consider the scope of alternatives. Attachment 6, Proposed Agenda. EPA and the U.S. Fish and Wildlife Service (FWS) members of the Steering Committee took the position that the PEIS had to consider alternatives to reduce environmental impacts. Id. at 8. They believed that "the new framework does not meet the NEPA requirements by providing a contrasting choices [sic] among several clear and distinct alternatives." Id. at 2. As a result of this meeting, the Steering Committee changed the alternative framework, but still recommended inclusion of an alternative that "would represent the suite of actions that would result in the most environmentally-protective alternative (i.e., restricting fills to the ephemeral zone...)." Id. at 11. The Steering Committee approved that recommendation. 6/19/02 Hoffman e-mail, Attachment 7. These changes were incorporated into a new alternatives matrix table. 6/26/02 Robinson e-mail, Attachment 9.

However, shortly thereafter, the Steering Committee's decision was overruled by the Executive Committee. Unnamed higher-level agency "executives instructed the SC to attempt to construct the alternatives for the EIS in a framework based largely on coordinated decision making for SMCRA and CWA–with no alternative restricting fills." Attachment 10, 9/23/02 Agenda, p. 1. Minutes of a July 14, 2002 Executive Committee meeting show that a new three-alternative approach was adopted. 8/15/02 email, Attachment 11, Attachment: Executive Committee Discussion. As a result, the prior alternatives restricting valley fills were stripped from the PEIS. Instead, the new alternative framework considered only process alternatives.

OSM has now continued this wholesale evisceration of alternatives by refusing to consider similar fill-restricting alternatives in the SBZ DEIS. However, the fact that two federal agencies previously recommended inclusion of those restrictive alternatives demonstrates that they are serious proposals that deserve and require full analysis and consideration.

It is also outrageous that OSM does not even consider the alternative of enforcing the SBZ rule as written and as it was interpreted by OSM itself in its April 2000 federal court brief and Acting Director letter. Instead, OSM reinterprets the existing rule in conformity with the new proposed rule, so that both of them allow valley fills in intermittent and perennial streams. This eliminates most of the difference between the two rules, and makes the "no-action" alternative a pale shadow of the proposed rule. The "no action" alternative in the DEIS merely substitutes OSM's past practice for its legal mandate to protect streams and the environment generally. A valid "no action" alternative would interpret the SBZ as applying to the footprint of the valley fills, as OSM determined was legally required in 2000.

OSM has failed to analyze a reasonable range of alternatives. All of the alternatives would allow mining activities and valley fills to be placed in any stream without any limitation on the amount of stream that could be buried and destroyed. OSM must consider some

alternatives that restrict filling of streams. Absent such consideration, the EIS fails to frame the true range of choices available to the decisionmaker.

Furthermore, OSM must consider some alternatives that address the cumulative impacts of stream filling. As OSM acknowledges, those cumulative impacts involve damaging or destroying over 1,700 miles of streams in Appalachia. DEIS, p. 117. The DEIS fails to address these cumulative impacts. Fill minimization, by itself, only results in a case-by-case analysis of filling for each separate project. It does not analyze or address cumulative impacts. OSM inexplicably assigns zero value to the loss of thousands of miles of headwater streams.

OSM's failure to consider a reasonable range of alternatives has a predictable result: all of the alternatives would have substantially the same impacts. OSM states that it "would not anticipate a major shift in on-the-ground consequences from any of the alternatives." DEIS, p. 121. The alternatives "would cause no discernable changes to the direct stream impact trend." Id., p. 124. This is unremarkable, since OSM interprets the "no-action" alternative and all the other alternatives to allow continued unlimited filling of the buffer zone. The absence of significantly different impacts demonstrates the artificially narrow range of the alternatives that OSM considered. What is remarkable is that although stream filling in Appalachia is one of the most, if not the most, environmentally destructive practices in the United States today, OSM cannot think of a single reasonable alternative that would result in a "major shift" in the effects of those practices. This inability is based on political considerations, not facts or analysis.

OSM's primary rationale in 2004 for gutting the SBZ rule and eliminating any more restrictive alternatives was its claim that it is "virtually impossible to conduct mining activities within 100 feet of an intermittent or perennial stream without causing some adverse effects," and that "SMCRA recognizes that an absolute standard of 'no adverse impacts' is unattainable." 69 Fed. Reg. at 1043. Similarly, in the DEIS, OSM states that if valley fills were restricted to ephemeral streams, 90.9% of the coal in central Appalachia could not be mined. DEIS, p. 20. OSM also argues that SMCRA does not prohibit filling streams with mine waste, and that it not economically feasible to eliminate such fills. 72 Fed. Reg. at 48891 ("the most economically feasible disposal areas are the upper reaches of valleys"); id. at 48892 ("maintenance of a buffer is neither feasible nor appropriate").

The 92.5% figure is based on the Mountaintop EIS Technical Report in Appendix G of the MTM/VF PEIS. It was based on a study of only ten mines, and did not consider the altered economics of revised mine configurations. MTM/VF PEIS, App. G, Cover Sheet, p. 3. It therefore cannot be extrapolated to all coal mining in central Appalachia. The more comprehensive economic analyses in the MTM/VF PEIS, based on work by RTC and Hill & Associates, showed that restricting valley fills to ephemeral zones would reduce coal production in Appalachia by 20-45%, and would increase coal prices by only two dollars a ton. Id. at 7; MTM/VF PEIS, p. IV-I.3.

Even that analysis is an overstatement of the impacts of the existing rule. We have examined seven recent NWP 21 authorizations issued by the Corps for surface coal mines in West Virginia. If the ephemeral/intermittent/perennial stream delineations used by the Corps to

grant those authorizations are valid, they show that mine operators can place large amounts of mine spoil in valley fills without impacting perennial streams. See OVEC 4/23/04 Comments on Proposed SBZ Rule, Attachment 7.

Mine operator/ Mine Name/ NWP 21 Issuance Date	Valley Fill No.	Water-shed Acres	Stream loss in linear feet		
			Ephemeral	Intermittent	Perennial
Kingston Resources, Inc./ Horse Creek 4/1/2003	1	56	973	600	0
	2	94	2916	500	0
	3	36	1035	315	0
	4	188	1247	2580	0
Horizon Resources, LLC/ Synergy 3/28/2003	I	14	0	0	0
	2	13	0	0	0
	3	121	700	1850	0
	6	160	1837	1500	0
Martin Logan Coal Co./ Phoenix No. 3 5/27/2003	2	76	851	0	0
	3	134	749	1290	0
	4	106	2131	0	0
Hobet Mining, Inc./ Westridge 11/24/2003	1	158	n/a	1800	0
	2	233	n/a	2000	0
Elk Run Coal Co./ West of Stollings 1/5/2004	B	150	310	2655	0
	C	154	778	1662	0
	D	56	600	0	0
	E	124	360	1736	0
Independence Coal Co./ Edwight 1/28/2004	East	517	50	4300	0
	West	497	0	0	0
Hobet Mining, Inc./ Hewitt Creek 2/4/2004	1	<141	1400	900	0
	2	<141	1400	0	0
	3	<141	650	1300	0
	4	<141	1280	0	0
	5	<141	850	0	0
	6	<141	350	0	0
Martin Logan Coal Co./	1	180	670	3803	0

	2	68	1779	0	0
	3	58	1040	0	0
	4	139	2240	0	0
	5	226	1485	2300	0
	6	182	2170	200	0
	7	85	470	400	0
Cumulative Totals	32 fills		30321	31691	0

Thus, none of the 32 fills are in perennial streams, and thirteen of them are only in ephemeral streams. Furthermore, nearly half of the stream length filled is in the ephemeral zone. Even though we believe that filling over 30,000 feet of ephemeral streams causes significant environmental harm, this data clearly refutes OSM's claim that it is impossible to mine without filling perennial streams, and also shows that significant mining can occur without filling intermittent streams.

Since 59% to 80% of valley fills (depending on the state) are less than 75 acres (MTM/VF PEIS, pp. III.K-41 to K-47), it is likely that the majority of valley fills could be constructed without impacting perennial streams. Furthermore, these valley fills were built or approved before fill minimization requirements were being enforced, and therefore probably understate the number of fills that could be built without intersecting intermittent or perennial streams.

Even if the existing SBZ rule may cause a limited loss of central Appalachia coal, that does not mean that there would be an overall shortage of coal for the nation. Higher mining costs "will result in coal supplies originating from coal basins outside this EIS study area where compliance can occur." MTM/VF PEIS, p. IV-I.1. In other words, any coal not mined in Appalachia will be replaced by coal mined elsewhere. So overall there will be adequate coal to meet demand and no necessary reduction in overall coal production.

In addition, OSM fails to acknowledge in its rulemaking, unlike its acknowledgment in the MTM/VF PEIS, that "minimizing fills will to some degree also affect mining costs." MTM/VF PEIS, p. IV-I-3. Indeed, all SMCRA environmental standards have that effect. Consequently, the fact that restrictions on mining in the SBZ will increase mining costs and make some coal unrecoverable is not, in itself, a reason to reject those restrictions. "Where mitigation presents significant costs to the applicant, the economic effect will likely be similar, but possibly less pronounced, to the results of the absolute fill restriction studies, inasmuch as mining methods that reduce the amount of excess spoil (and consequently reduce the size of fills and the amount of mitigation) will be selected." Id., p. IV.I-4. OSM has not summarily rejected mitigation of fill impacts on the ground that it will reduce the amount of coal recovered, even though that is likely. Consequently, it is irrational to summarily eliminate all restrictive alternatives on that basis.

2. There Is No Evidence that the Preferred Alternative Would Reduce Environmental Impacts

In the DEIS, OSM claims that the preferred alternative, Alternative 1, would reduce the environmental impacts of the current SBZ rule because: (1) the new excess spoil minimization rule would reduce the footprints of the fills; and (2) the minimization analysis would result in "less adverse functional impacts." DEIS, p. 124. No evidence or studies are presented to support these conclusions. In fact, the change to the SBZ rule is likely to increase environmental harm, because most mining activities that fill streams are being exempted from the rule. This will encourage greater filling of streams, not less.

3. OSM Has No Rational Basis to Conclude that SBZs Are Not BCTA

Section 515(b)(24) requires OSM to use the best technology currently available (BTCA) to minimize disturbances from mining activities on environmental resources. As OSM admits, the existing SBZ rule "manifest[s] an assumption that maintenance of an undisturbed 100-foot buffer around perennial and intermittent streams is the" BTCA. 72 Fed. Reg. at 48902. OSM is now abandoning that assumption, and reversing course, on the ground that "maintenance of a buffer is neither feasible nor appropriate because the activities inherently involve placement of fill material in waters of the United States." Id. at 48892. Thus, OSM claims that, as a factual and technical matter, stream buffer zones are impractical or impossible. However, OSM provides no evidence or studies to support this assertion. In fact, as we have shown above, the PEIS found that mining can feasibly continue even if SBZs are maintained. Even if some mining would be reduced, that is no reason to conclude, as a technical matter, that SBZs are infeasible.

Furthermore, the overwhelming scientific evidence shows that riparian buffer zones consisting of native vegetation communities are the best method for stream protection from disturbances upslope such as mining or logging. When the forests next to a stream are disturbed or destroyed, the streams and aquatic life suffer. Studies show that streams draining grasslands tend to downwaste and are both deeper and narrower than those adjacent to forest regions. Without their surrounding forests, stream runoff is faster, there are no significant litter inputs including woody debris (which help in retention and microbial uptake), and there is less surface area in stream bottoms for secondary production. Furthermore, removing the surrounding forest and changing the vegetation to grass changes the energy base of the natural headwater stream in the Appalachians.[4]

4. The DEIS' Analysis of Cumulative Effects Is Pathetically Inadequate

[4] These facts are supported by the comments submitted on this proposed rule by aquatic scientists Pat Mulholland, et al., and by the following studies: Lowrance, R., R. Todd, J. Fail, Jr., O. Hendrickson, Jr., and R Leonard. 1984. Riparian forests as nutrient filters in agricultural watersheds. BioScience 34:374-377; Osborne, L. L. and D. A. Kovacic. 1993. Riparian vegetated buffer strips in water-quality restoration and stream management. Freshwater Biology 29:243-258; Peterjohn, W. T. and D. L. Correll. 1984. Nutrient dynamics in an agricultural watershed: observations of the role of the riparian forest. Ecology 65:1466-1475; Meyer, Judy L., David L. Strayer, J. Bruce Wallace, Sue L. Eggert, Gene S. Helfman, and Norman E. Leonard. 2007. The Contribution of Headwater Streams to Biodiversity in River Networks. Journal of the American Water Resources Association (JAWRA) 43(1):86-103.

OSM's analysis of the cumulative impacts of its proposal is pathetic. It consumes a paltry two paragraphs. DEIS, p. 144-45. OSM argues in one paragraph that no further analysis is necessary because the cumulative impacts of surface coal mining were addressed in its 1979 and 1983 EISs on its SMCRA regulations. Id. at 145.

This argument is ludicrous. Those EISs are more than twenty years old. CEQ guidance provides that an EIS should be supplemented if it is more than five years old. CEQ, NEPA's Forty Most Asked Questions, No. 32, 46 Fed. Reg. 18026 (March 16, 1981). CEQ regulations require supplemental environmental analysis when changed circumstances or significant new information arises after an earlier NEPA evaluation is made. 40 C.F.R. § § 1502.9(c)(1)(i), (ii). There is no question that the scope and intensity of mining activities in Appalachia has changed significantly since 1983. The 2005 PEIS states:

> Increased public and government agency concern about MTM/VF operations emerged in 1997 and 1998. It appeared that the number of these types of operations had increased in recent years in Appalachia, and that more and more valley fills were being proposed/built. . . . [A] comparison of the fills constructed in the period 1985-1989 with those constructed in 1995-1998 showed that the average fill increased in size by 72 percent, and the average length of stream impacted per fill increased by 224 percent.

PEIS, p. I-5. This PEIS is no substitute for a full analysis in the SBZ EIS. OSM stated in the PEIS that "[t]he stream buffer zone rule proposal and other regulatory program changes were envisioned and sanctioned by the settlement agreement and do not rely on this NEPA document." PEIS, Response to Comments, p. 19.

OSM also argues that its regulations were, and continue to be, environmentally beneficial because they require mitigation. DEIS, p. 145. However, merely requiring mitigation does not mean it will be successful or effective. OSM cannot rationally conclude that mitigation will offset the loss because federal agencies do not fully evaluate the aquatic functions of streams before they are buried and, therefore, do not know what to replace. OVEC, 479 F. Supp.2d at 646. Furthermore, even if the assessment of lost stream functions were sufficient, OSM's finding that mitigation will replace those functions is irrational because OSM has no reasoned analysis of the effectiveness of mitigation. OSM cannot simply assume that mitigation will eliminate cumulative impacts. OVEC, 479 F. Supp.2d at 659.

In the second paragraph, OSM argues that "all regions" in the U.S. have streams "that are in poor and slightly impaired conditions," caused mostly by "natural and man-induced activities," that mining impacts involve mostly acid mine drainage, and that analyses of mines' probable hydrologic consequences (PHC) will "ensure that no material damage resulting from changes in water quantity or quality occur[s]." DEIS, p. 145. These statements are gross generalizations that completely ignore the government's own scientific studies that it spent $5 million to obtain and that formed the basis for the 2005 MTM/VF PEIS. OSM provides no factual basis for its assertion that burying over a thousand miles of streams is comparable to impaired streams in other parts of the country, or to existing acid mine drainage problems in

Appalachia. These statements reveal a complete ignorance of the biology and importance of headwater streams, the serious adverse effects of valley fills on downstream water quality, and the failure of compensatory mitigation to offset the aquatic functions of lost headwater streams. OSM's analysis of cumulative impacts is both quantitatively and qualitatively pathetic.

Judge Chambers recent decision in the OVEC case examined the Corps' analysis of cumulative effects for the four individual permits under this standard. He found that the Corps' analysis was deficient:

> The Corps does not explain how the cumulative destruction of headwater streams already affected by mining in these water in these watersheds will not contribute to an adverse impact on aquatic resources. The Corps fails to "articulate a satisfactory explanation," including a "rational connection," between the facts found and the conclusion reached. [citation omitted] Instead, the Corps recites the data and declares that the cumulative impacts are not significant.

479 F. Supp.2d at 659. Here, OSM has done even less. It cites no data whatsoever and declares that no material damage will occur to streams.

Nor it is enough that OSM has provided a quantitative estimate of the number of valley fills and the number of miles of streams that they have filled. 72 Fed. Reg. at 48891-92. Quantification of affected areas is a necessary, but not a sufficient, analysis of cumulative effects under NEPA. Klamath-Siskiyou Wildlands Center v. Bureau of Land Management, 387 F.3d 989, 995 (9th Cir. 2004) ("A calculation of the total number of acres to be harvested in the watershed is a necessary component of a cumulative effects analysis, but it is not a sufficient description of the actual environmental effects that can be expected from logging those acres.").

II. Under the Clean Water Act, OSM Must Obtain EPA Concurrence for the Final Rule

SMCRA provides that regulations on environmental protection standards cannot be approved by OSM unless it has "obtained the written concurrence" of EPA "with respect to those aspects" of federal regulations "which relate to air or water quality standards promulgated under the" Clean Water and Clean Air Acts. 30 U.S.C. § 1251(b). When it enacted this section, Congress was concerned about direct conflicts between air or water quality standards, and it believed that the EPA concurrence procedure would be sufficient to address such conflicts. The 1977 House Report contains a section entitled "Relation of H.R. 2 to Other Laws" that states, in relevant part:

> The committee felt that the requirement for the Secretary of the Interior to obtain the concurrence of the Administrator of the Environmental Protection Agency is necessary to insure that any environmental requirement of this act is consistent with the environmental programs and authorities of EPA and, in particular, those programs authorized under the Clean Air Act, as amended, and the Federal Water Pollution Control Act, as amended. Specifically, the Secretary must obtain the Administrator's concurrence in the coal

> surface mining regulations and requirements under the environmental protection and State program approval provisions of the bill, as well as the final approval of any State program. The EPA has been directed by the Congress to insure the environmental well-being of the country. EPA has established water quality standards, air quality standards, and implementation and compliance requirements for the coal mining and processing industry, and issues permits to the industry to insure appropriate pollution abatement and environmental protection. The committee concluded that because of the likeness of EPA's abatement programs and the procedures, standards, and other requirements of this bill, it is imperative that maximum coordination be required and that any risk of duplication or conflict be minimized.

H. Rep. No. 218, 95th Cong., 1st Sess. 142 (1977).

The proposed SBZ clearly implicates the Clean Water Act. OSM has deleted the "adverse effect" test and the requirement to meet water quality standards in the existing rule. As a result, as we explain below, the proposed rule will cause increased valley filling, leading to significant degradation of waters of the United States, in violation of EPA regulations under the CWA. Yet there is no indication in the proposed rule that OSM has sought, or intends to seek, EPA's concurrence. OSM must do so, or else the rule is invalid.

III. EPA Cannot Legally Concur with the Proposed Rule Because It Will Cause Significant Degradation of Streams, in Violation of the CWA

EPA cannot legally concur with the proposed rule because it violates the Clean Water Act. Valley fills are permissible only if they do not result in "significant degradation" to the aquatic ecosystem. 40 C.F.R. § 230.10(c); PEIS, p. II.C-38. By eliminating the adverse effects test in the existing rule, the proposed SBZ rule would implicitly allow effects which are adverse and significant, as long as they are minimized. Even if effects of valley fills are minimized, they are still likely to be significant. Minimizing harm does not ensure its insignificance. The proposed SBZ rule does not prevent significant harm from occurring. Cf. Hazardous Waste Treatment Council v. EPA, 886 F.2d 355, 361 (D.C. Cir. 1989) (RCRA requirement to "minimize" threats to human health and the environment does not require EPA to set treatment standard at levels where no threat to human health and the environment exists).

A. The DEIS Itself Finds that Valley Fills Cause Significant Degradation

The evidence that valley fills cause significant degradation is clear from the DEIS itself. Headwater streams "serve a number of important ecological functions including . . . improving water quality." DEIS, p. 109. Valley fills have already permanently filled over 700 miles of headwater streams in Appalachia, and are expected to fill 367 more miles. Id. at 117. When streams are buried by valley fills, "those segments no longer exist and all stream functions are lost." Id. This degradation must be deemed significant. There is no evidence showing that buried streams can be recreated successfully elsewhere on mined sites. The DEIS states that "the state of the art in creating smaller headwater streams has not reached the level of reproducible success." Id. at 111. "Attempts to reestablish the functions of headwater streams on the groin

ditches on the sides of fills have achieved little success to date." Id. at 117. "Past efforts at compensatory mitigation have not achieved a condition of no-net loss of stream area or functions." PEIS, p. III.D-17. Consequently, this loss is permanent and irreversible.

Valley fills also cause significant harm to downstream water quality. They increase downstream concentrations of sulfate, total dissolved solids, total selenium, total calcium, total magnesium, hardness, total manganese, dissolved manganese, specific conductance, alkalinity, total potassium, acidity, and nitrite/nitrate. DEIS, p. 118. Sulfate doubled in 13 of 52 basins and quintupled in five basins. Id. at 119. Valley fills cause water temperatures to be warmer in the winter and cooler in the summer than for unmined areas. Id. at 120.

B. The Available Scientific Evidence Demonstrates that Surface Coal Mining Activities Are Causing Significant Degradation of Streams in Appalachia.

Other available scientific evidence demonstrates that coal mining activities and valley falls are causing significant degradation. In its comments on the proposed 2002 NWP 21, EPA stated that coal mining and valley fill operations in Appalachia cause "significant ecological damage to the headwater stream systems." 10/9/01 EPA Letter, Enclosure, p. 8, Attachment 12. FWS similarly stated that it "believes that surface coal mines often adversely affect large areas of upland and wetland habitat." 7/2/01 FWS Letter, pp. 1-2, Attachment 13. FWS described the environmental impact of coal mines in Appalachia on aquatic and terrestrial ecosystems as "unmitigatable" and "unprecedented." 9/20/01 FWS Letter, p. 1, Attachment 14. FWS said it knew "of no other single type of activity, whether authorized by individual or general permit, with such significant individual and cumulative adverse environmental impacts as those currently authorized by NWP 21." Id., p. 2. FWS described the consensus of scientists working in the field that "small first order streams form the heart and soul of the functional stream ecosystem in . . . every watershed that has been carefully studied. . . . Clearly, any discussion of destroying even one first order stream is out of order. . . ." Id., p. 4. "These experts asserted that stream loss is unacceptable from a biological standpoint, and that there is no scientific basis on which to develop an acceptable loss threshold." Id., p. 5.

In addition, 43 "senior aquatic scientists," including "members of the National Academy of Sciences and its scientific Boards," "president[s] of national scientific organizations, and leading authors on the ecology, water quality, and biota of streams and rivers," stated in their comments on the proposed 2002 NWP 21 that:

> The available scientific evidence clearly demonstrates that the length of headwater streams in the landscape has been significantly reduced because of the mining and development activities that have been permitted under this program. . . . This loss of headwater streams has profoundly altered the structure and function of stream networks, just as eliminating fine roots from the root structure of a tree would reduce its chances of survival.

10/5/01 Univ. of Georgia Comments, p. 1, Attachment 15. These scientists supported their conclusion by citing and attaching thirty articles in scientific journals. Id. In addition, in her

recent testimony in OVEC v. Bulen, Civil No. 3:05-784 (S.D.W.Va.), Dr. Margaret Palmer, plaintiffs' expert on stream restoration, stated that in terms of conservation priorities, headwater streams are "at the top of the list" of areas that need to be preserved. Bulen Trial Transcript (hereafter "Bulen Tr.") 6:102-03, Attachment 16.

1. Stream degradation is significant. The PEIS demonstrates that significant degradation of the aquatic and terrestrial ecosystem in Appalachia has likely occurred, and is continuing to occur. Significant stream degradation caused by valley fill and mining activities is best documented for watersheds in West Virginia. In OVEC v. Bulen, Civil No. 3:05-0784 (S.D.W.Va.), expert analysis of GIS data showed that present and pending surface mining permit operations and valley fills conservatively cover the following percentages of streams in these watersheds:

Watershed/Subwatershed	% of total streams covered	% first order streams covered
Upper Guyandotte	7.4	9.5
Dingess Run	19.9	19.5
Coal River	12.0	14.5
Laurel Creek	28.0	37.3
Upper Kanawha	7.9	10.2
Cabin Creek–Headwaters	22.9	32.1

Expert Report of Douglas P. Pflugh, May 16, 2006, Summary, p. 2, Attachment 17. The Corps reviewed this data and found it to be "very reliable." Mullins Testimony, Bulen Tr. 3:202, Attachment 16. In the headwaters of Spruce Fork in West Virginia, surface mine permits and valley fills cover 35.5% of total stream length and an alarming 44% of first order stream length. FEIS, Spruce Mine No. 1, p. 2-180 (September 2006), Attachment 18. In OVEC v. Bulen, Civil No. 3:05-0784 (S.D.W.Va.), plaintiffs' expert aquatic ecologist, Dr. Bruce Wallace, testified in October 2006 that impacts of this magnitude were "astounding," a "danger signal," and meant lost headwater stream functions in these areas. Wallace Testimony, Bulen Tr. 2:32-34, Attachment 16. Plaintiffs' stream restoration expert, Dr. Margaret Palmer, similarly testified that a loss of 29% of the watershed and 18% of the first order streams in a watershed were "incredibly significant." Palmer Testimony, Bulen Tr. 2:134, Attachment 16. She said that this loss was so huge that it was questionable whether the stream could ever be restored. Id. at 2:135-36.

2. Water quality degradation is significant. In its June 16, 2006 comments on the Draft EIS for the Spruce No. 1 mine, EPA stated "existing data from Spruce Fork ...indicates MTM/VF activities have degraded streams to the point where they are considered impaired using the West Virginia Stream Condition Index (WVSCI). Considering that water leaving the mined and filled areas in Spruce Fork is degraded, additional caution is necessary in future permitting

and mitigation requirements. The Final EIS should consider the strong and statistically significant relationships found between biological condition and these water quality parameters as summarized in Table 1 and supporting data. (see Attachment 2)." FEIS, Spruce No. 1 Mine, p. 2-98, Attachment 18.

In addition, the PEIS stated that valley fills have the following adverse effects on downstream waters:

> Stream chemistry showed increased mineralization and a shift in macroinvertebrate assemblages from pollution-intolerant to pollution-tolerant species. Water temperatures from valley fill sites exhibited lower daily fluctuations and less seasonal variation than water temperatures from reference sites. . . .
>
> The EPA Water Chemistry Report found elevated concentrations of sulfate, total and dissolved solids, conductivity, selenium and several other analytes in stream water at sampling stations below mined/filled sites.

PEIS, p. IV.B-4. In fact, the EPA Water Chemistry Report found that conductivity was "clearly impacted by MTM/VF [mountaintop/valley fill] mining." PEIS, App. D, EPA 2002b, p. 2. "Conductivity at Filled sites can be 100 times greater than that at Unmined sites." Id. at 45. "Unmined sites have a consistently low conductivity no matter what the flow. Filled sites have a broad range of conductivity much higher than Unmined sites indicating that MTM/VF mining increases specific conductance in streams." Id. at 46. Conductivity is generally five to nine times greater below valley fills than below unmined sites. Wallace Testimony, Bulen Tr. 2:34-35, Attachment 16. Sulfates were 41 times greater; calcium, magnesium and hardnesss were 21 times greater; total dissolved solids were 16 times greater, and selenium was 7.8 times greater. Id. at 2:35. These chemical changes have a significant effect on the aquatic ecosystem. Id. Dr. Wallace called them a "witches' brew." Id. at 2:37, 95. EPA found that "[t]he highest values [for conductivity] are consistently at the Sediment Control Structure (MT-24) which is on a reclaimed MTM/VF mine." PEIS, App. D, EPA 2002b, p. 45. The PEIS also found that mining impacts on the nutrient cycling function of headwaters streams "are of great concern." PEIS, App. I, p. 74.

Coal mining and valley fills in WV are also causing significant degradation of the aquatic environment due to selenium contamination. OSM's DEIS confines its discussion of selenium to the following four sentences:

> Selenium concentrations from the "filled" category sites were found to exceed AWQC for selenium at most (13 of 15) sites in this category. No other site categories had violations of the selenium limit.
>
> In the USEPA (2002a) stream chemistry study in West Virginia, selenium was found at elevated levels below several streams where excess spoil fills were constructed. Elevated selenium concentrations may impact aquatic biota and possibly higher order organisms that feed on aquatic organisms [EPA 2003, p.III.D-7].

DEIS, pp. 118, 132. This is grossly inadequate, and omits reference to newer and more disturbing scientific data.

Subsequent to the issuance of the PEIS, the FWS released a study that confirms the seriousness of the selenium problem. During the spring and summer of 2003, FWS conducted a survey of selenium in fish, water, and sediments in streams in southern West Virginia. In a January 16, 2004 letter to the West Virginia Department of Environmental Protection (Attachment 19), the Supervisor of FWS' Pennsylvania Field Office, David Densmore, concludes that:

- Selenium was present in all fish samples.
- Selenium concentrations in fish in three watersheds exceeded the toxic effect threshold level for whole fish.
- Selenium is bioavailable in West Virginia streams, and violations of the EPA selenium water quality criterion may result in selenium concentrations in fish that could adversely affect fish reproduction.
- In some cases, fish tissue concentrations were near levels believed to pose a risk to fish-eating birds.

Fish tissue from Sugartree Branch and Stanley Fork contained selenium ranging from 4.13 ppm to 6.85 ppm, which are above Lemly's 4 ppm toxic effect threshold. July 16, 2004 Letter from Chapman to Mullins re: Phoenix No. 4 Surface Mine, p. 11, Attachment 20. FWS has also stated that the total number of fish species was dramatically higher in unmined streams than in either streams with valley fills and no selenium or streams with valley fills and detectable selenium. Id.

In November 2005, WVDEP began a fish tissue study of the impacts of selenium downstream from areas where high selenium coal is being mined. WVDEP's preliminary findings indicate significant bioaccumulation of selenium in downstream lakes and streams (April 28, 2006 powerpoint presentation: DEP Selenium Study, Background and Progress, available at www.dep.state.wv.us/item.cfm?ssid=11&ss1id=747, Attachment 21):

Stream	**Location**	**Avg. Water Column SE (ppb)**	**Average Fish Tissue Se (ppm)**
Beech Creek	Logan County, WV	11.0	10.7
Pond Fork	Near Bob White, WV	1.8	3.8
White Oak Creek	Near Orgas, WV	15.3	5.7

Seng Creek	Garrison, WV	34.0	8.6
Hughes Fork	Near Dixie, WV	5.6	10.1
Upper Mud River Reservoir	Lincoln County, WV	3.9	33.9

The levels found at these sites greatly exceed levels where toxic effects in sensitive species begin to occur, which is 4 ppm. See A. Dennis Lemly, "Selenium in Aquatic Ecosystems: A Guide for Hazard Evaluation and Water Quality Criteria," Springer 2002, p. 31, Attachment 22. In fact, the fish tissue selenium level in the Upper Mud River Reservoir, which is a lake downstream from the Hobet 21 mining complex, exceeds this threshold by 850%.

In general, "[t]he most widespread human-caused sources of selenium mobilization and introduction into aquatic ecosystems in the U.S. today are the extraction and utilization of coal for generation of electric power and the irrigation of high-selenium soils for agricultural production." Bryant, G., McPhilliamy, S., and Childers, H., 2002, A survey of the water quality of streams in the primary region of mountaintop / valley fill coal mining, October 1999 to January 2001, *in* PEIS, App. D, Stream chemistry final report, p. 74. "[I]n the region MTM/VF mining, the coals can contain an average of 4 ppm of selenium, normal soils can average 0.2 ppm, and the allowable limits in the streams are 5 ug/L (0.005 ppm). Disturbing coal and soils during MTM/VF mining could be expected to result in violations of the stream limit for selenium." Id.

FWS states in its comment letter on the Hollow Mountain project, "The Service believes that it is unlikely that toxic materials can be isolated indefinitely from weathering and in the long-term there will likely be leaching of toxic materials." July 9, 2004 FWS Letter to ACOE, p. 3, Attachment 23. Further, it is clear that prevention is key in controlling selenium contamination of surface water. Dr. A. Dennis Lemly stated in a January 5, 2004, white paper on selenium issues in West Virginia:

> The lessons from Belews Lake, supported by over two decades of research findings from many other locations throughout North America (Lemly 1997b, 1999, 2002b; Skorupa 1998a, Hamilton 2004), underscores the need to take a preventive approach to selenium pollution rather than attempting to deal with it after contamination has taken place. With respect to coal mining this means pre-mine assessment. Failure to adopt this approach can only worsen the selenium pollution and associated ecological risks that have emerged in West Virginia.

Attachment 24, p. 2. The risk of significant ecological harm from selenium contamination in the West Virginia coal fields is real and has been confirmed not only by the PEIS but also by studies conducted by the FWS. "Our results show that selenium present in surface waters in southern West Virginia is bioavailable, and that violations of the EPA selenium water quality criterion may result in selenium concentrations in fish that could adversely affect fish reproduction. In some cases fish tissue concentrations were near levels believed to pose a risk to fish-eating

birds." Id., pp. 2-3. More recently, USGS sampling of fish tissue in April 2006 from five bluegill fish taken from the upper Mud River Reservoir near Palermo, WV showed concentrations of 15.1 to 40.1 ug/g in whole body samples and 21.4 to 34.9 ug/g in ovary samples. Attachment 30.

These scientific studies demonstrate that selenium concentrations are already occurring from existing valley fills and are causing significant degradation of water quality. "If mining, permitting and mitigation trends stay the same, an additional thousand miles of direct impacts could occur in the next ten years." MTM/VF PEIS, App. I, pp. 66-67. The proposed rule does nothing to address the selenium issue and would permit more significant degradation to occur, and therefore would violate the CWA.

3. Water quantity and community impacts are significant. OSM has also failed to consider the major adverse effects of valley fills on hydrology. A USGS study found that runoff is 1.75 times greater per unit surface area from mined than unmined catchments. PEIS, App. H, p. 3. Even worse, EPA has found that "base flows of streams with valley fills are 6 to 7 times greater than the base flows of unmined areas." PEIS, App. D, 2002 EPA Water Chemistry Study, p. 86. This means not only that areas downstream from valley fills will experience much higher flows, but also higher loadings of the excessive and harmful chemicals mentioned above. These increased flows have real and devastating impacts on local communities, particularly during more extreme storm events. In addition, mines cause large amounts of noise, blasting impacts and community disruption. PEIS, p. IV.H-3 (noise and vibration caused by mountaintop mining near populated areas generate "relatively high numbers" of complaints). The DEIS fails to consider these hydrological and community effects.

4. Degradation of aquatic diversity is significant. Headwater streams can be responsible for 90 percent of the biodiversity in an entire watershed. Palmer Testimony, Bulen Tr. 2:176. Valley fills reduce biodiversity by favoring pollutant-tolerant macroinvertebrate species over pollution-intolerant species. The coal industry's own water quality expert admitted in OVEC v. Bulen that valley fills cause a dramatic reduction in mayfly taxa in downstream waters, with a shift to more pollution-tolerant taxa. Kirk Testimony, Bulen Tr. 5:88. Dr. Donald Cherry, an expert in aquatic ecotoxicology from Virginia Tech (Bulen Tr. 5:111), testified in OVEC v. Bulen about his research involving water discharges from valley fills in southern West Virginia. Bulen Tr. 5:114-16. His study found a shift in the benthic community to a more tolerant type. Id. at 5:120, 125, 165-66. He agreed that the created streams would not be the functional equivalent of the streams buried by valley fills. Id. at 5:145-46. Indeed, he rated the streams below valley fills as "terrible" with scores well below the score for the reference stream. Id. at 5:152-53. Those streams showed "significant stress." Id. at 5:174. Dr. Wallace stated that there is a well-established correlation between conductivity levels and the loss of sensitive benthic organisms. Wallace Testimony, Bulen Tr. 6:31-36. High conductivity is contributing to major problems with benthic invertebrates. Id. Some of the worst conditions were found below fill sites. Id.

The loss of biodiversity from this loss of benthic taxa is significant. Id. at 6:67-68. Other organisms cannot make up for this loss of biodiversity because they serve different functions.

Palmer Testimony, Bulen Tr. 6:103-06. Different species are not necessarily interchangeable. Id. The functions of filled first and second-order headwater streams cannot be replaced in the larger order streams downstream. Wallace Testimony, Bulen Tr. 6:41. Those functions include nutrient retention, water purification, and energy production functions. Id. at 6:43-47; Palmer Testimony, Bulen Tr. 6:101-02.

The only significant vertebrate animal in headwater streams is the salamander. Wallace Testimony, Bulen Tr. 1:258. The Central and Southern Appalachians contain the greatest abundance of species of salamanders in the world. Id. at 1:242, 6:39. Salamanders are being buried by valley fills and not replaced downstream. Id. at 6:40; Cherry testimony, Bulen Tr. 5:166-67. Forest loss associated with mountaintop mining and valley fills has the potential to adversely impact over 1.2 billion salamanders, or 3.4% of the entire four-state population in Appalachia. PEIS, App. I, pp. 92-93.

According to the PEIS, from 1992 through 2002, mountaintop removal mining and associated valley fills in Appalachian have destroyed 380,547 acres of forest (an area almost ten times larger than the District of Columbia). PEIS, pp. III.D-2, IV.C.1. If current trends continue, that amount will double by 2012. Accordingly, in its June 16, 2006 comments on Spruce Mine No. 1, EPA stated that, "[o]f the largely forested mountaintop mining study area, the Final PEIS estimated that approximately 761,094 acres have been or may be affected by recent and future (1992-2012) mountaintop mining. To date, these impacts have not been successfully mitigated, resulting in the impairment of significant natural resources at the watershed level." FEIS, Spruce Mine No. 1, pp. 2-64 to 2-65. In addition, the cumulative effects of past, present and anticipated surface mines in individual watersheds are even greater. For example, in the Coal River watershed, mining activities cumulatively impact 12% of that area, or 72,969 out of 570,713 acres. OVEC v. Bulen, Expert Report of Douglas P. Pflugh, May 16, 2006, Summary, p. 1, Attachment 17.

This forest destruction is profound and permanent because "unlike traditional logging activities associated with management of hardwood forest, when mining occurs, the tree, stump, root, and growth medium supporting the forest are disrupted and removed in their entirety." PEIS, p. IV.C-1. Mountaintop mining causes "fundamental changes to the terrestrial environment," and "significantly affect[s] the landscape mosaic," with post-mining conditions "drastically different" from pre-mining conditions. Id., App. I, pp. v, 23, 93. One recent study has found that "[a]t this point in time, reestablishment of forest on these postmining sites appears questionable. Neither mountaintop removal sites nor the contour mines support a vegetation composition or structure that is likely to resemble regional forests." Edmonds and Loucks, "Woody Establishment Patterns Following Mountaintop Removal in the Coal River Valley," available at www.mcrcc.osmre.gov/PDF/Forums/Reforestation/Poster/P-1.pdf, Attachment 25.

Mining impacts to habitat of interior forest bird species could have "extreme ecological significance." PEIS, App. I, p. 90. A study of cerulean warbler habitat changes due to mountaintop removal mining stated, "[p]reference for ridges suggests that MTMVF may have a greater impact on Cerulean Warbler populations than other sources of forest fragmentation since ridges are removed in this mining process. Generally, our data indicate that Cerulean Warblers

are negatively affected by mountaintop mining from loss of forested habitat, particularly ridgetops, and from degradation of remaining forests (as evidenced by lower territory density in fragmented forests and lower territory density closer to mine edges)." Weakland and Wood, "Cerulean Warbler (Dendroica Cerulea) Microhabitat and Landscape-level Habitat Characteristics in Southern West Virginia in Relation to Mountaintop Mining/Valley Fills," Final Project Report, December 2002, p. 1, Attachment 26. Mining could impact 244 terrestrial species. PEIS, App. I, pp. 86. The loss of the genetic diversity of these affected species "would have a disproportionately large impact on the total aquatic genetic diversity of the nation." Id., App. I, p. 78.

FWS has described the impacts of MTM/VFs on forest loss and fragmentation in its comments on the Phoenix 4 Mine in West Virginia:

> Habitat changes will occur in the study area and these changes will involve a shift from forest dominated landscape to a fragmented landscape with considerably more mining lands and eventually grassland habitat. This shift should lead to a shift in the floral and faunal components of the ecosystem. For example, dry grassland species will dominate the once post- mine and forest harvested sites. This will result in an overall reduction in the native woody flora as well as a reduction in the spring herbs and other vegetative components characteristic to the study area.
>
> Wildlife shifts will include a shift from forest to grassland species. The abundance of grassland birds will likely increase while many forest interior, neotropical migrant species will suffer losses in terms of number. There will likely be an increase in game species such as whitetail deer and turkey due to an increase in grasslands and diversification of the habitats. The herpetofauna will likely undergo a shift from mesic favoring salamander dominated communities along the riparian corridors of the small headwater streams and in the litter of the forest floor to a snake dominated grassland fauna...Two species, short-tailed shrew (*Blarina brevicauda*) and eastern chipmunk (*Tamias striatus*), were more abundant in intact forest than fragmented forest.
>
> Populations of forest birds will be detrimentally impacted by loss and fragmentation of mature forest habitat in the mixed mesophytic forest region, which has the highest bird diversity in forested habitats in the eastern Untied States. Fragmentation-sensitive species such as the cerulean warbler, Louisiana water thrush (*Seiurus motacilla*), worm-eating warbler (*Helmitheros vermivorous*), black-and-white warbler (*Mniotilta varia*), and yellow-throated vireo (*Vireo falvifrons*) will likely be negatively impacted as forested habitat is lost and fragmented from mountaintop/valley fill mining.
>
> The cerulean warbler, with the highest conservation rating (this species is listed as Action II by Partner-In-Flight (PFI)—in need of immediate management or policy rangewide) was found to be positively related to percent slope and percent canopy from >6-12 m. Based on habitat preference, it is reasonable to conclude that continued mountaintop/valley fill mining will negatively impact cerulean warbler abundance in southwestern West Virginia.

> ...mountaintop/valley fill mining has become a major method of vast landscape change where golden-winged and cerulean warblers may disappear with the changing proportion of mature forest to cleared land...The highest priority bird species other than the golden-winged warbler (*Vermivora chrysoptera*), in this region are forest-breeder (cerulean warbler, worm-eating warbler, and Louisiana waterthrush) whose center of global importance is along the Appalachian ridges most affected by mountain/valley fill mining.

Attachment 20, pp. 4-5. The FWS continues by commenting on a statement commonly made in mining environmental assessments:

> It is stated in the EID that 'bird and amphibian species richness increased significantly on more fragmented stands...and in study plots containing more edge.' This is true but there is failure to acknowledge that the increased richness is achieved by adding widespread generalist species that are taking over most of the landscapes, and the sensitive forest species are negatively affected. This is a common and misleading application of fragmentation and edge studies. This flaw is not that fragmentation will increase diversity; the flaw is that increased diversity is not necessarily desirable, especially if it comes at the expense of a sensitive species such as the cerulean warbler."

Attachment 20, pp. 5-6.

The EPA and FWS scientists who commented on the draft PEIS agreed that significant degradation is occurring. An EPA scientist stated that:

> EPA's studies and other studies have found that the strongest and most significant correlations are between biological condition and conductivity. We do know that the stream segments downstream of some of the fills are impaired, and we believe the impairments are due to water chemistry changes, based on the strong correlations.

12/20/02 Comments by EPA Wheeling Staff, Attachment 27. A FWS scientist objected to the "no significant degradation" statement in that draft PEIS (p. II.D-9), stating that "If impaired aquatic life, and selenium above water quality standards, resulting in streams being placed on the 303(d) list don't constitute significant degradation, what would?" 4/21/03 Rider email, attached file: chIVcomments.wpd, p. 2, Attachment 28.

5. OSM's DEIS Evades Its Obligation to Analyze Significant Degradation. OSM tries to avoid the significant degradation issue by arguing that the proposed rule would not make the current situation worse. It claims it "would not anticipate a major shift in on-the-ground consequences from any of the alternatives." DEIS, p. 121. Similarly, it states that the alternatives "would cause no discernable changes to the direct stream impact trend." Id. at 124. OSM repeatedly states that it "anticipates that the proposed regulatory language changes to the stream buffer zone rule would essentially be 'impact neutral.'" Id. at 126-27, 128, 131, 133, 135, 142.

That is not enough to satisfy the "no significant degradation" requirement in 40 C.F.R. § 230.10(c). OSM assumes it only has to assess the change in impacts between the status quo and the proposed rule. However, OSM must determine whether significant degradation is already occurring and is likely to continue if activities are maintained at the current pace.

OSM's proposed rules do not have adequate procedural mechanisms to ensure that such degradation does not occur. OSM's proposed rules that summarize the relationship between SMCRA permitting actions and Clean Water Act requirements merely require the applicant to identify the authorizations it needs under the CWA and the steps it has taken or will take to obtain them. 72 Fed. Reg. at 48901. That procedural step does nothing to ensure that significant degradation is assessed or avoided. Nor will the parallel processing of CWA § 404 permits ensure that significant degradation does not occur, since the Corps takes the position that it need not assess the SMCRA-related impacts of mining activities on streams. 72 Fed. Reg. at 11115 ("Impacts associated with surface coal mining and reclamation operations are appropriately addressed by the Office of Surface Mining or the appropriate state agency."). Furthermore, § 402 discharge permits for mining operation only cover discharges from downstream sediment ponds and do not address the permanent loss of stream functions from the filling of headwater streams.

OSM's procedural mechanisms to avoid significant degradation are also inadequate because OSM is removing the existing requirement for a finding that the activity "will not cause or contribute to the violation of applicable State or Federal water quality standards and will not adversely affect the water quantity and quality or other environmental resources of the stream." 72 Fed. Reg. at 48902. By removing this requirement, OSM will allow activities that can cause such violations or adverse water quality effects without any analysis of their propensity to do so. OSM also specifically disavows any effort to "pass judgment on . . . the adequacy of the steps that the applicant proposes to take" to comply with the CWA. Id. OSM would intentionally blind itself to the potential, indeed the likelihood, of significant degradation. OSM's "minimization" standard is completely untethered to any analysis or measurement of actual adverse effects. Indeed, OSM asserts that "the appropriate standard is *minimization* of adverse impacts . . ., not absolute avoidance of all adverse effects." Id. at 48902-03 (emphasis in original). See id. at 48906 (SMCRA establishes a minimization standard rather than an absolute 'will not adversely affect' standard"). "[S]ome adverse effects . . . are unavoidable . . ." Id. at 48903. OSM cannot read the word "minimize" as a license to allow some unknown but potentially significant adverse environmental effects, so long as those effects are minimized.

OSM attempts to finesse CWA requirements by including a catch-all provision that "discharges of water from disturbed areas 'be made in compliance with all applicable State and Federal water quality laws and regulations.'" Id. at 48903. This is merely a generalized requirement that the project applicant comply with the law. It does nothing to monitor, assess, measure or determine whether significant degradation is occurring or will occur. It is therefore wholly inadequate to satisfy OSM's independent and mandatory duty to ensure that its actions do not supersede, amend, modify or repeal the CWA. 30 U.S.C. § 1292(a)(3).

OSM's procedures are also insufficient to ensure CWA compliance because its standard for stream restoration does not meet CWA standards. Stream channel diversions are subject to § 404 of the CWA because they cause discharges of fill material into streams. In order to decide whether discharges will cause or contribute to significant degradation of the affected streams, the § 404(b)(1) Guidelines require a determination of "the nature and degree of effect that the proposed discharge will have, both individually and cumulatively, on the structure and function of the aquatic ecosystem and organisms." 40 C.F.R. § 230.11(e) (emphasis added). According to the Corps' May 7, 2004 guidance on "Mitigation for Impacts to Aquatic Resources from Surface Coal Mining," "[t]he Clean Water Act, and the Corps implementing regulations and policies, requires that compensatory mitigation projects replace aquatic functions lost as a result of authorized activities." However, OSM has proposed a performance standard for restoration after stream diversions that does not require restoration of aquatic functions, and instead focuses only on stream structure. OSM would only require that restoration:

> be designed and constructed using natural channel design techniques so as to restore or approximate the premining characteristics of the original stream channel, including the natural riparian vegetation and the natural hydrological characteristics of the original stream, to promote the recovery and enhancement of the aquatic habitat and to minimize adverse alteration of stream channels on and off the site, including channel deepening and enlargement, to the extent possible.

72 Fed. Reg. at 48906. Thus, this standard focuses on restoring stream structure and merely "promoting" recovery of aquatic habitat. It does not require restoration of the lost aquatic functions. As the Court recently found in OVEC v. U.S. Army Corps of Engineers, 479 F. Supp.2d 607, 635 (S.D. W.Va. 2007), the federal government must make "a full assessment of the streams' ecological functions before [it] may conclude that the structure and function of the resources buried by the valley fills is offset by the imposed mitigation measures." OSM fails to explain how it would make this assessment or how it would replace lost aquatic functions. Without such an explanation or assessment, OSM cannot rationally conclude that its methodology would prevent or avoid a significant degradation of aquatic functions.

C. The Proposed Rule Will Result in Significant Degradation of the Stream Segments Between the Toes of the Valley Fills and the Sediment Pond Embankments, Which Are "Waters of the United States"

OSM's proposed rule would only require sedimentation ponds to be constructed "as close to the toes of the fill as practicable." 72 Fed. Reg. at 48909. This will always leave an unprotected stream segment between the mining activity (the toe of the fill) and the downstream outfall of the sedimentation pond. OSM takes the position that this segment is not a water of the United States and instead falls under the "waste treatment system" exclusion of an EPA regulation. OSM relies on a March 1, 2006 letter from EPA to support its position. Id. However, on June 13, 2007, a federal court rejected that EPA letter and held that the "waste treatment system" exclusion is inapplicable to the stream segments below the valley fills. OVEC v. U.S. Army Corps of Engineers, 2007 WL 2200686 (S.D. W.Va. 2007). Consequently, OSM has no legal basis for exempting these segments from the requirement to obtain a NPDES permit

for discharges of pollutants into waters of the United States. Without such a permit and treatment of the discharges, these discharges are extremely likely to cause significant degradation. Indeed, the whole purpose of the downstream sedimentation pond is to intercept and collect that pollution.

IV. The Existing SBZ Rule is Consistent with the CWA

OSM has taken the position that applying the plain language of the existing SBZ to prohibit fills in intermittent and perennial streams would be inconsistent with existing CWA requirements allowing valley fills, and would therefore violate section 702 of SMCRA, 30 U.S.C. § 1292(a)(2), which provides that SMCRA does not supercede, amend or repeal the CWA. 69 Fed. Reg. at 1044.

EPA's Office of Water expressed concern in December, 2002 that this argument in the MTM/VF draft PEIS is incorrect, commenting that:

> There are fairly sweeping legal conclusions here that the stream buffer zone rule could not be used to determine allowable stream segments for filling because doing so would supercede the CWA, something [C]ongress precluded in SMCRA. The lawyers need to look at this more closely. I'm uncomfortable with the breadth of this argument...

1/7/03 Neugeboren e-mail, OGC water law office comments, p. 1, Attachment 29.

Furthermore, OSM's position is directly inconsistent with the position that it took in the Bragg litigation. In its brief in the Fourth Circuit, the United States stated, on behalf of OSM and other federal agencies:

> WVDEP has argued that because SMCRA cannot supersede, amend, modify, or repeal the CWA, SMCRA cannot be construed to prohibit any activity that would be allowed by the CWA. That argument is without merit. ...
> SMCRA section 702 provides merely that SMCRA does not alter the existing regulatory schemes adopted by Congress in the CWA and other environmental statutes. ...
>
> When Congress has intended that one statute should take precedence over another statute in the regulation of a particular activity, it has done so with language very different and much clearer than SMCRA section 702. ...
>
> While WVDEP has asserted that it would create an impermissible statutory "conflict" to read the buffer zone rule to establish a stricter standard than that established by the 404(b)(1) guidelines, such a statutory construction does not create any such "conflict" as that term is understood in the law. As the Supreme Court has held, two statutes can be said to conflict only when it is impossible to comply with both. See Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995). No such conflict arises if SMCRA is construed to prohibit some activities that would be authorized by the CWA, since it is possible to

> comply with both statutes by engaging in only those activities authorized by both statutes.
>
> Where an activity is regulated under the CWA and SMCRA – i.e., a surface mining activity that involves the discharge of pollutants from point sources into U.S. waters — regulation of the activity is governed by the usual principles that courts apply to reconcile overlapping statutes. Under those principles, "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. 'When there are two acts upon the same subject, the rule is to give effect to both if possible.'" Morton v. Mancari, 417 U.S. 535, 551 (1974) (quoting United States v. Borden Co., 308 U.S. 188, 198 (1939)). See also 2A Sutherland Statutory Construction § 51.05 (4th ed. 1984). An activity governed by both the CWA and SMCRA must therefore satisfy the requirements of both statutes.

U.S. Br. 45-49, Attachment 1. Consequently, the existing SBZ rule does not violate section 702, and there is no need to revise the rule to address OSM's presumed violation of that section.

XI. OSM's Deletion of the Requirement That Activities that Disturb the SBZ Must Comply With Water Quality Standards Is an Illegal Attempt to Exempt Activities From Water Quality Standards

OSM proposes to delete language in the existing rule that allows a variance only if surface mining activities "will not cause or contribute to the violation of applicable State or Federal water quality standards." 30 C.F.R. § 816.57(a)(1). This change "is intended to avoid the possibility that the SBZ rule could be misinterpreted to supersede the CWA by prohibiting an activity because of water quality standards that would otherwise be authorized under the CWA." 69 Fed. Reg. at 1043. OSM does not explain how such a conflict could occur. As we have explained above, OSM rejected the notion of such a conflict in its appellate brief in Bragg.

OSM's deletion of this language is even more perplexing in light of its statement in the EA that "this proposed change would be impact neutral because, whether or not OSM regulations include this statement, an applicant or operator would still be subject to applicable Federal and State water quality requirements and enforcement concerning matters such as effluent limits, in-stream water quality standards, storm water run-off, and anti-degradation." EA, p. 23 (emphasis added). Thus, OSM wants to throw away its cake and eat it too. It purports to delete a requirement, yet advises the regulated community that it still applies.

Regardless of what OSM says, the effect of its proposal is to imply that although water quality standards still apply, they will not be violated if valley fills are minimized. Otherwise, there is no reason to delete the language in the existing rule. As we show below, this attempted exemption violates the Clean Water Act.

In CWA §§ 301 and 404(t), Congress placed clear limitations on the placement of fill material. Pursuant to those two sections, § 404 fills must comply with water quality standards.

The placement of waste material that eliminates substantial portions of waters of the United States necessarily violates those standards, and therefore violates the clear intent of Congress.

The CWA states in its very first sentence that "[t]he objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (emphasis added). The Conference Committee described this objective as the "sole purpose of the Act." 118 Cong. Rec. 33700 (1972). The Senate Report stated that "this legislation would clearly establish that no one has the right to pollute and that pollution continues because of technological limits, not because of any inherent rights to use the nation's waterways for the purpose of disposing of wastes." S. Rep. No. 414, 92nd Cong., 1st Sess., p. 42 (1971). "The use of any river, lake, stream or ocean as a waste treatment system is unacceptable." Id. at 7. This section "simply mean[s] that streams and rivers are no longer to be considered part of the waste treatment process." 118 Cong. Rec. 33693-94 (1972) (remarks of Sen. Muskie). The Conference Committee stated that it "expects [EPA and the Corps] to move expeditiously to end the process of dumping dredged spoil in water" and to use land-based alternatives, because "the economic argument alone is not sufficient to override the environmental requirements of fresh water lakes and streams." Id. at 33699.

To implement these statutory purposes, Congress wrote several important provisions into the Act. In particular, "§ 301(b)(1)(C) expressly identifies the achievement of state water quality standards as one of the Act's central objectives." Arkansas v. Oklahoma, 503 U.S. 91, 105-06 (1992). Section 301(b)(1)(C) is designed to ensure compliance with these standards. PUD No. 1 v. Washington Dept. of Ecology, 511 U.S. 700, 712-13 & n. 3 (1994). It provides that "[i]n order to carry out the objective of this Act there shall be achieved . . . any . . . limitation . . . necessary to meet water quality standards . . . established pursuant to any State law . . . or any other Federal law or regulation . . ." 33 U.S.C. § 1311(b)(1)(C)(emphasis added).[3] To carry out this statutory requirement, EPA's 404(b)(1) Guidelines expressly require § 404 discharges to comply with water quality standards. 40 C.F.R. § 230.10(b)(1) ("No discharge of dredged or fill material shall be permitted if it: (1) Causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard"). Thus, this is a "Federal . . . regulation" that must be "achieved" under § 301(b)(1)©).

Furthermore, Congress added § 404(t) of the CWA in 1977 to reaffirm that state water quality standards are applicable to § 404 discharges. It provides that:

> Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to those requirements.

[3]State water quality standards under the CWA must "protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter." Id., § 1313(c)(2)(A).

33 U.S.C. § 1344(t) (emphasis added). The issuance of a SBZ variance by OSM or a primacy state is covered by this section.

The legislative history of § 404(t) fully supports this conclusion. "[U]nder section 404(t) and the amendments to section 313, every Federal activity is subject to State and Federal procedural requirements, including permits, as well as substantive requirements." 123 Cong. Rec. 39189 (1977) (remarks of Sen. Muskie). The "basic thrust of subsection (t)" is that "[t]he Corps of Engineers, like any other Federal agency, in performing maintenance dredging or undertaking other activities, is to comply with State substantive and procedural requirements." Id. The intent of the 1972 CWA "was not to exempt the U.S. Army Corps of Engineers or any other public or private agency from State water quality standards . . ." Id.

Valley fills that eliminate waters of the United States solely for the purpose of waste disposal cannot meet water quality standards. Water quality standards "define[] the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses." 40 C.F.R. § 130.3 (emphasis added). See also 40 C.F.R. § 130.2(d) (water quality standards "consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses") (emphasis added). EPA's regulations on water quality standards have provided since 1983 that "[i]n no case shall a State adopt waste transport or assimilation as a designated use for any waters of the United States." 40 C.F.R. § 131.10(a) (emphasis added). EPA has stated that "[a] basic policy of the standards program throughout its history has been that the designation of a water body for the purposes of waste transport or waste assimilation is unacceptable." 48 Fed. Reg. 51400, 51408-09 (Nov. 8, 1983).

Valley fills that bury waters of the United States with millions of tons of waste cannot achieve this water quality standard. As Judge Haden has stated, "valley fills are waste disposal projects so enormous that, rather than the stream assimilating the waste, the waste assimilates the stream." Bragg, 72 F. Supp. 2d at 662.

This violation of water quality standards is especially clear in West Virginia. West Virginia has several "designated uses" for state waterbodies. These uses include public water supply, propagation and maintenance of fish and other aquatic life, and water contact recreation, among others. See 46 C.S.R. § 1-6. The state water quality standards clearly state, however, that "[w]aste assimilation and transport are not recognized as designated uses." 46 C.S.R. § 1-6.1.a. Also notable is that water quality standards do not allow "[m]aterials in concentrations which are harmful, hazardous, or toxic to man, animal or aquatic life." 46 C.S.R. § 1-3.2.e. Furthermore, "industrial wastes. . .cause pollution and are objectionable in all waters of the state." 46 C.S.R. § 1-3.1. In addition, no "industrial wastes" shall cause or materially contribute to conditions such as "distinctly visible. . .settleable solids," "deposits. . .on the bottom" of streams, "materials in concentrations which are harmful, hazardous or toxic to. . . aquatic life," adverse alterations of "the integrity of the waters," or "significant adverse impact to the chemical, physical, hydrologic or biological components of aquatic ecosystems." 46 C.S.R. § 1-3.2. "Industrial wastes" are defined as "any. . .solid or other waste substance. . .from or incidental to the development,

processing or recovery of any natural resources. . ." W. Va. Code § 22-11-3(12). Accordingly, mining spoil is industrial waste pursuant to West Virginia law. Additionally, the act of filling a stream segment with overburden not only deposits waste and creates distinctly settleable solids, but also destroys the stream segment. Placing mining waste in streams, therefore, violates West Virginia water quality standards by materially contributing to the adverse conditions set forth in 46 C.S.R. § 1-3.2. Neither can the fills comply with the antidegradation provisions of the West Virginia water quality standards.

In short, although compliance with water quality standards is a "central objective" and requirement of the CWA, valley fills designed solely to eliminate waters of the United States and replace them with waste are incapable of such compliance. Evasion of a statute's core mandate and purpose is not a reasonable interpretation, and therefore is not entitled to deference. See, e.g., U.S. Army Engineer Center v. FLRA, 762 F.2d 409, 414 (4th Cir. 1985) ("[C]ourts must not 'rubber stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'") (citation omitted); Whitman v. American Trucking Ass'ns., 531 U.S. 457, 481 (2001) (reversing under Chevron step two an EPA interpretation that "goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear"); Natural Resources Defense Council v. Daley, 209 F.3d 747, 753 (D.C. Cir. 2000) (rejecting under Chevron step two an agency interpretation that "diverges from any realistic meaning" of the statute).

OSM is trying to use its SMCRA rulemaking power illegally to override the CWA. SMCRA does not preempt the Clean Water Act. Section 702(a)(3) of SMCRA provides that nothing therein "shall be construed as superseding, amending, modifying, or repealing the . . . Clean Water Act, the State laws enacted pursuant thereto, or other Federal laws relating to the preservation of water quality." 30 U.S.C. § 1292(a)(3). Thus, this savings clause specifically preserves the CWA's prohibition against waste assimilation. If SMCRA were construed to authorize waste assimilation in streams, it would not be consistent with, and would be preempted by, the CWA.

For these reasons, the proposed rule should be withdrawn.

Sincerely,

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Attachments to WVHC, Sierra Club, Earthjustice, OVEC, CRMW, and Waterkeeper Alliance Comments on Proposed Rule on Excess Spoil Minimization/Stream Buffer Zones

1 Brief for the Federal Appellants, 4th Cir., No. 99-2683, April 17, 2000 (excerpts).

2 Federal Appellants' Opposition to the Motion of the Intervenor-Defendants to Strike the Brief of the Federal Appellants and to Dismiss Appeal No. 99-2683, p. 2.

3 Letter dated April 17, 2000 from Kathrine Henry, Acting Director, OSM and John D. Leshy, Solicitor, U.S. Department of the Interior, to Michael C. Castle, Director, West Virginia Division of Environmental Protection.

4 Preliminary Draft EIS on MTM/VF in Appalachia, pp. ES-6, IV-1.

5 3/25/02 Email from Cindy Tibbott re: Purpose & need/alternatives write-ups, with Attachment: I. Purpose and Need for Action and IV. Alternatives.

6 6/14/02 Email from Mike Robinson re: Agenda and Handout for 6/18 SES Issue, with Attachment: Mountaintop Mining/Valley Fill Environmental Impact Statement, Senior Executive Issue Resolution Meeting, Interior South Building Room 332, June 18, 2002, Proposed Agenda; Handout for SES/Steering Committee Issue Resolution Meeting, Refresh on Teleconference Meeting Decisions, May 21, 2002.

7 10/5/01 Letter from J. Steven Griles to CEQ, OMB, EPA, COE re: Mountaintop Mining/Valley Fills Issues.

8 6/19/02 Email from William Hoffman re: out of office, with Attachment: Proposed EIS Alternative Framework.

9 6/26/02 Email from Mike Robinson re: Mock-up of Proposed new Alternative Framework, with Attachment: Mountaintop Mining/Valley Fill EIS Alternative Framework (June 26, 2002 v.).

10 Email dated September 20, 2002 from Mike Robinson, OSM, re: Executive Conference Call Agenda–9/23/02, 9-10 am, with Attachment: MTM/VF EIS Executive Meeting

Agenda, September 23, 2002 Conference Call Letter dated July 12, 1999 from Michael V. Shingleton, Asst. Chief Coldwater Management, West Virginia Division of Natural Resources, to Tony Barnett, West Virginia Division of Environmental Protection.

11 8/15/02 Email from Gregory Peck re: Executive Committee Discussion, with Attachment: Alternatives Matrix for Draft MTM/VF PEIS.

12 October 9, 2001 Letter from EPA to U.S. Army Corps of Engineers re NWP 21.

13 July 2, 2001 Letter from FWS to U.S. Army Corps of Engineers re NWP 21.

14 Letter dated September 20, 2001, from Jeffrey K. Towner, Field Supervisor, West Virginia Field Office, U.S. Fish and Wildlife Service, to Colonel John D. Rivenburgh, District Engineer, Huntington District, re: comments on 2002 NWPs.

15 Letter dated October 5, 2001 from The University of Georgia, Institute of Ecology, to Headquarters, U.S. Army Corps of Engineers, re: comments on 2002 NWPs..

16 Trial Transcript, OVEC v. Bulen, Civil No. 3:05-784 (S.D.W.Va.), October 2006 (excerpts).

17 Expert Report of Douglas P. Pflugh in OVEC v. Bulen, May 16, 2006, Summary, pp. 1-2.

18 FEIS, Spruce Mine No. 1, pp. 2-98, 2-180 (September 2006).

19 Letter dated January 16, 2004 from David Densmore, U.S. Fish and Wildlife Service, to Allyn Turner, West Virginia Department of Environmental Protection, re: Selenium Survey in southern West Virginia streams.

20 Letter dated July 13, 2004 to Ginger Mullins, Chief, Regulatory Branch, Huntington District, ACOE. From Thomas R. Chapman, Field Supervisor, USFWS Elkins, WV, Field Office. Re: Public Notice 200400604 and EID, Coal Mac, Inc., Phoenix No. 4 Surface Mine.

21 April 28, 2006 powerpoint presentation: DEP Selenium Study, Background and Progress, available at .

22 A. Dennis Lemly, "Selenium in Aquatic Ecosystems: A Guide for Hazard Evaluation and Water Quality Criteria," Springer 2002, p. 31.

23 July 9, 2004 FWS Letter to U.S. Army Corps of Engineers re: Hollow Mountain Project.

24 Report by A. Dennis Lemly, Ph.D, "Recommendations for Pre-Mine Assessment of Selenium Hazards Associated with Coal Mining in West Virginia," January 5, 2004..

25 Edmonds and Loucks, "Woody Establishment Patterns Following Mountaintop Removal in the Coal River Valley," available at .

26 Weakland and Wood, "Cerulean Warbler (Dendroica Cerulea) Microhabitat and Landscape-level Habitat Characteristics in Southern West Virginia in Relation to Mountaintop Mining/Valley Fills," Final Project Report, December 2002, p. 1.

27 Email dated December 23, 2002 from John Forren, EPA Region 3, re: Comments on Draft EIS for MTM/VF, with Attachment: Comments on the Draft EIS for MTM/VF Coal Mining (Dec 2002) from ESD, OEP, Wheeling Staff 12/20/02.

28 4/21/03 Email from David Rider re: Ch 14 edits, with Attachment: DEIS, Ch. IV.J., Threatened and Endangered Species, pp. IV.J-1 to IV.J-2.

29 Email dated January 7, 2003 from Steve Neugeboren, EPA, re: MTM legal issues, with Attachment: OGC water law office comments on mountaintop mining EIS 12/26/02.

30 USGS, Water-Data Report 2006, 380930082033101 Upper Mud River Reservoir near Palermo, WV.

T2ATTACHMENT 2

Natural Resources Defense Council • Sierra Club • Waterkeeper Alliance

COMMENTS
ON THE REVISED NPDES PERMIT REGULATION AND EFFLUENT LIMITATION GUIDELINES FOR CAFOS IN RESPONSE TO WATERKEEPER DECISION
DOCKET NUMBER EPA-HQ-OW-2005-0037
(August 29, 2006)

These comments are submitted by the Natural Resources Defense Council, Sierra Club, and Waterkeeper Alliance[1] in response to the "Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines for Concentrated Animal Feeding Operations in Response to Waterkeeper Decision," published at 71 Fed. Reg. 37744 *et seq.* (June 30, 2006) ("Proposed Revised Rule").

The Natural Resources Defense Council ("NRDC") is a national, non-profit organization dedicated to protecting public health and the environment. Founded in 1970, NRDC has more than 1.3 million members and online activists residing in all fifty states. NRDC maintains offices in New York, Washington, DC, San Francisco, and Santa Monica, CA.

Sierra Club is a nationwide non-profit organization dedicated to protecting and restoring the quality of the environment. It is comprised of approximately 700,000 members, including members who live on or near, or recreate in and along, many of the waterbodies into which CAFOs discharge their waste.

Waterkeeper Alliance, Inc. is a non-profit organization representing the interests of over 100 member watershed groups. Each of these groups, and their members, have as an express mission the preservation and protection of local waterbodies for aesthetic, recreational, and other purposes.

NRDC, Sierra Club, and Waterkeeper Alliance are concerned about the impacts of CAFOs on public health and the environment and have been active in efforts to reduce polluted runoff, control point source discharges, and promote sustainable agriculture.

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[1] The following Waterkeeper Alliance member programs have expressed their concurrence with these comments: Altamaha Coastkeeper, GA, Altamaha Riverkeeper, GA, Anacostia Riverkeeper, DC, Atchafalaya Basinkeeper, LA, Baltimore Habor Waterkeeper, MD, Baykeeper, CA, Black Warrior Riverkeeper, AL, Blackwater/Nottaway Riverkeerper, VA, Cape Fear Coastkeeper, NC, Cape Fear Riverkeeper, NC, Cape Hatteras Coastkeeper, NC, Catawba Riverkeeper, NC, Chattahoochee Riverkeeper, GA, Choctawhatchee Riverkeeper, AL, Choptank Riverkeeper, MD, Delaware Riverkeeper, PA, Deltakeeper Chapter of Baykeeper, CA, Detroit Riverkeeper, MI, Erie Canalkeeper, NY, French Broad Riverkeeper, NC, Great Salt Lakekeeper, UT, Housatonic Riverkeeper, MA, Hurricane Creekkeeper, AL, Kansas Riverkeeper, KS, Louisiana Bayoukeeper, LA, Lower Neuse Riverkeeper, NC, Lower Susquehanna Riverkeeper, PA, Milwaukee Riverkeeper, WI, Mobile Baykeeper, AL, New Riverkeeper, NC, New York/New Jersey Baykeeper, NJ, Ogeechee-Canoochee Riverkeeper, GA, Pamlico-Tar Riverkeeper, NC, Patuxent Riverkeeper, MD, Potomac Riverkeeper, Inc., MD, San Francisco Baykeeper, CA, Satilla Riverkeeper, GA, Savannah Riverkeeper, Inc., GA, Shenandoah Riverkeeper, VA, South Riverkeeper, MD, Upper Chattahoochee Riverkeeper, GA, Upper St. Lawrence Riverkeeper, NY, Upper Susquehanna Riverkeeper, PA, Virginia Eastern Shorekeeper, VA, Wabash Riverkeeper, IN, Waccamaw Riverkeeper, SC, West/Rhode Riverkeeper, MD, Western Lake Erie Waterkeeper, OH.

We gratefully acknowledge the technical assistance of Alex Sagady of Alex J. Sagady & Associates, who assisted us with preparation of the comments related to Nutrient Management Plans and New Source Performance Standards and Judson Jaffe of Analysis Group, who evaluated EPA's BCT economic analysis.

INTRODUCTION

EPA is well aware that Concentrated Animal Feeding Operations ("CAFOs") contribute to pollution of rivers, lakes, and streams across the country. When CAFO waste storage lagoons break, spill, or fail, animal wastes foul our waters. On a day-to-day basis, CAFOs often over-apply or inappropriately apply liquid animal waste to land, causing runoff into surface water or seepage into groundwater. Ammonia emissions from open-air lagoons and sprayfields redeposit nitrogen on land and waterbodies, adding further nutrient pollution. The nutrients in animal manure cause eutrophication and toxic algal blooms that harm recreational waters, kill fish, and alter the species composition of our coastal fisheries. Leaking animal waste storage lagoons threaten human health by contaminating groundwater used for drinking water supplies. Pathogens found in animal waste can also infect people. Water contaminated by animal manure contributes to human diseases such as acute gastroenteritis, fever, kidney failure, and even death.

In the past decade the CAFO industry has become increasingly concentrated, with fewer farms producing more animals and operations becoming more industrialized in nature. However, at a time when the threats to public health and the environment caused by the CAFO industry dictate tighter regulation, EPA has issued a Proposed Revised Rule that allows the industry to decide whether it should be regulated and attempts to avoid required controls to reduce pathogens and protect public health. As we explain in detail in the comments that follow, EPA's Proposed Revised Rule suffers from a number of significant flaws.

- In *Waterkeeper Alliance v. US EPA*, 399 F.3d 486 (2005) ("*Waterkeeper*"), the Second Circuit expressly reserved EPA's authority to establish a regulatory presumption that large CAFOs actually discharge, did not implicate EPA's ability to designate certain CAFOs to be proposed dischargers, and did not affect EPA's authority to require information from potential dischargers.

- EPA's interpretation of the agricultural stormwater exemption would unlawfully allow self regulation, depart from the 2003 rule, fail to require CAFOs to obtain permits to claim the exemption, and exempt discharges from additional controls.

- The Proposed Revised Rule must be revised to ensure CAFOs develop adequate Nutrient Management Plans, all NMP requirements are enforceable, and the public has sufficient opportunities to participate in reviewing NMPs.

- EPA's proposal attempts to substantially limit the availability of water quality-based effluent limitations to reduce water pollution.

- EPA's compliance alternative proposal for new source swine, poultry, and veal operations would create an exception to the zero discharge standard.

- EPA's economic analysis includes fundamental errors. After correcting these errors, EPA must select BCT that will result in greater pathogen reduction than BPT because nearly all of EPA's designated technologies will pass both the POTW test and the Industry Cost Test.

- EPA failed to consider alternative technologies with the capability to reduce pathogens in CAFO wastes.

DETAILED COMMENTS

For simplicity's sake, in these comments we adhere to the order of presentation in EPA's proposal. This order does not necessarily correspond to the importance of the issues addressed.

I. EPA'S PROPOSED SELF-PERMITTING SCHEME FOR CAFOS IS ARBITRARY AND CAPRICIOUS.

A. In Prior Rulemaking Efforts, EPA Established a Compelling Basis to Believe That CAFOs Actually Discharge, Had Been Evading Permitting Requirements, and Needed Increased Regulatory Scrutiny.

At the heart of EPA's 2003 final CAFO rule was a basic principle – CAFOs had not historically sought National Pollutant Discharge Elimination System ("NPDES") permits, even when they quite plainly discharged pollutants to protected waters. Some of the evidence that the agency had before it then – and should consider now – is summarized below.

CAFOs actually discharge pollution in numerous ways. First, facilities can have dry weather discharges of various types. These can involve spills and other extreme events. U.S. EPA, Environmental Assessment of Proposed Revisions to the National Pollutant Discharge Elimination System Regulation and the Effluent Guidelines for Concentrated Animal Feeding Operations, at pp. 2-17 to 2-18 (Jan. 2001)[2] (summarizing various examples of spills and dry-weather discharges, including a single event involving 25 million gallons of manure). Additionally, "[a]lthough manure solids

[2] This document can be found electronically through www.regulations.gov, and is identified as item EPA-HQ-OW-2002-0025-0022; *see also Waterkeeper* Joint Appendix at 916 (herinafter "*WK* JA"); U.S. EPA, National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations; Final Rule - Final Administrative Record Index, items 55201 & 70544 (hereinafer "Record Index"); Exhibit 1. In these comments, we have endeavored to identify at least one way in which EPA can obtain a copy of any cited material, or we have attached a copy to these comments, or both.

With regard to many older materials, EPA has not, as far as we can determine, included the documents from the record of the 2003 rulemaking in the docket for the present proposal, leaving commenters in the difficult position of relying upon the electronic version of the prior record (which is incomplete) and an index of the physical version of the prior record (which is presently inaccessible due to flooding in the docket office). *See* Exhibit 2. Because of these difficulties, and to ensure that the 2003 rulemaking record is considered properly in this new rulemaking, we incorporate the entirety of the prior rulemaking record (dockets OW-00-27 and OW-2002-0025) by reference, and consider those materials applicable to the current proposal. We also formally request that EPA place the entirety of the prior rulemaking record (dockets OW-00-27 and OW-2002-0025) into the present docket, and consider them in the present rulemaking process. We note that EPA has previously incorporated the records of one regulatory effort into the record of another pending rule docket. *See, e.g.*, www.regulations.gov, EPA-HQ-OAR-2002-0056-6173 (citing other rulemaking docket index and stating, "[t]he docket for this action (Docket ID No. OAR-2002-0056 and Docket ID No. A-92-55) includes the documents and information, in whatever form, in Docket ID No. OAR-2003-0053.").

purportedly 'self-seal' lagoons to prevent ground water contamination, some studies have shown otherwise. A study for the Iowa legislature published in 1999 indicates that leaking is part of lagoon design standards and that all lagoons should be expected to leak." *Id.* at p. 2-19 (citation omitted); *id.* ("A survey of swine and poultry lagoons in the Carolinas found that nearly two-thirds of the 36 lagoons sampled had leaked into the ground water." (citation omitted)). *See also* Memorandum from Craig Simons to Virginia Kibler & George Townsend, at 1 (Aug. 25, 2000)[3] (operations using lagoons with clay liners could be expected to have dry weather discharges due to failures at an estimated rate of 1.5 percent per year, and synthetic-lined lagoons would have a slightly lower rate).

Second, CAFOs have discharges from the overapplication of manure to land. It is common for large facilities to have manure in volumes they cannot agronomically apply to land, which indicates that such operations will discharge without adopting manure controls. "Larger-sized operations with 1,000 or more animals exceeding 1,000 pounds accounted for the largest share of excess nutrients in 1997. Roughly 60 percent of the nitrogen and 70 percent of the phosphorus generated by these operations must be transported off-site." 68 Fed. Reg. 7176, 7180 (Feb. 12, 2003). For instance, the agency's rulemaking record in 2003 contained a report of a case where allegedly the "dairy manager opened a valve and let it run" onto a saturated field for two days, releasing approximately 1.7 million gallons of waste. Eastern Research Group, Inc. Memorandum for EPA Region 9, Ponderosa Dairy CWA Violation (Apr. 27, 1999) & Department of Justice Press Release (Jan. 21, 1999).[4]

Despite these known discharge routes, the overall industry permitting statistics presented a gloomy view. According to the agency in 2001, "[u]nder the existing regulation, EPA estimates that about 12,000 facilities should be permitted but only 2,530 have actually applied for a permit." 66 Fed. Reg. 2960, 2963 (Jan. 12, 2001). Likewise, EPA compiled a list of documented discharges from animal operations, identifying numerous releases, several of which the agency specifically knew to be unpermitted. *See* U.S. EPA, Environmental Assessment of Proposed Revisions to the National Pollutant Discharge Elimination System Regulation and the Effluent Guidelines for Concentrated Animal Feeding Operations, at exhibits 4-16, 4-22 & 4-25 (Jan. 2001).[5] Consequently, EPA took the "position that inconsistent interpretations of current regulations over the years by state and federal regulators has resulted in inadequate permitting and enforcement practices across the country. *** Despite more than twenty years of regulation, there are persistent reports of discharge and runoff of manure and manure nutrients from livestock and poultry operations." U.S. EPA, Response to Comment Document, at A-48 (Dec. 2002).[6]

In specific states or regions, the state of affairs was even more discouraging. *See* Paul Shriner, EPA, Memo to Record: chronic discharge data from Region 6 (Oct. 30, 2001)[7] (documenting significant discharges in EPA Region 6 associated with rain events; largest documented discharge was 17,456,673 gallons, and highest documented fecal coliform level was 260,000,000 colonies/100 mL); *Save The*

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[3] *WK* JA at 597; www.regulations.gov (EPA-HQ-OW-2002-0025-1819); Record Index 22223; Exhibit 3.

[4] *WK* JA at 41 & 44-45 www.regulations.gov (EPA-HQ-OW-2002-0025-0165); Record Index 00129; Exhibit 4.

[5] www.regulations.gov (EPA-HQ-OW-2002-0025-0023); Exhibit 5.

[6] *WK* JA at 1766; Record Index 321846.

[7] *WK* JA at 1119-27; Record Index 140144.

Valley, Inc. v. U.S. E.P.A., 223 F. Supp.2d 997, 1008 (S.D. Ind. 2002) ("as of January 2002, IDEM had never issued an NPDES permit to a CAFO."); TetraTech, Inc. for U.S EPA, State Compendium: Programs and Regulatory Activities Related to Animal Feeding Operations at 5-6 (May 2002)[8] ("Five states (CO, MI, NC, SC and OR) only regulate AFOs under a state non-NPDES program, with Colorado and Michigan not requiring any AFOs to obtain any form of operating permit."). Citizen and agency enforcement will catch a few violators, but facilities sued under the Act do not simply accept the idea that they need permits to discharge. *See, e.g., American Canoe Ass'n v. Murphy Farms, Inc.*, 2000 WL 328027, at *2 (4th Cir. 2000) (even though facility had multiple prior discharges, it claimed not to be a covered discharger because it had state permit requiring it not to discharge); *Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055, 1063 (5th Cir. 1991) (suit for failure to obtain NPDES permit in case where future "intermittent or sporadic discharges" were reasonably likely).[9]

EPA considered the evidence of noncomplying discharges and the agency's knowledge of how CAFOs operate and manage manure, and reached a basic conclusion: such facilities should already have permits. According to the agency, "[g]iven the large volume of manure these facilities generate and the variety of ways they may discharge, and based on EPA's and the States' own experience in the field, EPA believes that all or virtually all large CAFOs have had a discharge in the past, have a current discharge, or have the potential to discharge in the future." 66 Fed. Reg. 3007; *see also id.* ("EPA believes that virtually all facilities defined as CAFOs already have a duty to apply for a permit under the current NPDES regulations, because of their past or current discharges or potential for future discharge.").

Nevertheless, EPA's evidence revealed that the nature of CAFO pollution discharges and the past regulatory climate for these operations had resulted in an unacceptable situation with regard to permitting these facilities. As EPA stated:

> [T]he nature of these operations is that any discharges from manure storage structures to waters of the U.S. are usually only intermittent, either due to accidental releases from equipment failures or storm events or, in some cases, deliberate releases such as pumping out lagoons or pits. The intermittent nature of these discharges, combined with the large numbers of animal feeding operations nationwide, makes it very difficult for EPA and State regulatory agencies to know where discharges have occurred (or in many cases, where animal feeding operations are even located), given the limited resources for conducting inspections. In this sense, CAFOs are distinct from typical industrial point sources subject to the NPDES program, such as manufacturing plants, where a facility's existence and location and the fact that it is discharging wastewaters at all is usually not

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[8] The cited version of this Compendium does not appear to be in the record of the prior rulemaking, though earlier versions of the document were. This version is available online at http://www.ars.usda.gov/sp2UserFiles/Place/19020500/PhosphorousImages/compendium.pdf (visited Aug. 16, 2006); Exhibit 6.

[9] More recent data indicate that permitting compliance remains a problem. *See* Environmental Integrity Project, Threatening Iowa's Future: Iowa's Failure to Implement and Enforce the Clean Water Act for Livestock Operations, at 15 (May 2004) ("Even though there have been hundreds of discharges from CAFOs, [the Iowa Department of Natural Resources] has only issued NPDES permits to 42 open feedlots. IDNR has never issued an NPDES permit to a confinement feeding operation although the state has over 1,800 documented confinement facilities that require NPDES permits."), available online at http://www.environmentalintegrity.org/pubs/EIP_CAFO_fnl_rpt.pdf (visited Aug. 16, 2006); Exhibit 7.

> in question. Accordingly, it is much easier for CAFOs to avoid the permitting system by not reporting their discharges, and there is evidence that such avoidances have taken place.

66 Fed. Reg. 3008; *see also* 68 Fed. Reg. 7201 ("[T]here are numerous documented instances in the administrative record of actual discharges at unpermitted CAFOs that are not associated with 25-year, 24-hour storms. EPA also disagrees that CAFO discharges are no more intermittent than those in other industries. Operations in other industries are typically designed to routinely discharge after appropriate treatment; this is not the case at CAFOs, where discharges are largely unplanned and intermittent. It is thus much easier for CAFOs to avoid permitting by not reporting their discharges. EPA continues to believe that imposing a duty to apply for all CAFOs is appropriate given that the current regulatory requirements are being misinterpreted or ignored."); NC DNR, Temporary restraining order issued against Orange County swine producer whose operation discharged waste Friday (June 3, 1999) (action against facility that discharged and appeared to have less lagoon capacity than needed to contain runoff from 25-year, 24-hour event).[10] EPA decided that this situation required regulatory action – the rules should be changed to require the category of CAFOs that the evidence showed to be routinely discharging without the required permits to be brought within the permitting system. The agency also concluded that "simply clarifying the [existing] regulations would not necessarily be adequate, because operations might still claim that the Clean Water Act requires no permit application if the facility claims not to discharge." 68 Fed. Reg. at 7201. From the foregoing evidence and the agency's conclusions, EPA created a "duty to apply" for large CAFOs, meaning they were required to seek NPDES permits or make a demonstration that they had no potential to discharge. 68 Fed. Reg. at 7200.

Industry petitioners challenged the "duty to apply" in the U.S. Court of Appeals for the Second Circuit. The United States defended the requirement vigorously, saying that it was strongly justified by the record evidence concerning CAFOs, their releases, and their permitting history. As EPA's brief stated, "[i]n the past, many CAFOs that discharged only intermittently did not apply for a permit." Brief for U.S. EPA, *Waterkeeper Alliance, Inc. v. U.S. EPA*, at 71 (Mar. 23, 2004)[11]; *id.* at 72 ("there is ample support in the record for the conclusion that many unpermitted CAFOs should have obtained a permit even under the old rules, because they *did in fact discharge* in situations other than the specified storm events" (emphasis added)). EPA recounted much of the evidence discussed above in defense of the requirement, and also argued that allowing a CAFO to avoid permitting based on its own conclusion that it does not discharge would also undermine the agency's ability to promulgate a "zero discharge" effluent limitation – an authority plainly authorized by the statute. *Id.* at 74-79.

The court concluded that the requirement exceeded EPA's authority in one respect; it held that the Clean Water Act does not allow EPA to require a source to seek a NPDES permit solely on the basis of the source's "potential" discharge. *Waterkeeper Alliance, Inc. v. U.S. EPA*, 399 F.3d 486, 505 (2d Cir. 2005) ("the Clean Water Act gives the EPA jurisdiction to regulate and control only *actual* discharges-not potential discharges"). The court did state, however, that the policy underlying the "duty to apply" was sound: it said, "we believe the EPA would have ample reason to consider imposing this duty upon Large CAFOs." *Id.* at 506 n.22. In particular, it stated, "the EPA has marshaled evidence suggesting that such a prophylactic measure may be necessary to effectively regulate water pollution

[10] www.regulations.gov (EPA-HQ-OW-2002-0025-0144); Record Index 40136; Exhibit 8.

[11] Exhibit 9.

from Large CAFOs, given that Large CAFOs are important contributors to water pollution and that they have, historically at least, improperly tried to circumvent the permitting process." *Id.*

B. The *Waterkeeper* Decision Expressly Reserved EPA's Authority to Establish a Presumption that Large CAFOs Actually Discharge, Did Not Implicate EPA's Ability to Designate Certain CAFOs to Be "Proposed" Dischargers, and Does Not Affect EPA's Authority to Require Essential Information from Potential Dischargers.

While disagreeing with the agency that EPA could require permits for facilities based merely upon their potential to discharge, the Second Circuit left open at least three options that will allow facilities with nothing more than a potential to discharge to avoid permitting but which will be more likely to identify and permit actual polluters than a system that relies entirely on CAFO operators' self-interested assessments of whether or not they discharge.

First, the court expressly held out a different legal theory under which EPA could require all large CAFOs to seek permits. The Second Circuit said, "[w]e also note that the EPA has not argued that the administrative record supports a regulatory presumption to the effect that Large CAFOs *actually* discharge. As such, we do not now consider whether, under the Clean Water Act as it currently exists, the EPA might properly presume that Large CAFOs -- or some subset thereof -- actually discharge." 399 F.3d at 506 n.22. In keeping with this concept, EPA should re-examine the substantial record already compiled that shows large CAFOs' tendency to discharge, and conclude that many facilities handle such significant quantities of waste without sufficient land area to accommodate it, are not designed to wholly contain such wastes, and therefore presumably discharge. At a minimum, EPA should identify categories of large CAFOs for which the evidence of actual discharges is particularly strong; such categories would include, at least: (1) CAFOs located in close proximity to water bodies and with physical features that facilitate waste flow; (2) facilities not designed to contain process water, contaminated runoff, and other polluted discharge or with insufficient capacity to hold it for later application in accordance with a proper nutrient management plan; (3) CAFOs lacking an adequate nutrient management plan; and (4) operations that have had a past discharge and not corrected the problem that caused it. In fact, EPA had drafted the proposal to say that a "CAFO that has discharged in the past will, except in unusual circumstances, continue to discharge, unless the owner or operator has corrected the design condition or the operational or maintenance practices that caused or allowed a discharge to occur," but this section of the proposal was weakened at the behest of the Office of Management and Budget. *See* OMB Revised CAFO Rule with Red Line Strike Out at 24 (June 5, 2006).[12]

Second, existing regulations provide that facilities must seek a permit not only if they actually discharge, but if they "propose" to do so. 40 C.F.R. § 122.21(a); proposed 40 C.F.R. § 122.23(d)(1). Certain CAFOs quite obviously meet this condition and EPA has the authority to direct that they apply for permits consistent with the rules. For example, if a facility is designed only to contain a manure

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[12] www.regulations.gov (EPA-HQ-OW-2005-0037-0234). After OMB's revisions, the proposal takes the wholly insufficient step – especially given CAFOs' history of noncompliance – of identifying these categories of facilities as examples of CAFOs that "should consider seeking permit coverage" because they "have a higher likelihood of actually discharging due to certain geographic and physiographic conditions." 71 Fed. Reg. 37749.

release in the event of a 25-year, 24-hour storm, it can be expected to discharge in more severe events, such that such a facility should be considered a proposed discharger.

Likewise, CAFO discharges from tiled fields are predictable enough to be considered "proposed" discharges, in view of reports that CAFOs regularly discharge manure from waste application fields through tile lines. *See* Final Report, ECCSCM Water Monitoring Project, 2001-2003 (citing study prepared for the Michigan Agriculture Environmental Assurance program indicating that nearly 100% of manure-application fields in Michigan are tile-drained.), available online at http://www.nocafos.org/finalreport.htm (visited Aug. 13, 2006)[13]; *id.* ("Most illegal manure discharges confirmed by the Department of Environmental Quality occurred after application of liquid manure to tiled fields, with the contaminated liquid percolating through the soils into drainage tiles, and flowing directly to streams."). These types of CAFO discharges are likely taking place throughout much of the Midwest, where "tiles drain up to 60 percent of agricultural land," Janet Kauffman, "A Dirty River Runs Beneath It," (Sept. 9, 2003), available online at http://www.landinstitute.org/vnews/display.v/ART/2003/09/09/3151527d008a9 (visited Aug. 13, 2006)[14]; *see also* "Farmland Drainage and the Nitrate Problem," at 2 (Jan. 2003) ("In both Indiana and Ohio, at least 50% of all cropland has drainage improvement. Minnesota is estimated to have about 40% of its cropland drained; Iowa and Illinois are each estimated at 35%."), available online at http://www.neat.org/nutrients/hypoxia/drainage1.htm (visited Aug. 13, 2006).[15]

Other CAFO designs that predictably lead to discharges should also be considered to be proposed dischargers. This category should include facilities whose discharge predictably could reach surface waters through groundwater connections. *Compare Idaho Rural Council v. Bosma*, 143 F.Supp.2d 1169, 1180 (D. Idaho 2001) (upholding groundwater connection as basis for CWA protection) *with Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965-66 (7th Cir.) (finding EPA's rules do not assert authority to reach discharges to groundwater), *cert. denied*, 513 U.S. 930 (1994). *See also supra* (discussing lagoon design & frequency of leakages). Likewise, uncorrected past failures leading to discharges should be considered to be proposed dischargers if the operator has not corrected the problem that caused the release. *See* Revised CAFO Rule with Red Line Strike Out at 24 (OMB deletion) ("a CAFO that has not taken such actions would 'discharge or propose to discharge' for purposes of proposed provision 122.23(d)(1) and would be required to apply for an NPDES permit.").

Finally, EPA has substantial information collection authority that it should use to require CAFOs to submit detailed factual material about their operations and discharges, even for those facilities from whom *Waterkeeper* indicates the agency cannot demand a permit application. Under section 308 of the Clean Water Act, 33 U.S.C. § 1318, EPA may, in order to "determin[e] whether any person is in violation of any . . . prohibition" under the Act,

> the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring

[13] Exhibit 10.

[14] Exhibit 11.

[15] Exhibit 12.

> methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require. . . .

Id. § 1318(a)(A). State permitting authorities must have similar authority in order to administer the NPDES program. *See* 40 C.F.R. § 123.26(b)(1) (state must have "[a] program which is capable of making comprehensive surveys of all facilities and activities subject to the State Director's authority to identify persons subject to regulation who have failed to comply with permit application or other program requirements"). Consistent with these authorities, EPA should conclude that any large CAFO that lacks a NPDES permit is at risk of violating the prohibition in the Act of discharging without a permit, and require such facilities to submit information to the permitting authority that will allow officials to determine whether the CAFO in fact is a discharger or a proposed discharger that needs a NPDES permit. The agency should require CAFOs to provide, among other things, information about: (1) the distance from the CAFO to the nearest surface water; (2) the amount of manure generated; (3) the capacity of the land application area, if any, to accommodate the facility's manure; (4) the geography of the area, including soil type and topography that might increase or decrease the likelihood that manure will pollute waterways; (5) types of waste retention and treatment facilities on site; and (6) past discharges of any kind and any action taken to address them. *See generally* Brief for U.S. EPA, *Waterkeeper Alliance, Inc. v. U.S. EPA*, at 78 ("courts have recognized that EPA's authority under section 308 is broad, and is not limited to information regarding actual, known discharges, but also extends to information reasonably necessary to identify and prevent *potential* discharges . . . as well as to assess compliance with the Act's requirements").

In summary, the Second Circuit dealt a blow to the agency's well-intentioned and well-supported program of requiring NPDES permits for all large CAFOs, but at the same time left EPA with substantial residual authority to have such facilities apply for NPDES permits.[16] EPA should do so. Alternatively, though less comprehensively, EPA should require any subset of large CAFOs particularly likely to discharge in the future to apply. Lastly, EPA should at least require all large CAFOs to provide information sufficient to allow the permitting authority to conclude whether the facility is a discharger or a proposed discharger that would need a NPDES permit.

C. EPA Proposes Not to Require CAFOs to Seek Permits Unless Facility Operators Decide They Are Necessary, and Cites No Other Changed Circumstances Aside from *Waterkeeper* to Justify the New Weak Permitting Approach.

EPA's proposal reverses course completely from its prior rule. If it is finalized, the rule would allow CAFO operators to decide whether their situation poses enough of a risk of getting caught having a discharge to warrant the investment of time and resources in obtaining a NPDES permit. In other words, it would return the regulatory framework with regard to permitting CAFOs to the same state it was in when the agency concluded just a few years ago that it had been a failure and needed substantial overhaul.

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[16] Indeed, EPA's self-permitting approach in the proposal is difficult to reconcile with the *Waterkeeper* court's invalidation of the CAFO rule insofar as it failed to require sources to submit nutrient management plans to the permitting authority to ensure they satisfy the regulatory requirements. *See* 399 F.3d at 498 ("The Clean Water Act demands regulation in fact, not only in principle. Under the Act, permits authorizing the discharge of pollutants may issue only where such permits *ensure* that every discharge of pollutants will comply with all applicable effluent limitations and standards.")

EPA is explicit – the proposal, if finalized, would only "hold CAFO owners and operators to the same 'duty to apply' requirement as already exists for [other non-CAFO] point sources," namely the duty to apply only when the operators conclude that their CAFOs will discharge or propose to discharge. 71 Fed. Reg. 37748. However, EPA does not suggest that this approach is justified by anything apart from the court's decision in *Waterkeeper*; to the contrary, the agency states that "EPA intends to make only those changes necessary to address the court's decision." *Id.* Specifically, EPA does not claim that new facts suggest that a prophylactic approach to permitting CAFOs is unjustified or unnecessary, that CAFOs' discharge patterns have become less intermittent and difficult to detect, or that other requirements in the rule will make it more likely that CAFOs will reverse their historically low permitting rates by complying with the permitting obligation as they had not done previously. Rather, at least one discussion in the proposed rule points in the opposite direction – EPA estimates that there are approximately 18,800 CAFOs in operation, and of the approximately 14,000 that the agency thinks need permits, only 8,500 have them.[17] *Id.* at 37,774.

Moreover, the proposal is extraordinarily unhelpful insofar as it fails even to identify those situations that would render a facility a discharger or proposed discharger subject to the rule, opting instead to list a number of circumstances in which discharges may be more likely, and to suggest that certain sources "consider seeking permit coverage" when conditions indicate they will discharge:

> For example, if the CAFO is in a flood plain, subject to high annual precipitation, or subject to lengthy rainy seasons, it is likely to have a discharge if the CAFO drains to a water of the United States. Other factors likely to result in a discharge include runoff from open feed bunkers, field storage, or other stockpiles exposed to precipitation; lagoons that are not sufficiently pumped down for the upcoming winter season; holding of process wastewater for summer irrigation that precludes adequate capacity for chronic rainfalls; and inadequate containment due to unavailability of land for manure, litter, or process wastewater application due to timing constraints associated with, for example, saturated ground or imminent rain. In addition, a discharge may occur from land application due to improper maintenance or operation of manure handling equipment that may lead to spills, and application of manure, litter or process wastewater to land in such a way that it does not qualify for the agricultural stormwater exemption. . . .

Id. at 37749. EPA makes matters worse by identifying four different scenarios in which CAFOs should plainly seek permit coverage as – at least – proposed dischargers, but saying instead that operators should "consider" permitting. *Id.* (discussing facilities that have certain geographic features, that lack sufficient manure containment, that land apply waste without following a nutrient management plan, and that have had past uncorrected discharges).

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[17] We do not cite these statistics for their accuracy. Rather, we simply note that EPA's own evidence indicates that thousands of facilities without permits should get them.

D. The Agency's Proposal is Arbitrary and Capricious Because it Entirely Reverses Course from 2003, Without Legal Compulsion to Do So, and Without Identifying New Facts to Support the Reasonableness of the New Approach.

EPA's approach to permitting CAFOs is a classic example of arbitrary and capricious decisionmaking, because it is a complete reversal of its prior position without any reasoned basis for doing so. EPA in 2003 developed a strong record supporting the need to bring CAFOs into the permitting system, in light of their historic noncompliance, unique type of discharge, and significant adverse impact on aquatic resources. *Waterkeeper* – the one and only reason that EPA cites for revising its rule leaves in place several means by which EPA can accomplish much, if not all, of its original permitting approach. And the agency cites no new facts to consider a different approach today.

Case law establishes that EPA's proposed actions are arbitrary and capricious in these circumstances. As the U.S. Court of Appeals for the D.C. Circuit summarized:

> Section 706(2)(A) of the APA requires agencies to, among other things, "consider the relevant factors and draw a rational connection between the facts found and the choice made." *Missouri Public Serv. Comm'n v. FERC*, 215 F.3d 1, 3 (D.C.Cir.2000) (citation and quotation marks omitted). In particular, an agency acts arbitrarily and capriciously when it abruptly departs from a position it previously held without satisfactorily explaining its reason for doing so. "Indeed, where an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious." *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C.Cir.1995); *see also AT&T v. FCC*, 974 F.2d 1351, 1355 (D.C.Cir.1992) (faulting the FCC for failing to explain why it "changed the original price cap rules" and concluding that the Commission's "Reconsideration Order is arbitrary and capricious for want of an adequate explanation"). As the Supreme Court has put it, "an agency changing its course must supply a reasoned analysis. . . ." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (citation omitted).

Wisconsin Valley Improvement v. FERC, 236 F.3d 738, 748 (D.C. Cir. 2001). Because EPA is now proposing the opposite policy for permitting CAFOs than it previously pursued, because it does not suggest that the real-world situation relating to CAFOs' non-complying discharges has changed, because the agency has said that the approach it now proposes has been ineffective in the past, and because EPA was not compelled to take this approach by the *Waterkeeper* decision, its wholly inadequate explanation for the proposal is arbitrary and capricious. *See County of Los Angeles v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999); ("'A long line of precedent has established that an agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently.'" (citations omitted)), *cert. denied*, 530 U.S. 1204 (2000).

E. EPA's Proposal is Arbitrary and Capricious Because it Ignores Central Facts.

If an agency completely ignores a central fact in taking a regulatory action, that action is arbitrary and capricious. *U.S. v. F/V Alice Amanda*, 987 F.2d 1078, 1085 (4th Cir. 1993) ("Agency action is arbitrary and capricious if the agency relies on factors that Congress did not intend for it to consider, *entirely ignores important aspects of the problem*, explains its decision in a manner contrary to the evidence before it, or reaches a decision that is so implausible that it cannot be ascribed to a

difference in view." (emphasis added)); *Natural Resources Defense Council, Inc. v. U.S. E.P.A.*, 790 F.2d 289, 305 (3d Cir. 1986) ("The fact that the Agency has 'entirely failed to consider an important aspect of the problem [and has] offered an explanation for its decision that runs counter to the evidence before the agency' renders arbitrary and capricious its decision to change the measure of consistent removal to what is in reality a measure of average removal." (citation omitted)). EPA has ignored at least two central facts in the present rulemaking.

First, EPA has failed to consider the various ways in which the prior rule relied on the "duty to apply" for large CAFOs, and how leaving the permitting decision to CAFO operators implicates these other requirements. For example, under the 2003 rule, facilities claiming only to have "agricultural stormwater" discharges would still be subject to the NPDES permitting requirement, as would facilities subject to zero-discharge effluent limitations. Such CAFOs would be responsible for appropriate monitoring and recordkeeping (and, under *Waterkeeper*, for publicly-available nutrient management plans), so that the source would remain accountable for its discharges. Without an obligation to secure permits, however, large CAFOs that claim not to discharge or to have only "agricultural stormwater" discharges will fly under the permitting radar without such confirmation (apart from spotty and difficult enforcement) of the validity of their claims.

Similarly, under EPA's proposal facilities that allegedly do not have regulated discharges (CAFOs that claim not to discharge at all, that claim to have only "agricultural stormwater" discharges, or that have supposedly zero discharge systems in place) would not be subject to permits through which the permitting authority could impose water quality-based effluent limitations ("WQBELs"). But without the required check-in with the permitting authority that the "duty to apply" provided, there will now be no standardized opportunity for state water quality officials to examine the impacts of the CAFO on the receiving water body's water quality standards in the context of a NPDES permit review.

Second, EPA's proposal ignores the fact that putting permitting decisions in the hands of CAFO operators will place undue pressure on state authorities to require permits themselves, conduct frequent inspections of CAFOs to ensure that facilities that discharge or propose to do so are covered by permits, or enforce violations of the Act after the fact, even though the evidence indicates that state permitting authorities lack the resources and/or inclination to do so. *See, e.g.*, Comments of the Environmental Integrity Project, Iowa Citizens for Community Improvement and the Iowa Chapter of Sierra Club (Aug. 29, 2006) (discussing state resources for CAFO enforcement); U.S. EPA Review of Ohio EPA's Programs, Excerpts from the Final Report (Feb. 13, 2003) ("'It is currently estimated that there are 144 facilities in the State with greater than 1000 animal units. As of the end of calendar year 2002, Ohio had inspected 88 animal feeding operations),'" available online at http://www.epa.state.oh.us/dir/USEPAReportSummary.html (visited Aug. 13, 2006)[18]; General Accounting Office, Livestock Agriculture: Increased EPA Oversight Will Improve Environmental Program for Concentrated Animal Feeding Operations, at 3 (Jan. 2003) ("EPA's limited oversight of the states has contributed to inadequate implementation by some authorized states. For example, our surveys show that 11 authorized states with over 1,000 large animal feeding operations do not issue discharge permits that contain all required elements. Three of these states have not issued any discharge permits to their operations, thereby leaving these facilities and their wastes essentially unregulated by

[18] Exhibit 13.

the CAFO program.").[19] Nevertheless, EPA does not even analyze the effect that eliminating the permitting requirement – and making CAFO compliance more dependent on states' affirmative efforts – will have on these limited state resources. *See* 71 Fed. Reg. at 37,774 (EPA impact analysis assumes "full compliance" with NPDES permitting requirement for all dischargers or proposed dischargers). Ignoring these effects is arbitrary and capricious.

F. Recommendation: EPA Must Require NPDES Permits from All Large CAFOs Based on a Presumption that Such Facilities Discharge. Though a Stronger Approach is Needed, EPA Also Has Ample Authority to Require Permits for Several Kinds of Large CAFOs, and to Require Discharge Information from All Large CAFOs.

As discussed above, EPA has the authority – and the factual record – to presume that large CAFOs actually discharge. In light of the significant support EPA marshaled in 2003 to illustrate the need for the "duty to apply," EPA's proposal to revert to a scheme that is entirely reliant on CAFO operators is arbitrary and capricious without a new justification for doing so. No such justification is present in the proposal.

Accordingly, EPA must presume that large CAFOs actually discharge and reinstate the "duty to apply" that it previously found to be needed to address CAFOs' unique discharges and poor compliance record. As an alternative – but one we find to be distinctly less preferable than an across-the-board duty to apply – EPA must at least require several kinds of CAFOs to apply for permits, those which are particularly vulnerable to discharges, such that they should be considered either presumptive dischargers or "proposed" dischargers. Such operations include, but are not limited to:

- CAFOs whose proximity to water bodies, soil types, geographic location (i.e., location in a floodplain), precipitation, and other factors make them more likely to discharge, including predictable discharges via groundwater connections;
- Facilities not designed to contain process water, contaminated runoff, and other polluted discharge under specific conditions or with insufficient capacity to hold it for later application in accordance with a proper nutrient management plan;
- CAFOs lacking an adequate nutrient management plan or which apply manure under circumstances where it is more likely to reach waters;
- Operations that have had a past discharge and not corrected the problem that caused it;
- Facilities designed only to contain a manure release in the event of a 25-year, 24-hour storm;
- CAFOs discharging manure to tiled drainage fields;
- Operations with exposed storage; and
- Facilities with improperly maintained application equipment.

[19] Exhibit 14.

Finally, although in our view it is a less preferable option to deal with the host of problems posed by CAFOs, EPA must, at the very least, use its significant information-collecting authority to require CAFOs that do not seek NPDES permits to submit detailed facts about their operations, their plans to manage manure, any discharges, and related information.

II. EPA'S INTERPRETATION OF THE AGRICULTURAL STORMWATER EXEMPTION WOULD UNLAWFULLY ALLOW SELF REGULATION, DEPART FROM THE 2003 RULE, FAIL TO REQUIRE CAFOS TO OBTAIN PERMITS TO CLAIM THE EXEMPTION, AND EXEMPT DISCHARGES FROM ADDITIONAL CONTROLS.

A. EPA's Proposal Allows Unlawful Self-Regulation

EPA has made little attempt to resolve one of the key legal tensions stemming from the *Waterkeeper* decision. The Second Circuit approved of EPA's definition of agricultural stormwater, and limited its authority to require CAFOs to apply for NPDES permit coverage. However, the court also expressly disapproved of the provisions of EPA's 2003 Rule that authorized a CAFO to make the jurisdictional determination about whether its operations fell within the purview of the Clean Water Act. *Waterkeeper*, 399 F.3d at 498. In rejecting these portions of EPA's 2003 Rule, the Second Circuit disapproved of EPA's failure to require state agency review of CAFO NMPs, agreeing that this lack of oversight created an "impermissible self-regulatory permitting scheme." *Id.* At the core of the court's holding was its realization that, absent adequate review by a state permitting agency, nothing prevented CAFO operators from "'misunderstanding or misrepresenting' the application rates they must adopt in order to comply with state technical standards." *Waterkeeper* at 502. EPA must reconcile this disapproval of self-permitting with its application of the agricultural stormwater definition. Obviously, the court did not approve of a system in which CAFO operators are given the latitude to make similar misunderstandings or misrepresentations about whether their discharges are subject to Clean Water Act permits or exempted from those requirements.

B. Large CAFOs Must Be Required to Obtain NPDES Permits in Order to Claim the Agricultural Stormwater Exemption.

As recognized by the Second Circuit, agricultural stormwater discharges represent some, but not all, possible discharges from a land application area. *Waterkeeper*, 399 F.3d at 508 ("...while the Rule holds CAFOs liable for most land application area discharges, it prevents CAFOs from being held liable for 'precipitation related discharges'...") For instance, tile drains which lower groundwater tables beneath land application areas may convey precipitation related discharges of manure and wastewater, but may also convey these same pollutants during dry weather.[20] Other land-application area discharges occur from cross-field ditch outlets, swales, and water control structures.

Determining whether a discharge is agricultural stormwater or not is also a determination as to whether the discharge is subject to the Act's point source controls, and is thus a jurisdictional decision

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[20] *See generally*, Dinnes, Dana L., et al., *Nitrogen Management Strategies to Reduce Nitrate Leaching in Tile-Drained Midwestern Soils*, Agron. J. 94:153-171 (2002), attached at Exhibit 15; Cook, M.J. and J.L. Baker, *Bacteria and Nutrient Transport to Tile Lines Shortly after Application of Large Volumes of Liquid Swine Manure*, Transactions of the ASAE, Vol. 44(3): 495–503 (2001), attached at Exhibit 16.

that is not properly left to the permitted CAFO. Unless a CAFO operator submits its "site specific nutrient management practices" to EPA or delegated state agency for review, it would engage in the type of jurisdictional determination rejected by both the Second Circuit in *Waterkeeper* and the Ninth Circuit in *Environmental Defense Center v. EPA*, 344 F.3d 832, 856 (2003). As a result, EPA must require that CAFOs set forth "site specific nutrient management practices" in a nutrient management plan that is reviewed and approved by either EPA or the delegated state permitting agency in order for any discharges from a CAFO's land application area to be deemed agricultural stormwater.

The only way to ensure full compliance with Clean Water Act controls over these non-exempt discharges is to require that Large CAFOs obtain an NPDES permit to ensure that they have fulfilled all the requirements of both the ELGs and an NMP based on state technical standards that eliminates all non-exempt discharges. In this context, the NMP that identifies certain land application area discharges as exempt from further controls would be subject to review and approval by the permitting agency and subject to public inspection and comment. Permitting authority review and approval of the NMP, in addition to the imposition of the design, operation and maintenance measures required by 40 C.F.R. §§ 122.23 and 412.4, would ensure that a CAFO operator has not mistakenly identified agricultural stormwater discharges and has taken all necessary steps to ensure the "appropriate agricultural utilization" of manure-derived nutrients. This review, and the implementation of all measures designed to eliminate non-agricultural stormwater discharges, is necessary in order to satisfy the holding of the Second Circuit.

Through an NMP approved by the state permitting agency, EPA and the state can require compliance with the state technical standards envisioned at 40 C.F.R. § 412.4(c) in order to identify agricultural stormwater discharges. Compliance with these state-developed technical standards is necessary because they:

- Provide greater specificity regarding buffer/setback provisions and soil and manure testing;
- Specify requirement to establish P and N application rates that minimize phosphorus and nitrogen transport from land application areas;
- May require the implementation of measures designed to ensure that water quality standards are not impaired.

It is not sufficient, as EPA proposes here, to require only that Large CAFOs seeking to characterize discharges from their land application areas as non-point agricultural stormwater to develop and demonstrate compliance with a Nutrient Management Plan that assures "appropriate agricultural utilization" of manure nutrients and which provides baseline removal of pathogens and other pollutants. While such an NMP would need to satisfy the specifications of 40 C.F.R § 122.42(e)(1)(vi)-(ix), these basic elements fail to take water quality protection into account. For example, while NRCS Conservation Practice Standard 590, at least in its "national" form, purports to require water quality

related planning and BMP implementation,[21] it does not provide an opportunity for EPA or a state agency to ensure that all CAFO practices or control structures are adequate to protect water quality.[22]

EPA's tolerance of CAFO operator identification of agricultural stormwater is directly in contrast to the position the Agency established in the 2003 Final CAFO Rule. There, EPA overtly maintained that the agricultural stormwater rule exempted only some of the discharges caused by or expected from Large CAFOs, and that an NPDES permit was required for all other discharges. *See* OMB Revised CAFO Rule with Red Line Strike Out, at 25-26. In developing this Proposed Rule, EPA initially summarized the agricultural stormwater rule as serving "primarily to define which component of the runoff at permitted facilities qualified as agricultural stormwater." *Id.* at 26-27. More trenchantly, EPA claimed to find "no basis for defining 'agricultural storm water' at those facilities differently from how it is defined for Large CAFOs that do seek permit coverage." *Id.*

Unfortunately, OMB provided the basis EPA could not find. This language was deleted from the proposal not on the basis of new facts or legal context requiring a departure from the Agency's 2003 position, but because OMB demanded the change. *Id.* EPA's acceptance of this change in Agency position, dictated by an outside agency, is an unlawful delegation of EPA's Clean Water Act rulemaking authority to an agency not properly authorized by Congress to set Clean Water Act regulations. *See, e.g.*, *Cuyahoga Valley R. Co. v. United Transportation Union*, 474 U.S. 3, 7 (1985); *Martin v. OSHRC*, 499 U.S. 144, 152-3 (1991). The expansion of the agricultural stormwater rule announced in this proposal is contrary to both the agency's prior position and the information before it. To make matters worse, OMB substantively interference with the Agency's preferred policy. As a result, the expansion of the current agricultural stormwater policy reflects pre-determined decision making rather than full consideration of the information contained in the administrative record, and as such it would not be entitled to deference by a reviewing court. *See, e.g.*, *Davis v. Mineta*, 302 F.3d 1104, 1112 (10th Cir. 2002).

C. <u>EPA's Proposal Represents An Unlawful Departure from Previous Agency Position and Is Otherwise Arbitrary and Capricious.</u>

EPA's proposal retreats from its previously announced position that compliance with 40 C.F.R. § 412.4(c) is mandatory in order to claim the agricultural stormwater exemption, and therefore is an illegal departure from its 2003 Rule. In its final 2003 Rule, EPA stated that it "believed that the potential for runoff and water quality impairments would be minimized where a CAFO implemented site-specific NMP in conformance with 40 CFR 122.42(e)(1(vi)-(ix) and, for Large CAFOs, the additional management practices required in 40 CFR 412.4(c)." 71 Fed. Reg. 37750 (2006). In this current proposal, EPA would only require compliance with the 40 C.F.R. § 122.42 standards in order to benefit from the agricultural stormwater exemption from NPDES permitting requirements. 71 Fed. Reg. 37750.

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[21] *See* "Additional Criteria to Minimize Agricultural Non-point Source Pollution of Surface and Ground Water Resources," at 4.

[22] As a far less preferable, and minimally compliant alternative, EPA must emphatically restate its previously announced position that the agricultural stormwater exemption is only available when Large CAFOs develop and implement an NMP that complies with the requirements of <u>both</u> 40 CFR 122.42(e)(1(vi)-(ix) <u>and</u> with the state technical standards required by 40 CFR 412.4(c). This NMP *must* also be submitted to the permitting agency for review and approval in order to demonstrate that full implementation of its provisions will ensure appropriate utilization of applied nutrients, and will eliminate all non-agricultural stormwater discharges from land application areas.

EPA's retreat from its 2003 Rule position is an unwarranted departure from the position and requirements that it espoused in the 2003 Rule. Without developing new facts justified in the administrative record, such departures are arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983); *Louisiana Pub. Service Comm. v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999).

EPA's apparent deviation from the position it announced in the 2003 Rule is an alteration to that Rule that is not required by the Second Circuit's decision and remand. "Deviation from the court's remand order in the subsequent administrative proceedings is itself legal error, subject to reversal on further judicial review." *Sullivan v. Hudson*, 490 U.S. 877, 886 (U.S. 1989) (internal citations omitted); *see also Mefford v. Gardner*, 383 F.2d 748, 758 (6th Cir. 1967) (it is the duty of the agency to comply with the mandate of the court and to obey the directions therein without variation and without departing from such direction…and if the cause is remanded for a specified purpose, any proceedings inconsistent therewith is error.).

D. Agricultural Stormwater Discharges Are Not Immune from All Clean Water Act or State Law Controls.

EPA should also clarify that agricultural stormwater, once properly identified and controlled, may be exempt from NPDES permitting requirements but is still subject to Clean Water Act and state non-point source pollution control efforts and regulations. For example, agricultural non-point source pollution, including that from CAFOs, may be subject to TMDL load allocation and reduction programs. Local TMDL provisions may require CAFO operators to take additional measures to reduce loadings of nutrients or other pollutants to affected surface waters. States retain the authority to use the TMDL process, where appropriate, to address the impacts of pollutants carried to surface waters by agricultural stormwater loadings. State responses, through the TMDL process, may include requirements that CAFOs adopt nutrient management planning, setbacks, buffers, and other best management practices. This option, because of its entirely discretionary nature, must be viewed as a complement to, and not a substitute for, the NPDES permit requirement outlined above.

III. THE PROPOSAL'S NMP SECTIONS MUST BE REVISED TO ENSURE CAFOS DEVELOP ADEQUATE NMPS, ALL NMP REQUIREMENTS ARE ENFORCEABLE, AND THE PUBLIC HAS SUFFICIENT OPPORTUNITIES TO PARTICIPATE IN REVIEWING NMPS.

The Second Circuit found that EPA's CAFO regulations created an "impermissible self-regulatory regime" that failed to meet the requirements of the Clean Water Act because the CAFO rule: (1) failed to require that the terms of CAFO nutrient management plans ("NMPs") be included in NPDES permits; (2) failed to require permitting agencies to review NMPs before issuing NPDES permits; and (3) failed to make the terms of NMPs publicly available for comment and a hearing before issuing NPDES permits. *Waterkeeper* at 498, 502-03.

A. CAFO Permits Must Include All Requirements of NMPs.

Because the nutrient management plan represents an essential effluent limitation on discharges of CAFO wastes, the permit must require a CAFO to comply with every discharge reduction or prevention

measure in its NMP and all of these measures must be enforceable both by government agencies and private citizens. However, EPA's proposed rule does not ensure that all the requirements in a CAFO's NMP will be enforceable. Instead, EPA explains in the preamble to the Proposed Revised Rule that "[i]t would be up to the permitting authority's discretion as to how to incorporate the terms of the NMP into the permit." It would be inconsistent with the Second Circuit's decision in *Waterkeeper* and arbitrary, capricious, and contrary to law for EPA to not require all requirements in NMPs to be included in NPDES permits for CAFOs.

In its Proposed Revised Rule, EPA creates a more specific meaning of the word "terms" than was intended by the Second Circuit. The Second Circuit did not intend its reference to "terms" of the NMP to restrict which elements of the NMP would be included in the permit as effluent limitations. If the Second Circuit had intended to ascribe to the word "terms" a special meaning in the context of elements of NPDES permit provisions, it would have articulated such a distinction, but it did not.

EPA's proposal would divide NMPs into "permit application" aspects, such as data and calculations, distinct from "terms," which EPA claims are the product of applying technical standards to the facts, data and calculations, such as schedule of field land application rates. *See* 71 Fed. Reg. 37753.

EPA's interpretation of the permitting elements of typical nutrient management plans is too narrow to ensure that all required elements of NMPs for purposes of effluent limitation under the Clean Water Act are properly included as permit requirements. In addition to the specific EPA regulations cited in the rule and land application rates, typical nutrient management plans must address a wide variety of rules, evaluation guidance, process values, work practice requirements, and other elements that encompass typical state technical standard requirements applicable to CAFO production area and land application activities.

Nutrient management plans typically contain the following elements:

- Structural engineering requirements for production area buildings, equipment and waste storage. Carrying out such requirements involves elements of design (involving both planning requirements and bright line structural requirements), operation and maintenance (typically involving plan compliance, work practices requirements, exertion of due diligence).

- Work practice and bright line compliance requirements for making land application decisions related to nutrient budgets, weather conditions, and runoff avoidance.

- Graphs, diagrams, and maps of land application and production areas and decisions and work practices based on such information.

- Application of bright line requirements from technical standards on soil testing, waste management, BMP structural element requirements, etc.

- Requirements for evaluation, processing and decision-making addressing certain data, including soil testing, nutrient budgeting, field evaluation, etc.

EPA's approach attempts to create an artificial distinction between "terms" as requirements and data/calculations as "application" aspects without recognizing the multi-faceted responsibility regime

and duties of CAFO operators under typical NMP conditions and jeopardizes accountability functions carried out during NMP plan development and compliance with such plans. Affording state permitting authorities "....discretion as to how to incorporate the terms of an NMP that meet the regulatory requirements....into a permit," invites state permitting authorities to render certain process-related, evaluation, planning, work practice and bright line compliance aspects of typical NMPs not enforceable.

For example, would a plan map showing the location of land application setback buffers be regarded as "data" or a "term" of the NMP? Would soil test data showing very high phosphorus on a field be considered "data" in regard to a CAFO requirement to address an NRCS technical standard for long term soil buildup of phosphorus, or would it be considered an element of the actual decision [a "term"] about the management decision implicit in the NMP addressing such a technical standard requirement involving protocols for field division, soil sample collection and soil data conversion and management? Would a nutrient budget concerning phosphorus inputs to a field be "data" that is used to determine an ultimate "term" of the NMP of a land spreading application rate, or would the nutrient budget, itself be a "term" of the NMP that would be an enforceable permit condition? Would a site drawing in a NMP plan of a CAFO production area data showing waste facilities and waste treatment units be "data" or a "term?" Nothing in the proposed rule provides a clear guide on how to answer such questions. EPA's proposal to provide state permit writers discretionary authority to make widely varying decisions between different jurisdictions as to what is a "term of the NMP" and what is not invites regulators to undermine fundamental requirements in the elements and substance of required nutrient management plans.

Furthermore, the extraction of what a permit authority might deem to be the "terms of the NMP" from the NMP itself may be a significant time-consuming operation. Many NMP documents for large facilities in particular are massive documents spanning several thousands of pages. Extraction of what a permit authority deems to be "terms" may involve significant work with a high potential for overlooking required elements. Such extraction of "terms" is likely to be far more complicated than merely mandating that all provisions of the NMP become a portion of the permit and are, in fact, enforceable, as we recommend.

Moreover, because the requirements of CAFOs' NMPs must be included in their permits, the records that CAFOs must maintain to document proper implementation of their NMPs must be submitted to the permitting authority instead of being maintained on-site for five years. *See* draft NMP template. Merely requiring the CAFO to make these records available to the permitting authority upon request does not ensure that citizens will have access to these records. Without access to these records, the ability of citizens to enforce the terms of CAFO permits related to nutrient management will be severely limited. Making the annual report available to citizens will not cure this problem because the annual report only contains summary information related to nutrient management and does not reveal whether a CAFO is consistently following the nutrient application rates and other requirements in its NMP and permit. At a minimum, EPA must require permitting authorities to obtain the records related to implementation of nutrient management plans from CAFOs when requested by citizens.

B. Draft NMP Template

Nutrient Management Plan Template versus Nutrient Management Plan Summary

EPA's draft NMP template may serve as a useful resource that condenses and summarizes the most critical pieces of a full NMP, but under no circumstances should it serve as a replacement or instructional guidance for the creation or public accessibility of a full, separate, and site specific NMP.

The draft template does not give enough details about the farm and management to adequately evaluate and intelligently comment on a proposed NMP and permit; however, it can serve as an outline summary of a full and publicly available comprehensive NMP. As noted by EPA, a complete NMP must contain full descriptions of both the requirements applicable to the facility and the assumptions, data, and calculations which provide the basis for those requirements.

The NMP summary provided through the template may offer an effective way to encapsulate the data contained within the full NMP, presenting the vital statistics of the facility. For citizens and officials familiar with a specific facility's management, layout, geology, etc., the summary NMP can serve as an initial indicator of the effectiveness of the proposed NMP and the management of a facility. For citizens and officials that are not familiar with a particular facility, the summary NMP will only provide the "vital statistics," requiring that the full NMP be reviewed to ascertain if any mitigating circumstances exist and whether the proposed NMP will be protective of water quality.

Comprehensive and Certified Nutrient Management Plans

States that require all NMPs to be written by certified nutrient management planner have multi-day courses and provide in-depth training materials. In New York, for example, prospective planners must first meet a set of pre-qualifications relating to their educational background and level of experience and training. Prospective planners are then required to attend a three-day live course, participate in online classes, pass two written exams, and submit two NMPs for review by a panel of experts prior to receiving state certification. Continuing education credits are required to maintain certification. EPA's draft NMP template simply cannot and should not be a substitute for this kind of rigorous training, resources, and comprehensive nutrient management plan for a livestock facility.

While EPA's draft NMP template cannot serve as a template or a substitute for a comprehensive NMP, changes and additions can be made to improve the functionality of the template as a NMP summary.

1. General Information

EPA should reorganize the Draft NMP Template to address CAFOs with multiple production areas in different locations. The General Information section of the NMP Template is poorly suited to handling CAFOs with multiple production areas in different locations. A better approach would be to make the first information element in subsection A focus on the owner or operator of the overall CAFO operation. The phone number of the owner/operator should be included and the address of the owner/operator should be a valid mailing address.

EPA should add a section to subsection A to focus on the physical location of each production area in the CAFO operation. For each such production area, the physical address of the production area and GIS coordinates should be provided. The NMP Template should require a site plan diagram showing each element in each production area. Site plans should show, at a minimum, animal housing structures, outdoor animal exercise and containment areas, roof runoff water management, all waste processing, treatment and storage facilities associated with the production area, silage bunkers, feed storage, fertilizer storage facilities, roof runoff and segregated clean water management facilities, ditches and conveyances, well heads, hydrologically sensitive and critical areas, a topographic map of the site, including any steep slopes or highly erodible land, and all features for the management of silage leachate, compost pad runoff, outdoor solid waste storage runoff and outdoor barnyard wastewater processing, management and containment should be provided (including storage, filter strips, discharge

location, etc), as well as a soils map for the facility. All features of the facility for animal waste transfer should be depicted on the site plan. All tile risers, grate inlets and tile outlets associated with the production area should be shown on the site plan. This section should also include a calendar schedule for crops, indicate the 12 or 14 digit Hydrological Unit Code in which the production area is located, and include a brief narrative about the facility's management.

In subsection B, a line should be added to indicate the date by which state technical standards indicate the next regularly scheduled review of the NMP should take place. As currently drafted, subsection B.1 suggests that a single date might describe all features of when plan compliance will be implemented. However, for facilities subject to operational and planning standards that have been in place for a long time under previous permits, the suggestion that a single date in the future when the plan will be operational could be misleading. Operators must not be permitted, nor given the impression that immediately effective best management practice implementation requirements may be put off until a future date. The template should be altered to describe effective dates of immediately effective BMP requirements and for structural elements for which permit requirements allow a time delay for compliance. Under no circumstances should the template provide CAFOs with room to argue that any requirements it was previously required to comply with may be put off to an ultimate compliance date in the future or that BMPs effective upon permit coverage may be delayed. This section should also include the name and contact information for the person who wrote the NMP, the date that the NMP was drafted, and the name, title, and contact information for the person who approved the NMP.

Subsection C should indicate how many animals and the numbers of each are housed at each production area as of a certain date. This subsection should also summarize the animal types and numbers for the entire CAFO operation across all production areas.

Either as part of the general information section or a new major section, the NMP Template should set forth the elements of emergency response provisions applicable to both production area operations, animal waste transfer operations, and land spreading operations. Emergency response NMP provisions should include the following elements which should be attached to the primary NMP template form:

- The first and second primarily responsible CAFO officials who should be on call on a continuous basis for emergency response and coordination, including office and cell phone numbers.

- Business hour and night/weekend emergency phone numbers for the following officials:

  - Regional district office of the state environmental protection water pollution/water resource protection officials.

  - Local law enforcement

  - Office of any potentially affected downstream municipal and/or private public water supply agencies with surface water intakes that may be affected by a CAFO facility spill.

- Listing of operational heavy equipment and spill control countermeasures available and maintained for any response activity at a production area, and outside resources previously identified for site spill control response measures.

- CAFO site NMP emergency policies and direction to CAFO production area employees, including policies to mitigate and control spills and the need to promptly report and exercise spill control countermeasures.

2. Storage

The NMP Template should be amended to include a definition of "process wastewater." Silage leachate should be added to the list of production area wastes for management. The NMP Template should be revised to include "manure" managed as solids, including all entrained bedding, feed rejects, spoiled feed and other production area solid wastes destined for land-spreading, composting or similar management. The NMP Template should identify veterinary wastes as a separated waste stream for management apart from other production area wastes.

A "year" should be identified as a "crop year" and defined to begin after harvest in the fall. The NMP Template should provide a spreadsheet template showing expected waste generation, net precipitation and transfers to land disposal for each month of the year as a projection for the next crop year to allow planning to ensure that solid and liquid storage facility capacity will not be exceeded. Line 5 should be changed to "maximum storage period."

The NMP Template should list and embrace proper best management practices for storage of artificial fertilizers.

Subsection B should be renamed "Waste Storage and Management Units." The spreadsheet on the waste storage units should be expanded to include column listings of the groundwater protection and storage management design standard to which the storage unit complies, whether (yes/no) an engineering report signed by a certified professional engineer exists that the storage facility complies with applicable state requirements for containment design and groundwater protection, the date of that certification and the identify of the design standard to which the waste storage unit complies. This section should also indicate the age of the waste storage structure(s), whether the waste storage structure(s) are lined and with what, whether the waste storage structure(s) are located in the floodplain. Line 3 should be clarified to reflect that the capacity should not include freeboard; the amount of freeboard for each structure/facility should be indicated.

Each waste storage and management unit listing should indicate the relationship between its storage capacity and the particular production area to which it is related. Each such listing should indicate all engineered features incorporated in the design for waste transfer, if any. Each listing should indicate whether there are permanent or temporary facilities in place for waste agitation to entrain solids in stored production area wastewater. Each waste storage and management unit listing should indicate the total outdoor rainfall runoff catchment area in acres, if any, for which the storage unit receives runoff precipitation, process wastewater from outdoor animal waste confinement areas, silage bunkers, roof runoff, off-site drainage and other sources of runoff which is destined to flow to a waste storage unit.

The waste characterization provisions of Part IV of the NMP Template should be moved from that section and placed in a new section under the Part II Waste Management and Storage subsection. For each waste stream and waste storage unit, a waste characterization spreadsheet in the NMP template should have the following columns as information elements: the predicted annual crop year volume of waste expected from that storage unit and the date of the last waste characterization analytical results

and the findings for TKN as N, Ammonia as N, phosphorus as P_2O_5, potassium, percent solids, whether any liquid waste analyzed was from agitated storage or non-agitated storage and the date by which such waste characterization will be periodically re-performed under an acceptable frequency under federal and state requirements. TKN, ammonia, P_2O_5 and K should be reported on a lbs per Kgal basis for liquid and lbs per ton basis for solids.

The NMP Template should contain a section indicating what odor control measures and BMPs are employed to control waste storage and management unit odor emissions, including practices on covers, biofilter controls of covered facilities and targeted pH management, including pH monitoring frequency and practices to ensure minimum pH conditions in storage liquid wastes.

3. Site Specific Conservation Practices

The list of BMPs in subsection A is not comprehensive. The list should also include: waste treatment technologies (and specify what kind of treatment, i.e., anaerobic digestion), streambank stabilization, wooded buffers, permanent vegetation on erodible cropland, permanent vegetation on critically eroding areas, reforestation of crop and pasture land, sidedress application of nitrogen for corn, late winter split application of nitrogen on small grains, cover crops, maintenance of crop residue, mulch application, protective berms, physical soil infiltration and moisture capacity determination, sedimentation collection basin, crop rotation, surface water monitoring, ground water monitoring, tile water monitoring, and waste application setback from residential drinking water well heads, etc..

The questions listed at Subsections B.3 and B.4 should emphasize that any discussion in response to the questions should feature field-section specificity.

Considerably more detail should be provided in field maps that are requested for attachment in this subsection; the NMP Template instructions as to field maps should include the following elements in addition to those indicated at C.1. Field maps should show all of the following features in one or more sets of specifically annotated field/field-section maps:

- Each field and field-section should be identified and marked on the map.
- All field and field-section descriptors should track those descriptors used to report soil test information, crops grown, harvest amounts, waste applications, etc., with a consistent system of field and field-section descriptors.
- All field maps should be identified with the Crop Year when they were prepared.
- All blue line permanent and temporary streams, wetlands, lakes and ponds should be marked.
- All roadside ditches, field ditches and other open field runoff conveyances should be marked, including the direction of flow and the connection such runoff conveyances have with blue line streams, wetlands, lakes and ponds.
- All field concentrated flow lines should be marked, together with any of downgradient water features which would carry such flow to waters of the U.S.

- All hydrologically critical areas and sensitive areas should be marked.
- All wellheads – residential, commercial and agricultural – should be marked on the required maps.
- All maps should indicate the county and township sections where the fields are located.
- All field maps should indicate the watershed and watershed boundaries in relation to fields/field-sections.
- All field-specific BMP areas should be marked on field/field-section maps.
- All high erosion risk fields should be indicated on maps.
- Where traveling irrigation equipment for waste applications is used, all design irrigation center lines should be marked and additional sub-maps should show the bands of application and overlap areas.
- All open field tile inlets, tile risers, grate inlets, junction boxes and tile outlets should be marked on required maps. The relationship between different tile system features should be made clear with a consistent pattern of tile system descriptors. Where tile inlets and collection systems appear on one map and the discharge is on another map, the relationship between common tile system elements should be annotated on each map.

The NMP Template should require owner-operator assessment and knowledge of field-specific surface water quality watershed concerns and groundwater quality issues in locations where land application of animal waste takes place. The NMP Template should be amended to indicate whether direct areawide or downstream watersheds do not meet water quality standards. The specific pollutant-related impairments should be listed, including excessive nutrients, sedimentation/turbidity, unacceptably low dissolved oxygen, excessive pathogens, etc. The NMP Template should show how field-specific conservation practices and land application restrictions will be used to address such watershed problems. For example, the NMP Template should consider phosphorus planning for all land application in watersheds showing impairments from excessive phosphorus nutrients. Similarly, where elevated nitrate concentrations occur in groundwater, the owner/operator should show in the NMP where restrictions on the amount and timing of nitrogen and other practices (such as cover crops) will be used to prevent additional degradation of groundwater quality.

4. Manure, Litter, Process Wastewater and Soil Testing

Subsection A.3 is not clear or flexible enough to ensure that consistent terminology is used for nutrient planning. Soil test phosphorus will virtually never be in the form of P_2O_5, but fertilizer and animal waste phosphorus will frequently reflect this form. As a result, trying to answer on the form of phosphorus across both soil tests and waste/fertilizer phosphorus content will be confusing.

As for nitrogen, the nutrient plan should always be clear that amounts of waste and fertilizer applied should reflect the total physically applied in the form spread and not on a "plant available" basis. It is important to consistently educate the agricultural sector on the magnitude of ammonia losses from application of animal wastes when such materials are surface applied and not immediately incorporated.

Maintenance of traditional "plant-available" approaches to ignoring ammonia agricultural process losses in reporting on waste applications should end for regulated CAFO operations.

Subsection B.2 and V-B.3 dealing with land application equipment leaks and spreading rate calibration should be moved to the Land Application Section, subsection V. EPA should revise the NMP Template to require the owner or operator to specifically name the type of soil test used (for example: Morgan, Mehlich III, Bray) and the name of the laboratory utilized for each soil test. If any soil test conversion systems are used (for example, converting Mehlich III values to Morgan equivalents), all soil chemistry analytical results used to make the conversions should also be disclosed in the NMP template along with the original test and the converted soil test result. For example, for converting Mehlich III results to Morgan equivalents, results for the original Mehlich III analyte is needed along with pH, calcium, magnesium and aluminum. At a minimum, the NMP should contain phosphorus soil test results on each field.

The NMP template should also require submittal of USDA soil survey maps for all fields showing soil descriptors. Information submitted with the NMP on soils should enable the reader to determine the flooding frequency, the drainage class of soils, the hydrological soil classification and any other soil management coding commonly in use in the state where the CAFO facility is located.

If a soil test fertilizer rate recommendation has been provided with the soil testing result and the owner/operator is relying on that recommendation for planning purposes, such recommendation should be provided for each field for which soil testing was conducted.

The NMP template should include an attachment of all field/field-section soil information with both Factor A from the RUSLE calculation for erosion losses and any factors listed and used to determine Factor A for expected soil losses per acre-year. Factor A information should indicate whether it is a single year calculation or a multi-year average rate.

The NMP Template soils section should indicate the crop rotation sequence for each field-field/section. If cover crops, residue and other methods are required to reach a tolerable soil erosion rate, such conservation practices should be listed for each field/field-section. NMP templates should further provide for accountability reporting on any such erosion control field practices. Erosion control on fields is an essential part of reducing particle-bound transport of phosphorus.

Each NMP should have a policy that addresses long term buildup of phosphorus in soils from animal waste applications. For example, for soils testing very high in phosphorus or beyond the recommended soil test phosphorus threshold, the NMP Template should indicate policies to restrict or cease application of both phosphorus-bearing animal waste and phosphorus-containing fertilizers.

5. Land Application and Application Rate Worksheets

The title of this section should be changed to "Land Application and Nutrient Management." The information in the NMP Template at this section is insufficient to ensure that the plan meets BMP requirements and to allow enforcement of Plan requirements. For each of the nutrient transport risk determination methods, the NMP Template should require that field/field-section specific information be provided. In the case of Phosphorus Index risk determination, for example, supporting attachments to the NMP Template should show the P Index determination for each field/field-section and for each segment of the year in which wastes are planned for application. Such supporting schedules should show all factors on which a state-specific P Index determination was made, including such factors as the

soil test P, distance to watercourses, soil drainage class and any other factor used in a state-specific P Index determination process. The entire process of determining the P or N index should be transparent from the field/field-section specific schedules provided as part of the NMP Template. The NMP Template language should make clear that nutrient transport risk must be a pre-land application determination made at the beginning of the Crop Year. Any underlying P_2O_5 of N application rates used for P and N index determination should be clearly visible in the field/field-section specific schedules (actual application rates must always be less than or equal to the rates of application planned in the P and N index determinations).

Where risk determination for P and N indexes depend on knowledge of the time of year of application in state-developed indexing schemes, the spreadsheet at subsection B.5 should be carried out as planned on a field by field basis rather than on a whole CAFO land application basis.

EPA should revise the NMP Template to include a statement of all plans and policies the operator will carry out (and will comply with) relating to field condition assessment immediately before application. Such policies would include such matters as:

- Assessment of past weather and soil moisture/soil saturation conditions immediately prior to land application;
- Review of expected precipitation conditions in the next 72 hours after the expected time of land application;
- Assessment of whether field tiles are presently discharging runoff during expected land application times;
- Soil assessment to avoid application on drought-cracked, desiccated soils which would allow immediate macropore transport to field tiles or transport of nutrients and pathogens below the root zone;
- Review of prohibition and/or regulation on winter spreading risk for a particular field and/or potential from melt-water transport of frozen animal waste during spring melt conditions;
- Assessment of whether field conditions will allow immediate or near immediate plowing for incorporation of surface applied waste; and
- Determination of the likelihood for problematic transport if surface applied waste is not incorporated and evaluation of nitrogen losses and phosphorus buildup consequences of such practices.

In subsection B.4, the "nutrient basis" column should be amended to add the descriptors NI and PI to N and P that are already there. NI and PI would be descriptors to describe application rates that are restricted to less than what would be allowed under nutrient planning because of N index and P index assumptions showing excessive and/or impermissible nutrient transport risk.

EPA should revise subsection B.4 to include the P Index, the N index, the P application rate assumed in calculating the P Index and the N application rate assumed in calculating the N index.

Where the P application and N application rates associated with P and N index calculation are less than the P and N rates from nutrient planning, the plan must show a more stringently limited allowed spreading rate.

Section V should also include a whole CAFO summary on total projected N losses and excessive P application for each Crop Year, on both an aggregate mass total and an average mass per acre basis. Total whole CAFO N losses would be shown as tons of N lost based on the sum of all N losses assumed from the field specific spreadsheet in the attached worksheet. Excessive P applications would similarly be derived as a total from all of the fields for which excessive P was applied during nitrogen planning in the land application rate worksheet.

Such a section is essential for the owner/operator to understand the consequences of their traditional animal waste disposal practices in the form of agricultural process loss nitrogen and non-agronomic excessive phosphorus waste disposal practices. CAFOs that surface apply animal waste without immediate incorporation can lose on the order of 50% of their applied nitrogen to atmospheric losses. This contributes to serious PM 2.5 and odor air pollution problems while increasing the amounts of excessively applied phosphorus to fields during nitrogen planning. CAFOs that purchase and use additional ammonia and other nitrogen fertilizers can benefit from the knowledge that such spreading practices will cost them considerable funds for replacing nitrogen losses to the atmosphere or to spreading during non-growing season and potential groundwater nitrogen pollution.

Requirements for documentation in subsection D.1 should also indicate whether applications were restricted to an amount less than would be applied on a P or N planning basis because of limitations from assumptions for N and P Index determination.

Requirements for documentation under subsection D.3 should include the following additional elements:

- The specific waste source applied (i.e. litter, solid animal waste, process wastewater, silage)
- The number of tons of applied wastes managed as solids and the number of kgals applied for wastes managed as liquids.
- The area of the field application in acres and the field-section to which it was applied, if the application was made only to a portion of a field.
- The total amount of nitrogen (on a TKN basis) and phosphorus (in equivalents of P_2O_5) applied should indicate clearly that this is on a physical applied basis – divorced from any loss or plant availability assumptions.
- Whether surface applied waste was incorporated and the date and method of any such incorporation.

Requirements for documentation under subsection D.5 should include assurance of periodic calibration of all waste spreading equipment according to NRCS Agricultural Waste Management Field Handbook methods.

Land Application Rate Worksheet

Worksheet section W(II)-A indicates that the crop nitrogen and phosphorus needs should be written and the yield goal be determined, but nothing in the spreadsheet shown shows how the relationship between yield goal and the N and P needs will be determined or otherwise describes the method of arriving at N and P needs. EPA should revise the NMP Template to ensure that a reviewer will see the basis of the relationship between yield goal and N/P needs, if any, and the additional basis for determining N/P needs upon a verifiable and justified method.

If N and P are determined on the basis of cropping removal rates of N and P, then this should be indicated in an additional "basis" spreadsheet column. If another basis is used, such as a soil test recommendation or Land Grant university recommended rate is used, this basis should be indicated.

Section W(II)-B indicates the method used to estimate realistic yield goals and W(II)-C discusses P and N "utilization" data. These sections should not allow the owner/operator to introduce the concept of "plant available" discounts and percentage reductions at this stage in the planning. All agricultural N and P process loss should be transparently stated in the planning process and based on well recognized and accepted technical approaches.

The spreadsheet at (W)III on summary field information is not sufficiently specific and detailed to allow transparent review of the basis and assumptions for RUSLE2 Factor A soil loss and the P index. This spreadsheet should be expanded and potentially separated into three spreadsheets – one for soil loss determination, another for P index determination and a final one for N index determination. Each spreadsheet should contain all input data and assnmptions to transparently justify the final result indicated for soil loss, P index and N index, according to state specific determination methods. The soil loss should indicate whether the calculation is for a single year or an average across the entire soil rotation. Alternatively, both maximum loss in any given year as well as the rotation average should be reported.

The P Index determination should also transparently indicate whether it is a worst case calculation based on the most adverse spreading practices taking place at the times of the year of greatest risk or whether it is an integrated annual risk determination with assumptions about spreading at certain scheduled times of the crop year. If it is the latter, the assumptions should be transparently stated in additional spreadsheet columns.

EPA should revise subsection IV of the land application rate worksheet to proscribe planning based on soil tests carried out in the smallest division of a field (a field-section). EPA should also revise the form to add the amount of acres for a field or field-section. Subsection B for nitrogen should be amended to add an additional spreadsheet for manure residual and legume residual determination. The residual N columns should either be expanded to include an additional column for process wastewater or it should be made clear that "manure" includes process wastewater that contains nitrogen.

The spreadsheet at subsection C addresses crop phosphorus needs. This spreadsheet should have an additional heading to show whether underlying columns contain phosphorus as P or as P_2O_5. Column 4 shows a heading of "plant available soil P." Additional column should be added showing any assumptions made to convert or transform previously shown soil test P results with discounts or phosphorus utilization efficiencies in order to derive "plant available soil P." In certain states, crop P needs depend solely on soil test P and the "plant available soil P" column should be eliminated from further consideration in such phosphorus planning.

In the N recommendation subsection, subsection D, column 4 should be carried over from column 6 of spreadsheet B and that column 2 is the sum of column 3 and column 4. An additional column should be added to the subsection D spreadsheet explaining the basis of the nitrogen loss column. An additional column should be added for pre-sidedress nitrogen soil testing results on a lb/acres basis and such results should be integrated into nitrogen planning. The heading of column 5 should clearly indicate that this should be TKN and not just N. Columns 6 and 7 should be expanded to 2 additional columns to increase clarity by separating animal waste managed as solids and measured by tons from animal waste managed as liquids or slurries and measured by gallons or kgals. EPA should also add two columns to subsection D showing:

- The expected crop removal rate of P_2O_5 from expected cropping under Nitrogen planning; and

- The actual rate of P_2O_5 application for the crop year implicit in applying nitrogen from animal waste at the gallon/tonnage rates under Nitrogen planning in the spreadsheet at subsection D and at the expected, indicated rates of nitrogen losses from animal waste and process wastewater application techniques.

The difference between the two, being the total rate of excess P_2O_5 applied under nitrogen planning and N loss assumptions for nitrogen planned fields.

For the phosphorus spreadsheet at subsection E, Columns 4 and 5 should be expanded to 2 additional columns to increase clarity by separating animal waste managed as solids and measured by tons from animal waste managed as liquids or slurries and measured by gallons or kgals.

6. Mortalities

For sites using composting or burial of mortalities, the NMP Template should show a site plan for such activities including provisions to ensure that leachate and runoff from such operations does not reach surface waters. Where leachate from such operations is collected for later land application, such a waste stream should be analyzed for nutrient content and for integration into the nutrient budgeting. The NMP Template should contain a reference to any applicable state law and/or state technical standard requirements in the management of mortality disposal by burial or composting. A line should be added at line 2 to identify the rendering facility used and the name of any separate transportation company used to remove carcasses from the livestock facility to the rendering facility.

7. Diversion of Clean Water

Both the site plan and the Section VII narrative should address the total catchment area of outdoor exercise areas, calf hutch areas, open barnyards, other areas where animals are kept and silage bunkers, which are subject to either direct or indirect flow from precipitation, roof water, adjacent lot runoff, etc. Catchment area should be depicted using both a site plan marking borders of the catchment area and a numerical total of the total catchment area. For existing sources, for each outdoor catchment area where precipitation is directly or indirectly allowed for co-mingling with deposited animal waste and/or silage leachate, the NMP Template should show the total amount of expected stormwater for a 25-year, 24-hour storm and the methods and the physical equipment, structures and conveyances by which such contaminated stormwater will be managed, treated, collected for discharge, discharged after

treatment, etc. For filter strips that discharge to surface waters, such discharge points should be clearly identified. The NMP Template should indicate whether all filter strips comply with state technical standard design elements and operational requirements.

The NMP Template site plan map and map of all catchment areas should show the relationship between the catchment area and any features of surface streams, ditches or other conveyances that have a potential to allow runoff to escape to waters of the United States.

C. Changes to CAFOs' Nutrient Management Plans

The proposal's scope of "substantial" changes is too narrow because it does not speak to the potential of pollutant runoff in pollutant-specific form. *See* 40 C.F.R. § 122.42(e)(5)(iv). A "substantial" change must also be considered a change that results in increased off-site loading to waters of the United States or hydrologically connected groundwater in the form of increased nutrients, ammonia, TKN, biological oxygen demand (5-day), total suspended solids, pathogens and other CAFO pollutants.

New use of filter strips with discharges to surface waters for process wastewater generated at the site, use of wetlands as treatment and/or use of underground tile fields for disposal of wastewater should be considered a substantial change that requires both permit authority and public review.

All NMPs should provide for planned increases in the number of animals during a 5 year individual permit, NOI, or Certificate of Coverage term. An NMP that contemplates a future increase in the number of animals must provide for a quantitative review of the consequences of such an increase and the consequences for both long-term and peak waste storage capability, compliance with discharge limitations at production areas and consequences for land application areas.

Any increase greater than a permit-term-cumulative 5% above animal population limits previously articulated in the NMP at the time of NMP approval should be considered a substantial change that must be subject to prior review by the permit granting authority and public review and subsequent approval.

Construction of new/expanded animal housing units, outdoor animal exercise areas and outdoor barnyards, waste storage, treatment and management units all should be deemed substantial changes that require both permitting agency and public review.

EPA's optimism about the degree to which the permit and NMP can be written to anticipate future management scenarios is probably unrealistic given the widely varying management conditions implicit in animal agriculture and related soil/crop systems. Considerable variability would be expected in a typical 5-year permit or certificate of coverage term. In addition, writing a NMP that encompasses future management scenarios would be problematic because neither the public, nor the permitting authority would know what practices any particular CAFO is implementing at a given time, making enforcement difficult. If EPA disagrees and includes this option in its revised rule, the CAFO must be required to document which alternative practices it is using from the "menu" of combinations in its NMP and the CAFO must be required to submit documentation to the permitting authority of which practices that it is implementing each time it switches practices. These additional provisions would assist the permitting authority and the public with knowing what practices a CAFO is implementing and also provide documentation that would make enforcement possible.

EPA's proposed list of "substantial" changes requiring both permit granting authority and public notice/public review fails to list soil-Phosphorus buildup beyond certain thresholds that would mandate changes in both animal waste land application rates and determination of phosphorus agronomic rates. *See* proposed 40 C.F.R. § 122.42(e)(5)(iv). Many states will have technical standards requiring alteration of phosphorus management and changes in determination of agronomic rates under the condition of excessive/very high soil test phosphorus.

EPA must ensure that the Clean Water Act NPDES permit shield does not provide CAFOs with authority to continue high rates of animal waste phosphorus application to lands that have crossed a state technical standard soil test phosphorus threshold. The occurrence of field-section soil tests crossing such threshold must be deemed as an event triggering one of two outcomes:

- The applicant must be required to amend its permit to include land application rates that are lower and in compliance with any state technical standard requirements governing high soil test phosphorus land application management.

- The Applicant must alter land application rates and generate new NMP provisions for land application commensurate with the changed field-section soil test phosphorus management requirements that are already articulated in the permit, either as a policy or as contingent nutrient budgets and land application limitations.

CAFOs must not be allowed to claim that existing land application rates for phosphorus that are part of an existing permit/NMP authorize the facility to continue applying at previous rates and still be in compliance with the permit after a soil test phosphorus threshold sentinel event has taken place indicating that soil phosphorus management must change.

EPA's proposed list of "substantial" changed conditions at 40 C.F.R. § 122.42(e)(5)(iv), as well as all individual CAFO permit, NOI, Certificate of Coverage "re-opener" language, should take notice of all watershed impaired water quality status changes (on the CWA Section 303(d) list) involving numerical and narrative nutrient, total suspended solids, ammonia, nitrate/nitrite, minimum dissolved oxygen and pathogen water quality standard violations, as well as narrative standard impaired status from a failure to maintain a balance population of aquatic flora and fauna or a failure of existing water quality to support valid in-stream uses of a particular stream segment or body of water.

In addition, if evidence has emerged from any party that a CAFO operation has caused impermissible water quality degradation of existing water quality or that continued operation of the facility jeopardizes outstanding national resource waters, such a condition should also be considered a substantial changed condition and grounds for permit/certificate of cover re-opener provisions.

D. Procedures for Public Participation Prior to Permit Coverage

The CWA requires EPA and state permitting authorities to provide the public with notice, an opportunity to comment, and to a hearing on CAFO nutrient management plans. 33 U.S.C. §§ 1342(a), 1342(b)(3), 1342(j); *Waterkeeper* at 503. We support providing the public with opportunities to participate in reviewing and commenting on nutrient management plans for CAFOs that would be

regulated by either a general or individual permit. All such public notice procedures should be required in regulations for binding state program element approval. However, as we articulated above, whether particular elements in any CAFO's NMP should be a term of its NPDES permit is not a question that should be decided on an ad hoc basis. Rather, all elements of a CAFO's NMP must be included in its NPDES permit. In addition, the revised rule should include a provision that defines all NMP elements that relate to BMPs and recordkeeping/reporting to ensure compliance with such BMPs as "effluent data," which is public information pursuant to CWA § 308(b).

Mandatory public notice and public information requirements for individual CAFO permits, Certificates of Coverage and permit/certificate amendments in both existing and the proposed regulations are not sufficient to ensure and encourage public participation, which is a principle goal of the Clean Water Act. EPA should amend its federal permit program elements and regulations for minimum state program elements to require the following additional measures of public noticing of draft CAFO individual permit and general permit Notices of Intent ("NOI") or Certificates of Coverage:

Applicants must be placed under a burden of certifying, as part of an administratively complete application, that they have carried out the following public notice and information measures:

- Applicants must certify that they have notified all entities shown below that they have applied for an individual CAFO permit, NOI or Certificate of Coverage under a general permit or permit/certificate amendment to the entities listed below;

- Applicants must be required to place a sign visible to the public from a public road at or near the entrance to property at each location where a production area will be located that notifies the public that a complete application has been submitted to the permitting authority;[23]

- Applicants must be required to place a complete copy of the draft individual CAFO permit, NOI or Certificate of Coverage, permit/certificate amendment, the application for the permit/certificate and the required nutrient management plan either in the nearest public library or nearest township or municipal government office at the time of the public notice. The revised rule must require all public notices to indicate the presence of these materials at such locations.

- Applicants should be required to show that they have transmitted a copy of the official public notice with the pending public comment period deadline indicated not later than 2 days after publication of the state public notice to all of the following entities:

    - Property owners adjacent to both production areas and land application areas;

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[23] Signs should be similar in format to the following: http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=30&pt=1&ch=39&rl=604. *See* Exhibit 17.

- The principle responsible officer/elected official and the responsible planning official of the township and county in which the facility is located and the nearest incorporated municipality;
- The principle county/intercounty health department officer in the geographic jurisdiction where any production area or land application fields would be located;
- The principle responsible officer of any municipal and/or private drinking water system with surface water intakes within 30 miles of a production area or land application area downstream in the respective watershed where such production area and land application area is located;
- All persons on a list of interested parties provided and maintained by the permitting authority.

In addition, the permitting authority should notify the public via the permitting authority's website and an email notice that would be sent to interested members of the public.

We object to EPA's proposal to let the permitting authority decide what an appropriate period of time would be for public review of the NOI and proposed permit conditions incorporating the NMP. EPA must select a minimum timeframe to ensure that the public has ample time to review a CAFO's NMP and to provide meaningful comments. The minimum public notice period required in 40 C.F.R. § 124.10 is 30 days, which is an appropriate minimum period of time for such review to take place. Alternative options for fixed time frames of less than 30 days are insufficient to afford the public time to meaningfully participate in the process, particularly for large facilities with large numbers of animals and numerous land application fields. Multiple production area facilities with thousands of acres of land application fields generally have nutrient management plans running to several hundreds of text pages, maps and extensive data. Any period less than 30 days will not allow meaningful public review of such proposals. For public notice on state general permits, CAFO permitting rules and any permit by rule approaches for general applicability, a minimum comment period of 60 days must be provided.

EPA should strike its proposed provision at 40 C.F.R. § 122.42(e)(5)(v) allowing virtually any change to be made by a CAFO owner/operator in an NMP, apparently including all substantial changes listed at 40 C.F.R. § 122.42(e)(5)(iv), as long as EPA makes a decision that the changes "will not result in increased runoff of manure, litter, or process wastewater from the CAFO." Given the extreme deference provided to state technical standards to set standards for land application, the failure to have a clear process for determining the likelihood of "increased runoff" will not ensure water quality protection. In general, as drafted, the proposed provision is problematic because it allows a facility to circumvent nearly all public notice and public participation for facilities that could have significant impacts on communities.

At a minimum, this provision simply should not apply to new and expanding CAFOs. However, this provision could be applied in the case of NMP changes that are remedial actions intended to solve a pre-existing problem, provided there is high confidence by the permitting authority that the problem will

be remedied with a single step. But, even under such circumstances this may constitute an evasion of other permit enforcement and consent order requirements that would allow the facility to inappropriately escape penalties for non-compliance. Furthermore, where a decision about no increase in runoff from a planned change benefiting from the 180 day provision depends on temporary over-utilization of a facility's excess waste storage capability, such reliance should be precluded where the ultimate decision leads to greater populations of animals being brought onsite that were not previously envisioned in a prior NMP/permit approval.

IV. EPA'S PROPOSED EXPLANATION OF THE AVAILABILITY OF WQBELS VIOLATES THE CWA AND IS ARBITRARY AND CAPRICIOUS.

EPA's proposed explanation of the availability of Water Quality Based Effluent Limitations ("WQBELs") goes beyond the Second Circuit's request for clarification of the availability of WQBELs to address CAFO discharges in the way it proposed to limit the scope and applicability of WQBELs to CAFOs. *See Waterkeeper*, 399 F.3d at 523-24. Instead, EPA's "clarification" purports to further limit the authority of state permit writers to rely on WQBELs to remedy potential and continuing violations of water quality standards attributable to CAFO discharges. The increasing erosion of state WQBEL authority directly contradicts the express mandate of the Clean Water Act that NPDES permits contain WQBELs whenever technology-based limitations are not sufficient to achieve compliance with water quality standards. CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C). Indeed, the Act prohibits state permitting agencies, and EPA, from issuing NPDES permits that cannot ensure compliance with water quality standards. 40 C.F.R. §§ 122.4(a), (d). EPA's attempt to address the deficiencies identified by the Second Circuit creates a structure that does not satisfactorily meet this legal mandate.

In the Proposed Revised Rule, EPA attempts to set forth two different scenarios where it believes that WQBELs may apply to CAFOs, depending upon the source of CAFO discharges. First, WQBELs are available as more stringent water quality-based controls on some, but not all, discharges from CAFO production areas. Second, WQBELs may be available in response to some non-agricultural stormwater discharges from land application areas. The net result of EPA's proposal is to substantially limit the availability of WQBELs as an allowable option for state permit writers faced with real and potential water quality impairments caused by CAFO activities.

A. Background: Frequency, Sources and Impacts of CAFO Discharges on Water Quality

According to many sources, the primary pathway for CAFO pollutants to local waters begins on CAFO land application areas.[24] Runoff of over-applied manure, direct discharges from ditches and tile drains, and infiltration of pollutants into shallow groundwater are among the causes of surface water contamination tied to land application areas.[25] Together, these discharges have the potential to cause both localized and widespread violations of water quality standards.

[24] *See, e.g.*, Daniel, T.C., et al., *Edge of Field losses of Surface-Applied Animal Manure*, Animal Waste and the Land-Water Interface. (Kenneth Steel ed. 1995).

[25] *See* Woodside, Michael D. and Benjamin R. Simerl, "Land Use and Nutrient Concentrations and Yields in Selected Streams in the Albemarle-Pamlico Drainage Basin, North Carolina and Virginia, USGS Open File Report 95-457, at *4,

Existing technical standards in many states do not account for intrusion into tile drains from soil macropore transport below the root zone and entrainment of animal waste into tile drain risers and open grate inlets. Soil macropores include wormholes, old root pathways, drought-related soil dessication cracks, etc.[26] Application of animal waste to fields while tiles are running frequently allows uncontrolled and unmonitored entrainment of animal waste into field effluents through such field tile.[27] Mere observations of field tile effluents without quantitative measurement of effluents cannot ensure efficacious control of animal waste entrained in field tile discharges.

Considerable control of field tile discharges could be achieved by prohibiting waste applications during times when field tiles are running with drainage water, limiting maximum liquid waste applications to less than 6000 gallons per acre per day and pre-plowing-disturbance of soils to disrupt soil macropore transport before liquid CAFO wastes are applied. However, the EPA regulations do not require these measures.[28]

In North Carolina, nutrient and fecal coliform pollution attributed to industrial swine operations has resulted in the addition of numerous stream and river stretches to the state's 303(d) list. For instance, a portion of the Haw River is impaired by excessive fecal coliform attributed to agriculture and urban runoff. *See* North Carolina Water Quality Assessment and Impaired Waters List (2002 Integrated 305(b) and 303(d) Report), Final (February 2003), Surface Waters Impaired Waters List at 4.[29] Little Contentnea Creek is impaired by low dissolved oxygen attributable to, among other sources, "intensive animal feeding operations." *Id.* at 45. The Trent River suffers from the same impairment, again due to "intensive animal feeding operations." *Id.* at 46. Numerous other river and creek portions of the Neuse River Basin have been listed as impaired, some by fecal coliform, and other pollutants attributed to agricultural, including intensive animal feeding operations, and other sources. *See id.* at 42-52.

EPA Region Six has conducted some of the most telling analysis of the water quality impacts associated with CAFO production area discharges, primarily lagoon overflows associated with chronic or severe rainfall. Many of the CAFOs analyzed by Region Six were constructed in compliance with the then, and current ELG, which allows discharges from production areas designed, operated and maintained to meet the 25-year, 24-hour storm standard. The regulations place no limit on the number of discharges from an individual facility, nor on the pollutant loadings in these overflows.

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attached at Exhibit 18; Daniel, T.C., et al., "Effect of Extractable Soil Surface Phosphorus on Runoff Water Quality," Transactions of the ASAE 36(4), 1079-1085 (1993), at 1079 *et seq.*, attached at Exhibit 19.

[26] *See* Comis, Don, *Smoking Out Worms*, Agricultural Research, Sept. 2005, at 10-12, attached at Exhibit 20.

[27] *See, e.g.*, Geohring, Larry D. , et al., *Preferential Flow of Liquid Manure to Subsurface Drains*, Drainage in the 21st Century: Food Production and the Environment, Proceedings of the Seventh Annual International Drainage Symposium, March 8-10, 1998, at 7, attached at Exhibit 21; Cook, M.J. and J.L. Baker, *Bacteria and Nutrient Transport to Tile Lines Shortly after Application of Large Volumes of Liquid Swine Manure*, Transactions of the ASAE, Vol. 44(3): 495–503 (2001).

[28] *See* Harrigan, Tim, *Manure Application on Tile-Drained Cropland*, Michigan Dairy Review, January 2005 at10-12, attached at Exhibit 22.

[29] Available at http://h2o.enr.state.nc.us/tmdl/Docs_303/2002/2002%20Integrated%20Rept.pdf

EPA Region Six calculated that, based on historical weather data, overflows from CAFOs designed to meet the ELG would occur once in some areas once every 2 years, more frequently in other areas. *See* Memorandum, Kenneth Huffman to Jack Ferguson, *Estimated Frequency of CAFO Holding Pond Overflows Caused by Chronic Rain Events,* April 8, 2003, attached at Exhibit 23. The Region staff's analysis of overflow discharges in Region 6 revealed that these regularly expected events have a tremendously detrimental impact on water quality. BOD_5, ammonia nitrogen and fecal coliform concentrations in these overflows exceeded state water quality standards in Oklahoma and New Mexico by several orders of magnitude. *See* Memorandum, Kenneth Huffman to Jack Ferguson, *Water Quality Violations Caused by Wet Weather CAFO Lagoon Overflows*, July 16, 2002, attached at Exhibit 23.

B. Competing Tensions: Agricultural Stormwater and Clean Water Act Water Quality Mandates and Prohibitions.

The Clean Water Act and its implementing regulations explicitly prohibit the issuance of NPDES permits that allow discharges that violate applicable water quality standards. *See* CWA § 301(b)(1). Specifically, state permitting agencies are prohibited from issuing a permit "when the conditions of the permit do not provide for compliance with the applicable requirements of CWA, or regulations promulgated under CWA," or "when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states." 40 C.F.R. §§ 122.4(a), (d).

The CWA requires state permitting agencies to incorporate WQBELs into NPDES permits whenever technology-based limitations are not sufficient to achieve compliance with water quality standards. CWA § 301(b)(1)(C); 40 C.F.R. § 122.44(d)(1). Indeed, NPDES permits must include WQBELs if the permitting authority concludes that technology-based effluent limitations, the minimum level of control imposed in a permit, are insufficient to achieve compliance with water quality standards. *Id.*

The Second Circuit directed EPA to "explain whether or not, and why, WQBELs are needed to assure that CAFO discharges will not 'interfere with the attainment or maintenance of [water quality standards].'" *Waterkeeper*, 399 F.3d at 523. The court, however, recognized that WQBELs may not be available to address agricultural stormwater discharges; obviously, the court's directive must be read within the context of its approval of EPA's agricultural stormwater definition. *See id.* at 522.

In approving of EPA's agricultural stormwater definition, the court maintained that "the Rule holds CAFOs liable for most land application area discharges," but found that "where a CAFO has taken steps to ensure appropriate agricultural utilization of the nutrients in manure, litter and process wastewater, it should not be held accountable for any discharge that is primarily the result of 'precipitation.'" *Waterkeeper*, 399 F.3d at 508-09.

The net result of this holding is a recognition that a limited subset of CAFO land application area discharges, those that are "primarily the result of precipitation," shall not be subject to NPDES controls, including the ELGs relevant to particular CAFO categories. EPA's proposed response improperly expands on the court's relatively narrow understanding of the nature of agricultural stormwater discharges and the availability of WQBELs to address remaining land application area discharges. This over-reaching is most fundamentally apparent in the statement in EPA's preamble to the Proposed Revised Rule that "in most instances, a CAFO's requirement to meet technology-based permit limits

that require manure to be applied at appropriate agricultural rates should eliminate all or most dry weather discharges." 71 Fed. Reg. 37758. EPA's failure to recognize the frequent, in many cases regular, discharges from land application area tile drains, ditches, swales, and water control devices fosters an incorrect impression that these discharges are somehow covered by the agricultural stormwater exemption and not subject to WQBELs. Nothing could be further from the court's directives and the CWA's insistence that permitted discharges either be prohibited altogether or subject to WQBELs when they reach impaired waters or when they have the potential to violate water quality standards. CWA § 301(b)(1); 40 C.F.R. §§ 122.4(a), (d).

Fundamentally, EPA has not clarified how it or delegated state agencies will resolve this essential charge of the Act within the context of CAFO NPDES permits that are chiefly built around NMPs. This is especially true given the exclusion of precipitation-related discharges from land application areas covered by such NMPs. Under EPA's proposal, by operation of its current definition of agricultural stormwater, WQBELs are unavailable to address the water quality impacts of these statutorily defined non-point source discharges. 71 Fed. Reg. 37758. Because NMPs form the core permit measures intended to address discharges of manure and wastewater discharges from land application (as well as reflecting the technology-based ELGs), EPA's proposal deprives state permit writers of the authority to implement any more stringent control measures intended to ensure that land application area discharges do not cause or contribute to violations of water quality standards, in compliance with 40 C.F.R. § 122.44(d)(1).[30] In the context of CAFO permitting, the ELG that offends the Act by providing insufficient compliance with water quality standards is the very same device that takes the offending discharges out of NPDES coverage altogether.

C. Nutrient Management Plans Cannot Assure Compliance with Water Quality Standards.

Under EPA's 2003 Rule, CAFOs are required to develop and implement NMPs that are tied to "appropriate agricultural utilization," derived with reference to state technical standards for the agronomic uptake of nutrients, prioritizing nutrient removal through maximized crop yield etc. 40 C.F.R. § 412.4(c). In practice, these state technical standards are often based upon or derived from NRCS Conservation Practice Standards such as NRCS CPS 590 or 312, and rates published by the agricultural departments at land grant universities. *See, e.g.*, New York State Department of Environmental Conservation, General Permit (GP-04-02, State Pollutant Discharge Elimination System (SPDES) General Permit for Concentrated Animal Feeding Operations (CAFOs), at 11.[31] In general, these standards are focused on maximizing crop yield with the nutrient potential contained in applied manure. At best they have a secondary relationship to ensuring that CAFO land application does not cause discharges adverse to water quality standards. NRCS CPS 590, for example, contains "Additional Criteria to Minimize Agricultural Non-point Source Pollution of Surface and Ground Water Resource." While these criteria purport to respond to manure application in "areas with an identified or designated

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[30] Despite the residual state authority enshrined in CWA § 510, in 22 states, the permitting agency is prohibited by state law or regulation from issuing NPDES permits or regulations that impose more stringent requirements than those adopted by EPA.

[31] Available at http://www.dec.state.ny.us/website/dow/gp0402permit.pdf.

nutrient-related water quality impairment," the response indicated is tied both to an assessment of phosphorus or other nutrient loss, with the potential that recommended practices for limiting this loss may be implemented. *See* NRCS CPS 590, at page 4, attached at Exhibit 24. No response is indicated when water quality impairments are the result of contamination by other CAFO pollutants such as fecal coliform. An NMP based on CPS 590 comprehensively falls far short of the CWA's mandate to "ensure compliance with the applicable water quality requirements of all affected States." 40 C.F.R. §122.4(c).

Moreover, there is no mechanism either in rule or in practice whereby EPA approves state technical standards and conservation practices prior to their implementation and their use in permitting programs and in CAFO owner/operator nutrient management plans. There is no evidence in the administrative records for either the 2003 Final Rule or the Proposed Rule that EPA has reviewed state technical standards, conservation practices and Land Grant University recommendations presently in place. In the absence of such review, it is arbitrary and capricious for EPA to find that implementation of such state standards and practices will "ensure appropriate agricultural utilization."

EPA refused to promulgate any technical standards for nutrient management in either the 2003 Final Rule or the Proposed Revised Rule. In the absence of EPA issued national standards, and as a result of EPA's deference to state developed technical standards, there is no effective nationally uniform definition of the term to "ensure appropriate agricultural utilization." Nothing in place in EPA's national CAFO regulations will guarantee, with the degree of certainty suggested by the word "ensure," that such agricultural utilization will actually take place and is, in fact, mandated in nationally uniform EPA standards.

Absent such national EPA regulations governing nutrient management and the concept of "ensure[ing] appropriate agricultural utilization," there can be no agreed upon method for actually measuring the assured level of "ensure[ing]" the achievement of "appropriate agricultural utilization" or measuring these concepts by either quantitative and qualitative methods. EPA cannot assure agreement or shared consensus on the development of standards that assure "appropriate agricultural utilization" among state environmental and agricultural agencies, CAFO owners/operators, their employees and consultants, Land Grant University crop/soil/animal science departments that recommend waste and fertilizer application rates, soil test laboratories, agricultural extension agents, NMP planners, USDA and state agriculture departments, or the other individuals whose participation is required by the current CAFO regulatory scheme.[32]

There are considerable variations between the states' definition of agronomic uptake rates for manure nutrients and how such rates are derived. While virtually all Land Grant Universities publish recommended fertilizer rates, such rates will mostly be determined through field trials to attain a particular crop production rate along with inherent process nutrient losses. The proclivity of the actors involved will be for Land Grant University crop and soil science departments to term their fertilizer

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[32] For instance, a recent study demonstrates that farmers do not consistently understand the manure application rates of typical farm equipment, and often rely on visual estimates that could result in application of livestock waste at twice the desired rate. *See* K.M. Manel and J.D. Slates, *Farmer Estimates of Manure Application Rates*, Ninth International Animal, Agricultural and Food Processing Wastes Proceedings of the 12-15 October 2003 Symposium (Research Triangle Park, North Carolina USA),at 200-203, attached at Exhibit 25.

recommendations as agronomic rates. There isn't any agreement among states that the crop nutrient removal rate....the actual uptake of nutrients by crops at a certain field production level that can be measured by nutrients found in the plant products...is the "agronomic rate."

Two other problems plague NMPs developed to meet these diverse state technical standards. First, "appropriate agricultural utilization" cannot be achieved if any significant percentage of applied nutrients are escaping the root zone, either from runoff, evaporation to air pollution, from transport away from the field in field tile discharges or from migration in the soil to points below the root zone. Secondly, as evidenced in the language of NRC CPS 590, the language used to guide the development of these NMPs often fails to establish mandatory requirements, instead expressing desired outcomes in terms of "should" or other discretionary terms. As a result, the provisions of an NMP constructed around such standards become difficult, if not impossible, to enforce, depriving EPA, state agencies, and citizens of the ability to assure compliance with water quality standards.

EPA has provided no means of measuring either the level of certainty of "ensuring" this concept or the degree of "appropriate agricultural utilization." "Ensuring appropriate agricultural utilization" cannot be assured merely by unverified and unsupported owner/operator statements. "Ensuring appropriate agricultural utilization" must be verifiable on the basis of the simultaneous high percentage maintenance in the root zone of N, P_2O_5 and K and minimal losses to locations outside of the root zone. Nothing in the Proposed Revised Rule provides any real basis for assuring the achievement of "ensuring appropriate agricultural utilization."

D. <u>WQBELs and New Source Swine, Veal and Poultry Operations</u>

EPA's proposal "clarifies" that WQBELs are allowed when state permit writers seek to address discharges from CAFO production areas, except in the case of discharges from new source swine, veal, and poultry CAFOs designed, constructed, and operated to comply with the NSPS ELG at 40 C.F.R. § 412.46(a). 71 Fed. Reg. 37758. In these instances, EPA maintains that because these facilities are "zero discharge" operations, there are no discharges that can be redressed through the imposition of additional, water quality-based discharge limitations. EPA's position is thoroughly undermined by the agency's admission, in the Preamble and in its public meeting presentations, that despite the intended zero discharge effluent limitation attached to these facilities, discharges may in fact occur, and may, in fact, be covered (or excused) by an expanded upset/bypass provision. "If a facility has complied with all of the specified site-specific design, construction, operation, and maintenance components of such a system…it would be deemed to be in compliance with the no discharge requirement even in the event of an unanticipated discharge." 71 Fed. Reg. 37760. The oxymoron here - zero-discharge facilities that are allowed to actually discharge - undercuts EPA's attempt to deny state permit writers the ability to implement WQBELs to address the water quality impacts of these anticipated discharges. As a result, EPA's withdrawal of WQBEL authority for these discharges is arbitrary and capricious.

State permitting agencies may choose to respond to these discharges either through structural and operational changes expressed as permit effluent limitations or through the imposition of WQBELs. EPA should not foreclose the latter option on the false premise that facilities intended to meet the zero-discharge will actually do so.

E. Recommendation

EPA's proposal represents an impermissible retreat from the CWA's mandate that all NPDES permits, including those issued to CAFOs, incorporate more stringent WQBELs whenever necessary to assure compliance with water quality standards.

EPA must take affirmative steps to ensure that state, and federal, permit writers retain their significant authority to implement WQBELs whenever a CAFO proposes to discharge to a water body that is not meeting water quality standards, when the potential exists for the CAFO discharge to violate water quality standards, or when violations of these standards can be attributed to the land application of manure at a CAFO, even when the source claims that its only discharge is "agricultural stormwater." Specifically, EPA should encourage states to impose water quality-based conditions as a matter of state law, and should explicitly clarify that state permitting agencies must consider water quality standards when establishing state technical standards that will determine what land application practices will qualify to consider polluted runoff to be "agricultural stormwater."

State permit writers should also be encouraged to utilize state law for WQBELs implemented through state technical standards. Local statutes and regulations often provide the immediate authority for state-issued NPDES permits, and expand on the baseline authority and requirements issued by US EPA. While EPA may not properly require permit writers to adopt limitations based on state law, it may not properly deny the availability of such limitations under CWA § 510. EPA's proposal implicitly suggests that all WQBELs are unavailable for land application area discharges, when, in fact, state laws in many instances provide a broader basis for the imposition of these limitations. EPA must revise its final preamble language to reflect the availability, and potential necessity, of WQBELs grounded in state law.

V. EPA'S PROPOSAL FOR NEW SOURCE SWINE POULTRY, AND VEAL OPERATIONS IS ARBITRARY AND CAPRICIOUS BECAUSE IT WOULD CREATE AN EXCEPTION TO THE ZERO DISCHARGE STANDARD.

The Clean Water Act explicitly provides EPA with the authority to issue "zero discharge" effluent limitations and permits to prevent discharges of pollutants and to effectuate the "zero discharge" directives of CWA §§ 301(b)(2)(A) and 306(a)(1), 33 U.S.C. §§ 1311(b)(2)(A) and 1316(a)(1). CWA § 306(a)(1) requires EPA to set standards of performance for new sources "which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable…including, where practicable, a standard permitting no discharge of pollutants." *Id.* (emphasis added.) These standards must be set for new facilities "from which there is or may be the discharge of pollutants" CWA § 306(a)(3) (emphasis added.) This section of the Act specifically applies to "feedlots," or CAFOs. CWA § 306(b)(1)(A). All new poultry, swine, and veal CAFOs must apply for NPDES permits in order to implement the zero discharge effluent limitations contained in 40 C.F.R. § 412.46. Moreover, all new poultry, swine, and veal CAFOs must be required to meet the zero discharge standard, without exception.

We are concerned that EPA's latest compliance alternative proposal for new source swine, poultry, and veal operations is yet another attempt to create an exception from the zero discharge

standard. EPA's proposal would allow discharges as long as a facility complies with construction, operation, and maintenance best management practices ("BMPs") developed for the facility. Because new sources must be held to higher standards than existing sources, not to mention EPA's indication that an upset or bypass defense may be available for a new source to escape liability for discharges caused by extreme weather events, the proposal to design site-specific BMPs for open storage structures must be dropped from the final rule.

We oppose EPA's attempt to create a means for new sources to evade the zero discharge standard by substituting a modeling exercise and ongoing compliance with the assumptions used for such a modeling exercise as a de facto final determination of design compliance requirements for no discharge of manure, litter or process wastewater from the production area, even in the face of an actual discharge. *See* 71 Fed. Reg. 37760.

EPA's proposal to afford operators of new sources such a shield against discharges appears to be absolute and is reminiscent of the metaphor of a physician who claims that the treatment of his patient was successful, but the patient died. Indeed, as proposed, mere compliance with the BMPs would shield a new source from liability for discharges from the production area, even absent any precipitation on the day the discharge occurs.

EPA's approach allowing an absolute defense for virtually any discharge from a production area waste storage facility merely on the basis of a CAFO operators compliance with the design, operation and maintenance assumptions made in the modeling exercise is arbitrary, capricious, and contrary to Congress' instruction to require new sources to meet higher standards than existing sources. Indeed, this approach suffers the same problems as the 100-year, 24-hour compliance standard alternative that was rejected by the Second Circuit in *Waterkeeper* because the BMPs contemplated are not the equivalent of zero discharge. This approach is an attempt to define a modeling exercise as a pro forma substitute to meeting actual effluent standards in practice. It is an attempt to substitute a non-control practice of prior modeling for maintaining operational responsibility and judgement in the present in response to potentially changed conditions when a CAFO operator operates their waste storage pond at a high proportion of its overall capacity in the face of potentially unusual weather conditions. The shield may even have the potential of rescuing CAFO operators from enforcement following catastrophic failure of wastewater storage ponds or unanticipated soil infiltration/liner failure and groundwater transport and subsequent surface water contamination, particularly for waste storage ponds built directly adjacent to stream surface waters and site drains (a common occurrence).

In addition, neither of the two papers by Moffit cited (DCN 1-01233 and DCN 1-01224) by EPA as a basis for the proposed modeling demonstration to develop alternative BMPs addresses advanced CAFO waste treatment technology. The model merely addresses traditional CAFO waste pond/production area/land spreading area/weather climate relationships. The model does not account for process malfunction and excessive precipitation-related throughputs in an advanced waste treatment system and the disruption of such waste treatment systems. The preamble to the Proposed Revised Rule asserts that such modeling would address advanced waste treatment systems when it does not. No aspect of the two Moffitt papers addresses advanced CAFO waste treatment systems. As a result, any application of the Moffitt paper concepts as embodied in the proposed rule language at 40 C.F.R. § 412.46(a)(1) to advanced treatment systems and exceptions to their operation must be rejected. Even the

July 2003 Moffitt paper recognizes that the SPAW model is not suitable for "field level use." *See* Moffit at DCN 1-01233, at 3-4. Thus, EPA should not allow use of such modeling to design alternatives to the no discharge standard.

The AWM model requires 30 years of monthly precipitation data and the SPAW model requires 30 years of daily precipitation data. However, there are many locations in the United States where such precipitation data are not available and the use of other nearby precipitation data as a substitute will introduce a level of error that may be problematic. EPA never evaluated the practical consequences of the precipitation data availability issue and potential error from data substitutions on the error span of the modeling exercise.

The "demonstration" in the Moffit paper indicated:

> SPAW calculated daily rainfall runoff and pond volumes (depths) for each day of the 30 year period. The assumption was made that the pond would be operated near empty during the periods when effluent could be safely removed. This was a simplifying assumption, but may not reflect reality at some of the locations evaluated.

Moffit at DCN 1-01233, p. 5. This is thus an example of the error that would be introduced by actual practices that would affect model assumption compliance.

Nothing in the two Moffit papers actually carried out the process described by EPA in the proposed regulation at 40 C.F.R. § 412.46(a)(1) for the facilities described in the Moffit Papers. The model validation study in the 2004 Moffitt paper was only carried out for 3.5 years. Nothing in either Moffitt paper carried out a 100-year SPAW evaluation as contemplated in the proposal.

EPA cited some additional case studies where a two week pump down of waste storage lagoons was required in the simulation. However, rapid application of wastes to lands in such a short time may be incompatible with certain land application waste pollution prevention goals in many cases.

We also question the enforceability of the proposed alternative BMPs when a new source has a discharge, particularly considering the fact that OMB deleted the language in the proposal stating that a new source CAFO seeking alternative BMPs would be required to obtain an individual permit. Certainly, the only means to enforce alternative BMPs that are tailored for a specific facility is to require the facility to obtain an individual permit that includes record keeping and monitoring to demonstrate compliance with the BMPs.

The Moffitt paper further emphasizes that quick contingent action is necessary in many cases to avoid pond overflows even assuming use of AWM-SPAW modeling:

> The SPAW analysis points out the need for contingency planning in the CNMP process. While the AWM designed waste storage ponds provide adequate runoff storage in the majority of years, there will be those occasions where pond levels

> will need to be lowered in less than ideal conditions. In addition to a strategic nutrient management plan that identifies intended nutrient use which matches designed storage periods, there will need to be a tactical management plan that identifies operations for wastewater application during what would normally be non-application periods. Managing the unusual and the unpredicted events will be key to good nutrient management planning.

2003 Moffitt paper at 9.

However, EPA's proposed revisions to the NSPS for swine, poultry, and veal could allow an operator to claim that compliance with the modeled BMPs is compliance with the NSPS, notwithstanding a discharging production area pond and the failure of the operator to exercise short term management due diligence for unanticipated pumping needs.

VI. EPA'S TREATMENT OF BCT FOR PATHOGENS DOES NOT COMPLY WITH THE SECOND CIRCUIT MANDATE, THE CLEAN WATER ACT OR THE ADMINISTRATIVE PROCEDURE ACT.

Manure contains pathogens. Humans may contract a number of diseases, including salmonellosis, cryptosporidiosis, and giardiasis, from contact with manure. Symptoms range from headaches to abdominal gas and pain, to fever, to even death. The very old, the very young, people with compromised immune systems, and pregnant women are most susceptible to disease from manure pathogens.

Humans are most often exposed to manure pathogens via water—from both contaminated recreational waters and from contaminated drinking water supplies. When manure is applied to land just before a rainfall event, under saturated conditions, or over-applied it can run off, contaminating surface waters and wells. Overflowing manure storage pits, basins, channels, and ponds can contaminate surface waters and wells. Faulty storage facilities may also jeopardize water quality if manure percolates to groundwater or aquifers. Inappropriate manure storage, transport, and treatment put all waters at risk of contamination. The threats to human health from pathogens in animal waste underscore the need for EPA to develop a technology-based standard to reduce pathogens in CAFO wastes and our waters.

The comments below set forth our concerns regarding EPA's failure to follow fully the legal requirements in establishing the pathogen rule. These comments outline numerous ways that the pathogen rule does not meet the requirements of the *Waterkeeper* decision, the Clean Water Act or the Administrative Procedure Act ("APA"). In short, the EPA's determination of BCT is arbitrary and capricious, an abuse of discretion and/or not in accordance with law.

A. <u>CWA § 304's BCT Requirement and the Second Circuit Mandate</u>

In establishing BCT effluent limitations, EPA must consider:

> . . . the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived, and the

> comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources . . . .

CWA § 304(b)(4)(B).

The Act also specifies that in establishing BCT effluent limitations, consideration be given to the age of equipment, production processes, energy requirements, and other appropriate factors. *Id.*

In *Waterkeeper*, the court held:

> The Environmental Petitioners next claim that the EPA's failure to adopt any requirements specifically designed to reduce pathogen discharges violates the Clean Water Act and is otherwise arbitrary and capricious in violation of the Administrative Procedure Act. We agree with the Environmental Petitioners in part. . . .
> In our view, however, the CAFO Rule violates the Clean Water Act because the EPA has not made an affirmative finding that the BCT-based ELGs adopted in the CAFO Rule do *in fact* represent the best conventional pollutant control technology for reducing pathogens. The EPA may well determine, within the bounds of its discretion, that the ELGs otherwise adopted by the CAFO Rule do in fact represent the best conventional pollutant control technology for reducing pathogens. It may well be the case, to put it slightly differently, that the EPA determines, after considering all the relevant factors, that the ELGs otherwise adopted by the CAFO Rule will directly-not just incidentally-reduce pathogens and do so better than any other pollutant control technology. But we cannot, consistent with the Act, allow the EPA to avoid imposing any other pollutant control technology without an express finding in this regard. The Act requires that the EPA select the best pollutant control technology for reducing pathogens, and we must enforce that requirement. . . .
> Accordingly, we grant the petition to the extent that Environmental Petitioners challenge the EPA's failure to impose ELGs specifically designed to reduce pathogens in CAFO discharges as a violation of the Clean Water Act.

Waterkeeper, 399 F.3d at 518-19 (fn. omitted, italics in original, underline added).

Thus, the court ordered EPA to establish BCT effluent limitations for pathogens. EPA claims to have done this in the instant rulemaking. However, as set forth below, EPA applied an invalid test for BCT or the test was not applied properly. EPA's finding that the BPT scheme it developed for CAFOs also constituted *best* conventional pollutant control technology, and EPA's rejection of other pathogen controls, were arbitrary and capricious and contrary to the evidence before the agency.[33]

[33] The Second Circuit noted that EPA admits that pathogens have adverse environmental effects. *Waterkeeper*, 399 F.3d at 518-19. The adverse effects of pathogens, and in particular fecal coliform, are set forth in the prior CAFO rule preamble and rulemaking record, which are incorporated. This includes but is not limited to EPA's

B. EPA's Consideration of Alternatives and Conclusions

In the proposed revised rule, EPA discusses what it describes as options 3, 5, 6, and 7 from the 2003 rule plus four other technologies. 66 Fed. Reg. 37764. The following options were considered.

1) Anaerobic Digestion: Option 6 in 2003;
2) Fluidized Bed Incinerators;
3) Chemical Disinfection;
4) Deep Stacking and Composting of Poultry Litter and General Composting Practices;
5) Ground Water Controls: Option 3 in 2003;
6) No Discharge Option: Option 5 in 2003;
7) Production Area Management Practices: reducing catastrophic spills; and
8) Land Application Timing Restrictions: Option 7 in 2003.

Production area management practices were not evaluated in the POTW and industry cost-effectiveness tests because "EPA has not identified any additional production area management practices that will result in additional reductions of pathogens." *Id.* Fluidized bed incinerators, deep stacking poultry litter, and chemical disinfection were also not evaluated using the POTW and industry cost-effectiveness tests because none of them were found to be technically feasible. *Id.* at 37766.[34]

Anaerobic digestion, ground water controls, the no discharge option, general composting practices, and land application timing restrictions were first considered under the POTW test developed in an EPA 1986 rule. In the "1986 BCT methodology, the two conventional pollutants used in calculating the POTW pollutant removal benchmark are BOD [Biochemical Oxygen Demand] and TSS [Total Suspended Solids]." *Id.* at 37768. EPA concluded that they all failed because "[i]n all cases, the POTW benchmark is lower than the cost per pound of conventional pollutants removed by the candidate technology." *Id.* at 37770.

Next, a second POTW test was done specifically for fecal coliform—the "pathogen rule."[35] Under this test, anaerobic digestion for swine and land application timing restrictions for

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environmental assessment and studies on edge-field loading and numerous public comments. *See, e.g.*, Sierra Club comments on 11/21/01 NODA at 6; ED comments at WK JA 1492-95. That is also demonstrated by the CWA 305(b) reports and 303(d) lists of numerous states, which are in EPA's possession, and which are also incorporated. In the remand proceedings, these commenters submitted to EPA additional information on the harm of pathogens. And, *see* Exhibit 26 attached (Rose, Dept. of Fisheries and Wildlife Michigan State University, *Risks to Human Health Associated with Water and Food Contaminated with Animal Wastes*, August 16, 2005).

[34] Chemical addition for disinfection refers to chlorine and ozone, which were rejected by EPA with a conclusory analysis stating that they would be too costly and involve too high a level of maintenance operator skill. This conclusory approach makes review and comment on EPA's findings virtually impossible.

[35] "The Second Circuit directed EPA to make an affirmative finding that the BCT-based ELGs adopted in the 2003 CAFO rule do in fact represent the best conventional pollutant control technology for reducing *pathogens*, specifically fecal coliform. Although fecal coliform is not typically used in BCT cost calculations, in light of the Second Circuit's direction and the flexibility inherent in the BCT methodology, EPA developed procedures to evaluate cost-reasonableness for fecal coliform removal for this industry. Therefore, today's proposal includes an

swine passed. *Id.* at 37772. These two candidate technologies then passed on to the industry cost-effectiveness test. Both failed. *Id.* at 37773.

C. EPA's Economic Analysis is Flawed.

We hereby incorporate, as if repeated verbatim herein, the attached comments of Judson Jaffe, an economist. *See* Exhibit 27 attached. His report establishes that EPA's methodology and conclusions for establishing BCT for the CAFO industry, i.e. the new "pathogen rule," are flawed for many reasons, including but not limited to:

1. EPA's Failure to Correctly Calculate the POTW Benchmark for Fecal Coliform Profoundly Affects Its BCT Cost-Reasonableness Conclusions;

2. EPA's POTW and Industry Cost Benchmarks for Fecal Coliform Removal Reflect Either a Calculation Error or a Fundamental Misunderstanding of the Difference Between Incremental Costs and Changes in Average Cost;

3. EPA's Industry Cost Benchmark for Fecal Coliform Removal is Incorrect Because it is Based on the Incorrectly Calculated POTW Benchmark;

4. Even with EPA's Incorrectly Calculated Benchmarks, All Swine Technologies Achieving Incremental Fecal Coliform Removal Pass the Two-Part BCT Cost Test for FC Removal;

5. Several Candidate Technologies Offer More Cost-Effective Fecal Coliform Removal Than Both the BPT and Secondary Treatment at POTWs; and

6. The Results of the Corrected Two-Part BCT Cost Test Are Insensitive to Significant Changes in the Candidate Technologies' Effectiveness in Removing Fecal Coliform.

The conclusions reached by Mr. Jaffe, at outlined in his report, reveal that EPA's BCT determinations are fatally undermined by numerous and substantial errors in its analytical methodology and calculations. Commenters request that EPA make corrections to all the analytical flaws identified by Mr. Jaffe. We further request that EPA re-calculate the values for incremental cost-effectiveness of fecal coliform for each of the technologies identified by EPA in its proposal, as well as those identified by Commenters herein. We note that, based on Mr. Jaffe's preliminary analysis, corrected calculations would enable nearly all of EPA's designated technologies to past the both the POTW test and the Industry Cost Test.[36] Further analysis of

additional set of cost comparisons to directly account for pathogens by specifically including fecal coliform, the only conventional pollutant that is a possible pathogen. . . The proposed approach parallels the two-part cost-reasonableness test conducted above for pounds of conventional pollutants, but here, pounds of conventional pollutants is replaced by colony forming units ("CFU") of fecal coliform." 71 Fed. Reg. 37744, 37771.

[36] *See* Jaffe Report, attached at Exhibit 27.

other technologies with the demonstrated ability to remove fecal coliform from livestock waste may reveal that they too pass the relevant portions of a corrected BCT analysis. Having corrected its analysis, we then request that EPA issue a new determination that identifies one or more candidate BCT technologies that achieve greater fecal coliform reductions than achieved by the BPT technologies identified in the 2003 Final Rule.

D. EPA's POTW Test is Invalid as Applied in this Case.

1. Under the Legislative History, the POTW Test Is Not a Controlling "First Test."

In the instant rulemaking, EPA concludes that "[o]nce the candidate technology fails the POTW test, the candidate technology fails the cost-reasonableness test. The industry cost-effectiveness test (the second test for determining cost reasonableness) is only relevant if the POTW test (the first test) is passed." 71 Fed. Reg. 37744, 37770 (emphasis added). Thus, EPA has in effect created a "POTW or Nothing" test for the technologies which did not pass the POTW test. As set forth above, those are ground water controls, the no discharge option and production area management practices on reducing catastrophic spills. (In addition, EPA wrongfully rejected fluidized bed incinerators, chemical disinfection and deep stacking and composting without even giving them the benefit of the POTW test.)[37]

The legislative history of the 1977 Amendments to the Clean Water Act (hereinafter Amendments) provides no justification for EPA's conclusion that the POTW test is determinative in this situation and actually indicates EPA's position is erroneous.

The language in the legislative history referring to 304(b)(4)(B) focuses on the tests finding a cost to industry that is reasonable. None of the legislative history says that the POTW test is an initial threshold for reasonableness; to the contrary, it indicates that it should not be. Therefore, simply failing the POTW test cannot justify rejecting a technology because the cost is allegedly unreasonable.

Senator Muskie's remarks during the Senate debate on Agreement to Conference Report on H.R. 3199 are a good example.

> Under the amendments to section 304 effluent guidelines for conventional pollutants are subject to a new cost effectiveness test. . . The bill provides as a basis comparison of the costs for industry to the costs for municipalities. Clearly, if the cost of achieving a certain level of reduction of conventional pollutants for industry is less than the cost of achieving a similar level of reduction for a community, it would be reasonable. . . . *The contrary is not necessarily so.* One could well pose a case the cost of achieving a reduction

[37] In the instant rulemaking EPA found composting was a "technically feasible technology for incremental pathogen removal at most poultry operations," and EPA found that would lead to a 99% reduction of fecal coliform in the manure or litter prior to overflows from storage ponds or from land application. The failure rates projected for poultry in the 2003 rulemaking were also significantly less than other categories. Therefore, EPA should have considered poultry as a separate and distinct CAFO category and found composting was BCT and/or BPT for poultry. *See* EPA June 30, 2006 notice at 37766-67, 37773.

> of a conventional pollutant from all [sic] industrial category might *greatly* exceed the cost for the municipal category. In that case, the Administrator *might* determine such reduction to be unreasonable at this time and thus modify the requirement in accordance with regulatory authority.

123 Cong. Rec. 39170, 39171 (1977) (emphasis added).[38]

It is clear that Congress understood the POTW test to be indicative, but certainly not dispositive, of reasonableness and that failing the POTW test is not an inherent indication of unreasonableness.

Representative Roberts' remarks during the House Agreement to Conference Report on H.R. 3199 on the same day have a similar implication.

> In assessing the need for BCT, the Administrator is required to consider the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived. Essentially, we are talking about removing additional 'cheap pounds' of conventional pollutants. Stated another way, BCT imposes a level of control technology which anticipates and accepts the possibility of an increase in stringency beyond BPT, but not resulting in increased costs beyond the 'knee of the curve,' the take-off point where incremental costs begin to exceed incremental benefits. Comparison of the costs and level of reduction of such pollutants from the discharge of publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial point sources is appropriate in making these determinations of reasonableness [sic]. 123 Cong. Rec. 38949, 39961 (1977).[39]

As the court noted in *American Paper Institute v. EPA*, 660 F.2d 954 (4th Cir. 1981), the first two sentences of CWA § 304(b)(4)(B) "make reference to an industry cost-effectiveness test" and even if "these comments mention only the industry POTW comparison for determining reasonableness, it is not reasonable to conclude that their failure to point specifically to an industry cost-effectiveness test is indicative of Congress' intent to exclude such test when it is specifically provided for in the statute." *Id.* at 960. Thus, while upholding the methodology that EPA had developed for the POTW cost comparison test, the court remanded the regulation to the Agency for two reasons. First, the court held that the Clean Water Act requires EPA to consider two tests of "reasonableness" as part of the BCT methodology: a POTW cost-comparison test and an industry cost-effectiveness test. Since the 1979 methodology contained only the POTW cost test, the court directed EPA to develop a separate industry cost-effectiveness test. The

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[38] Note that the page numbers cited herein are to the Lexis database because the 1977 Amendments to the CWA not available on Thomas or another government source. Lexis' cite: CWA77 Leg. Hist. 14.

[39] CWA77 Leg. Hist. 13.

POTW test as applied in the instant rulemaking does not involve two distinct tests and is therefore contrary to the CWA and the *API* decision.

The legislative history further suggests that Congress' interest with determining what constitutes a reasonable cost did not rely solely on the POTW test. Typical statements include "[BCT] essentially represents an upgrading of BPT to the extent that the increased cost of treatment be reasonable in terms of the degree of environmental benefits" 123 Cong. Rec. 38949, 38974 (1977) (statement of Rep. Clausen)[40]; "[i]n establishing a requirement that reduction in effluent bear a reasonable relationship to costs of reduction, the committee intends a general test of reasonableness. . . [t]his provision's goal is to limit unnecessary 'treatment for treatment's sake'" Sen. Rep. No. 95-370 at 44 (1977)[41]; "[t]he Administrator must determine whether or not the cost of achieving reductions of conventional effluent bears a reasonable relationship to the amount of effluent reduction achieved" 123 Cong. Rec. 39170, 39182 (1977) (statement of Sen. Muskie).[42] That this standard of reasonableness was cited so often without an explicit prioritization of the POTW test indicates that Congress did not have such a prioritization in mind. It indicates instead that Congress wanted both tests used to determine reasonable cost to industry.

Overall the legislative history supports what a plain reading of the statutory language shows: there are two separate tests meant to inform EPA's decision, neither of which is dispositive on its own and both of which are meant to be used to determine what level of pollution control it is reasonable for industry to achieve. Ultimately, these statements are incompatible with the theory that the POTW test is an initial test that must be passed and that if the cost to an industry is more than that of a POTW, that technology can be eliminated from consideration.

It is repeatedly stated in the legislative history that one of the main purposes of the Amendments was to encourage industry to use POTWs. Examples of Congressional concern that industry use POTW abound in the legislative history. Senator Clausen explicitly stated it during the House debates: "[t]he Federal Water Pollution Control Act was intended to serve as an incentive for industrial dischargers to participate in municipal systems." 123 Cong. Rec. 10391, 10402 (1977).[43] So did many others: "[o]ne of the objectives . . . is the encouragement of industrial dischargers to participate in publicly owned treatment works" 123 Cong. Rec. 10391, 10407 (1977) (statement of Rep. Anderson);[44] "[i]t has long been the intent of Congress to encourage participation in publicly owned treatment works by industry" 123 Cong. Rec. 38949, 38954 (1977) (statement of Rep. Roberts);[45] "sewage treatment technologists recognize that there

[40] *Id.*

[41] CWA77 Leg. Hist. 20.

[42] CWA77 Leg. Hist. 14.

[43] CWA77 Leg. Hist. 6.

[44] *Id.*

[45] CWA77 Leg. Hist. 13.

are benefits from mixing industrial and municipal wastes in the treatment process, and that is one of the reasons that in 1972, this committee encouraged the juncture of industrial dischargers with municipal treatment plants, particularly regional plants." Federal Water Pollution Control Act: Hearings on H.R. 3199 Before the Subcomm. on Water Resources of the Comm. on Public Works and Transportation, 95th Cong. 354-55 (1977) (statement of Rep. Oberstar, Member, House Comm. on Public Works and Transportation).[46]

It is clear that Congress wanted industry to utilize POTWs and thought it would often be the best option. In this context, it makes sense that Congress would mandate the POTW test in order to ensure that option was consistently (but not solely) considered by EPA.

Another concern of Congress was that the CWA should not give a competitive advantage within and between industries. Congress established the POTW test so that a member of the industry that treated it own waste would not be placed at a competitive disadvantage against the industry member that sent its waste to a POTW for treatment. "The purpose of industrial cost recovery is to avoid inequity through subsidy which creates a competitive advantage for an industrial point discharging through municipal plants over those sources which must construct separate treatment works and pay the entire cost." 123 Cong. Rec. 26690, 26693 (1977) (statement of Sen. Muskie).[47]

Rep. Cleveland noted that "if companies A, B, and C comply, it is not fair for D to have a competitive advantage, selling the same product, and continuing to pollute, and produce at a lest [sic] cost." Federal Water Pollution Control Act: Hearings on H.R. 3199 Before the Comm. on Public Works and Transportation, 95th Cong. 153 (1977) (statement of Rep. Cleveland, Member, House Comm. on Public Works and Transportation).[48]

In sum, Congress wanted EPA to consider the costs of POTW treatment of an industry's waste in establishing BCT. If the cost to industry of a technology was less than treating the waste through a POTW, it would be reasonable to require the industry to use that technology. The inverse is not, however, true. If the cost to industry for a particular technology is more than it would be to treat it through a POTW that does not mean that EPA (or the industry) can reject that technology. If that were the case an industry could avoid any treatment if the only treatment available to it was more costly than POTW treatment, and it was not geographically or technically capable of sending its waste through a POTW, which is in effect the ultimate conclusion EPA reaches in its application of the POTW test to CAFOs.

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[46] CWA77 Leg. Hist. 34.

[47] CWA77 Leg. Hist. 10.

[48] CWA77 Leg. Hist. 37.

2. EPA's Comparison of CAFOs to Municipalities is Inappropriate Because of the Economic Disparity Amongst CAFOs and Municipalities.

The POTW test was put in Clean Water Act because Congress wanted EPA to consider what it thought was usually going to be the best technological option, not create a bright line economic cost test for industry based on what it cost municipalities to treat waste. What is economically feasible for a particular industry, in particular one as wealthy as the CAFO industry, may or may not be comparable to what is feasible for a municipality.

In 2003, EPA laid out CAFO size thresholds for large, medium, and small operations. 68 Fed. Reg. 7176, 7191. Small and medium CAFOs are defined in part by boundaries on the numbers of animals that do not appear unreasonable, but large CAFOs do not have an upper limit. *Id.*

The number of animals that constitute a large CAFO are: 1,000 or more cattle or cow/calf pairs; 700 or more mature dairy cattle; 1,000 or more veal calves; 2,500 or more swine weighing over 55 pounds and 10,000 or more weighing less than 55 pounds; 500 or more horses; 10,000 or more sheep or lambs; 55,000 or more turkeys; 30,000 or more laying hens or broilers (with a liquid manure handling system); 125,000 non-laying chickens (other than a liquid manure handling system); 82,000 laying hens (other than a liquid manure handling system); 5,000 or more ducks (with a liquid manure handling system) or 30,000 or more ducks (with other than a liquid manure handling system). *Id.*

Although EPA's rule does not provide any estimates of the range within large CAFOs, a number of factors suggest that its regulatory definitions do not adequately capture the range of sizes in the large CAFO category. This is suggested first by the fact that as far back as 2001 EPA noted the increasing consolidation of factory farms was leading to an "increase in animal densities at operations."[49] 66 Fed. Reg. 2960, 2974.

It is also suggested by the sheer number of large CAFOs. EPA reports that "[d]airies with more than 2,000 cows and swine operations with more than 10,000 hogs are not unusual . . . [b]roiler houses with 50,000 birds are common." Risk Assessment Evaluation for Concentrated Animal Feeding Operations.[50] The US Department of Agriculture's 2002 Census of Agriculture[51] reported 905 farms with 5,000 or more cow/calf pairs (Table 12); 2,206 farms with

[49] "In the poultry sectors, the average number of birds across all operations is four to five times greater in 1997 than in 1974. In 1997, the number of broilers per operation averaged 281,700 birds, up from 73,300 birds in 1974. Over the same period, the average number of egg laying hens per operation rose from 1,100 layers to 5,100 layers per farm, and the average number of turkeys per operation rose from 2,100 turkeys to 8,600 turkeys. The average number of hogs raised per operation rose from under 100 hogs to more than 500 hogs between 1974 and 1997. The average number of fed cattle and dairy cows per operation more than doubled during the period, rising to nearly 250 fed cattle and 80 milking cows by 1997." 66 Fed. Reg. 2960, 2974. *See also* EPA's report Confined Animal Production Poses Manure Management Problems, available at: http://www.ers.usda.gov/publications/agoutlook/sep2000/ao274f.pdf.

[50] EPA/600/R-04/042 at iv (2004). Available at: http://www.epa.gov/ORD/NRMRL/pubs/600r04042/600r04042.pdf.

5,000 or more hogs and pigs (Table 19); and 498 farms with 100,000 or more laying hens (Table 27). The number of farms that qualify as large CAFOs suggest many must contain far more than the minimum level of animals.

Indeed, the number of animals reported for the largest farms are startling. Buckeye Egg (now closed) was "the [Ohio's] largest egg-producing operation with 115 barns and 14 million chickens." (An average of 933,333 per barn.)[52] Threemile Canyon Farms in Oregon currently has 52,000 cows and its permit allows up to 90,000.[53] NRDC reports two swine CAFO permits in Texas allowing 220,000 or more hogs and one allowing up to 925,000.[54] America's Animal Factories: How States Fail to Prevent Pollution from Livestock Waste. The same report details four cattle permits for 80,000 to 100,000 cattle.

In sum, the number of animals within EPA's large CAFO category is unbounded and widely variable. As a result, comparing the industry to municipalities means that the largest, wealthiest CAFOs, are getting a free ride by virtue of being grouped with the smaller, less wealthy, CAFOs for purposes of comparison to the POTWs. This is explained further in the attached report of Judson Jaffe, an economist retained by commenters.[55]

D. EPA's "Industry Cost-Effectiveness Test" is Another POTW Test

1. Formulation of the Industry-Cost Effectiveness Test

EPA's 1986 rule describes the industry cost-effectiveness test as a comparison of two ratios. The first ratio is composed of two incremental costs: "the cost per pound removed by the BCT candidate technology relative to BPT. . . [and] the cost per pound removed by BPT relative to no treatment." 51 Fed. Reg. 24974, 24976. EPA notes that "[t]he ratio of the first cost divided by the second is a measure of the candidate technology's cost-effectiveness." *Id.*

The second ratio is also made up of two incremental costs: "the cost per pound to upgrade a POTW from secondary treatment to advanced secondary treatment is divided by the cost per pound to initially achieve secondary treatment from raw wasteload." *Id.* EPA refers to this as an "industry cost benchmark." *Id.* In fact, it is exactly the same ratio as the first using data derived from POTWs,[56] actually measures POTW's cost-effectiveness, and should be referred to as a POTW benchmark.[57]

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[51] Available at: http://www.nass.usda.gov/census/census02/volume1/us/index1.htm. Note that all these farms are not necessarily CAFOs. Nonetheless, they provide a slightly more refined look at size ranges within the industry.

[52] Dale Dempsey & Laura A. Bischoff, *Buckeye Egg Farm Violations Among Worst in Country*, DAYTON DAILY NEWS (Dec. 4, 2002) available at http://www.daytondailynews.com/project/content/project/farm/1204buckeyeegg.html.

[53] *See* Perkins Coie EPA Permit.pdf.

[54] Available at: http://www.nrdc.org/water/pollution/factor/sttex.asp#notes3.

[55] The National Academy of Sciences also criticized the earlier CAFO rule for grouping CAFOs together without regard to size in connection with the regulation of air emissions. *See* Exhibit 28 attached.

The final step in the industry cost-effectiveness test is to compare the two ratios. ("If the industry ratio is lower than the benchmark, the candidate technology passes the industry cost test." *Id.*) The inescapable conclusion is that the candidate technology is only compared to—and must be more cost-effective than—a POTW benchmark in order to pass the so-called industry cost-effectiveness test. EPA admits as much when it notes that "[t]he methodology for both tests relies on the cost for POTWs to control conventional pollutants." *Id.* at 24980.[58] Thus, instead of coming up with an industry cost-effectiveness test, EPA has created a second POTW test in violation of the command in *American Paper Institute v. U.S. Environmental. Protection Agency* to "develop an industry cost-effectiveness test." 660 F.2d 954, 961 (1981). (The fact that EPA's industry cost test is in reality another POTW test is discussed further in the Jaffe Report attached.)

2. Application of the Industry-Cost Effectiveness Test

EPA applied this industry cost-effectiveness test twice in its 2006 rule.[59] First it was utilized after determining all the candidate technologies had failed the POTW test for BOD and TSS "for completeness." 71 Fed. Reg. 37744, 37770. All the candidate technologies failed the BOD and TSS industry cost-effectiveness test.

A separate analysis was then done for fecal coliform using the "pathogen rule." The pathogen rule's industry cost-effectiveness test was applied to two candidate technologies that passed the POTW test. (As noted above, these were anaerobic digestion for swine and land application timing restrictions for swine.) Both candidate technologies failed.

In both cases, EPA ultimately compared the cost to industry to a POTW cost.[60] Thus, what is being applied is effectively just another version of the POTW test that will usually find a candidate technology is unreasonable. This is explained further in the Jaffe Report, attached.

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[56] EPA's methodology for calculating POTW cost data can be found in section C "POTW Cost Data." 51 Fed. Reg. 24974, 24980 *et. seq.*

[57] *See* Jaffe Report at 9, attached at Exhibit 27.

[58] *See also* "The ratio is compared to an industry cost benchmark, which again is based on POTW cost and pollutant removal data." 51 Fed. Reg. 24974, 24976.

[59] Neither the POTW nor the industry cost-effectiveness test was applied in the 2003 Rule. "EPA identified no BCT technology option that achieves greater TSS removals than the BPT requirements promulgated today, and EPA does not believe the candidate BCT options would substantially reduce discharges of BOD. EPA therefore concluded that there are no candidate BCT technologies for establishing limits on conventional pollutants that are more stringent than BPT, and is establishing BCT requirements in this rule equal to BPT. If EPA had identified technology options appropriate for a national rule that achieve greater reductions of conventional pollutants than are achieved by BPT, then EPA would have performed the two-part BCT cost test. (*See* 51 Fed. Reg. 24974 for a description of the methodology EPA employs when setting BCT standards.)" 68 Fed. Reg. 7176, 7224.

[60] The methodology EPA outlined in the first application is the same as the 1986 test. "To pass the industry cost test, EPA computes a ratio of two incremental costs. The first incremental cost is the cost per pound removed by the candidate technology relative to BPT. The second incremental cost is the cost per pound removed by BPT relative to no treatment. . . The industry cost benchmark is the ratio of two incremental costs: The cost per pound to upgrade a POTW from secondary treatment to advanced secondary treatment is divided by the cost per pound to initially

E. The EPA Has Wrongfully Established a Non-numerical BCT.

The EPA has established BCT for pathogens as the equivalent of BPT, or de-faulted to BPT, based on its new analysis. The BPT that applies under the 2003 CAFO Rule, however, is non-numerical. There EPA declared BPT to be essentially Best Management Practices ("BMPs") and other non-numerical measures. Therefore, BCT is non-numerical as well.

The EPA's approach is not consistent with *Citizens Coal Council v. E.P.A.*, 447 F.3d 879 (6th Cir. 2006)(*en banc*). There, the majority found that non-numerical limits *(e.g.* BMPs) could suffice as ELGs where numerical limits are *infeasible.* The court found that the "baseline loading" of the pollutants could not be calculated, hence the non-numerical ELGs would be allowed. *Id.* at 897. In the instant case, however, EPA has done edge of field loading analyses and/or used surrogates for determining pathogen (FEC) loading. And, unlike the pollutants in *Citizens Coal Council*, in the case of pathogens, numerical limits are feasible, as evidenced by the effluent limitation guidelines and standards that EPA has established for pathogens for land application by municipalities. *See,* 40 C.F.R. § 503.32 (and EPA's federal register notices and history thereon). Thus, this is a case like that found by the minority in *Citizens' Coal Council*, where EPA has not established that the limits are infeasible because EPA has not established that it is incapable of being done, i.e. impossible.

By not addressing whether numerical limits are feasible for CAFO pathogens, EPA not only violated *Citizens' Coal Council,* EPA has not made the "affirmative finding" that BCT-based ELGs for pathogens do "in fact" represent BCT for pathogens that was required by *Waterkeeper Alliance*. At best, EPA's establishment of BCT for pathogens leaves in place the incidental or indirect reductions that would occur from the reduction of nutrients in the land application scheme, and has not established that its BCT constitutes the "direct" reductions that *Waterkeeper Alliance* found are necessary.

F. EPA's BCT Technology Selection Process Is Undermined by the Agency's Illogical Subcategorization of the CAFO Industry.

The current subcategories of livestock, see Table 1, are based on the percentage of time that the animals are confined. While this categorization may make sense in some applications, it has little to do with how livestock excreta should be treated; the current livestock categorization is detrimental in identifying effective waste treatment technologies. In manure and wastewater treatment, the design of the treatment technology is based on the characteristics of the influent and the desired effluent quality, not on the length of animal confinement.

Table 1: EPA subcategories of livestock.

Subcategory	Livestock
A	Horses and sheep
B	Ducks

achieve secondary treatment. If the industry ratio is lower than the benchmark, then the candidate technology passes the cost test." 71 Fed. Reg. 37744, 37770. For the second application, EPA's "proposed approach parallels the two-part cost-reasonableness test conducted above for pounds of conventional pollutants, but here, pounds of conventional pollutants is replaced by colony forming units ("CFU") of fecal coliform." *Id.* at 37771.

C	Dairy and beef cattle
D	Swine, poultry, and veal

Moisture content, solids content, oxygen levels, nitrogen and phosphorus levels, and carbon-to-nitrogen ratios are characteristics typically used to evaluate the potential success and design of a manure and wastewater treatment technology. These characteristics can be drastically dissimilar due to differences in feed input; species; animal anatomy, maturity, and gender; and manure and wastewater collection and storage. Even when examining the pathogen reduction potential of a technology alone, these characteristics must be considered for any mechanical, chemical, or biological treatment. Even incineration of the waste for pathogen destruction must consider at least moisture content. When these characteristics vary within a subcategory, it is unlikely that a treatment technology can be identified that can treat all the manure and wastewater for all the livestock within the subcategory. Therefore, the BCT analysis for pathogen reduction treatment technologies is undermined and fatally flawed by this artificial categorization.

Tables 2 through 13 show the as excreted waste characterizations of horses, sheep, ducks, dairy cattle, beef cattle, swine, poultry, and veal calves; the characteristics of the wastes under various storage and treatment conditions; and analyses of the differences in waste characteristics. The values in these tables originate from the Natural Resources Conservation Service's Animal Waste Management Field Handbook (1992).

Subcategory A: Horses and Sheep

Table 2 compares the waste of horses and sheep, as grouped by subcategory A. Both horses and sheep are hoofed mammals, but the horse is an ungulate and the sheep is a ruminant; their waste is still somewhat different. Percent differences ranged from four percent different for moisture content to one hundred percent different for potassium (K). These differences can make it difficult to determine a single treatment method that will be effective for both kinds of livestock.

Table 2: Horse and sheep waste characterization – as excreted* (adapted from NRCS, 1992).

Component	Units	Horse	Sheep	Percent difference
Weight	lb/d/1000#	50.00	40.00	25.00
Volume	ft^3/d/1000#	0.80	0.63	26.98
Moisture	%	78.00	75.00	4.00
TS†	% w.b.	22.00	25.00	13.63
	lb/d/1000#	11.00	10.00	10.00
VS‡	lb/d/1000#	9.35	8.30	12.65
FS§	lb/d/1000#	1.65	1.76	6.67
COD‖	lb/d/1000#		11.00	
BOD_5#	lb/d/1000#		1.00	
N**	lb/d/1000#	0.28	0.45	60.71
P††	lb/d/1000#	0.05	0.07	40.00
K‡‡	lb/d/1000#	0.19	0.30	100.00
C:N§§		19	10	90.00

*Increase solids and nutrients by 4% for each 1% feed waste more than 5%. † Total solids, the sum of the volatile solids and the fixed solids. ‡ Volatile solids. § Fixed solids. ‖ Chemical oxygen demand.
Biochemical oxygen demand. ** Nitrogen. †† Phosphorus. ‡‡ Potassium. §§ Carbon to nitrogen ratio.

Subcategory B: Ducks

Table 3 depicts the waste characteristics of ducks, the sole form of livestock in subcategory B.

Table 3: Duck waste characterization – as excreted* (adapted from NRCS, 1992).

Component	Units	Duck
TS†	lb/d/1000#	12.0
VS‡	lb/d/1000#	7.0
FS§	lb/d/1000#	5.0
COD‖	lb/d/1000#	9.5
BOD_5#	lb/d/1000#	2.5
N**	lb/d/1000#	0.7
P††	lb/d/1000#	0.3
K‡‡	lb/d/1000#	0.5
C:N§§		6

*Increase solids and nutrients by 4% for each 1% feed waste more than 5%. † Total solids, the sum of the volatile solids and the fixed solids. ‡ Volatile solids. § Fixed solids. ‖ Chemical oxygen demand.
Biochemical oxygen demand. ** Nitrogen. †† Phosphorus. ‡‡ Potassium. §§ Carbon to nitrogen ratio.

Subcategory C: Dairy and Beef Cattle

Tables 4 and 5 depict the as excreted characteristics of dairy and beef manure. Even within a single cow type (i.e., dairy or beef) there are differences in the waste characteristics.

Table 4: Dairy waste characterization – as excreted* (adapted from NRCS, 1992).

Component	Units	Lactating	Dry	Heifer	Average
Weight	lb/d/1000#	80.00	82.00	85.00	82.33
Volume	ft^3/d/1000#	1.30	1.30	1.30	1.30
Moisture	%	87.50	88.40	89.30	88.40
TS†	% w.b.	12.50	11.60	10.70	11.60
	lb/d/1000#	10.00	9.50	9.14	9.55
VS‡	lb/d/1000#	8.50	8.10	7.77	8.12
FS§	lb/d/1000#	1.50	1.40	1.37	1.42
COD‖	lb/d/1000#	8.90	8.50	8.30	8.57
BOD_5#	lb/d/1000#	1.60	1.20	1.30	1.37
N**	lb/d/1000#	0.45	0.36	0.31	0.37
P††	lb/d/1000#	0.07	0.05	0.04	0.05
K‡‡	lb/d/1000#	0.26	0.23	0.24	0.24
TDS§§		0.85			
C:N‖‖		10	13	14	12.33

*Increase solids and nutrients by 4% for each 1% feed waste more than 5%. † Total solids, the sum of the volatile solids and the fixed solids. ‡ Volatile solids. § Fixed solids. ‖ Chemical oxygen demand.
Biochemical oxygen demand. ** Nitrogen. †† Phosphorus. ‡‡ Potassium. §§ Total dissolved solids. ‖‖Carbon to nitrogen ratio.

Table 5: Beef waste characterization – as excreted* (adapted from NRCS, 1992).

Component	Units	Feeder, yearling: 750-1100 lb High forage diet	High energy diet	450 to 750 lb	Cow	Average
Weight	lb/d/1000#	59.10	51.20	58.20	63.00	57.88
Volume	ft^3/d/1000#	0.95	0.82	0.93	1.00	0.93
Moisture	%	88.40	88.40	87.00	88.40	88.05
TS†	% w.b.	11.60	11.60	13.00	11.60	11.95
	lb/d/1000#	6.78	5.91	7.54	7.30	6.88
VS‡	lb/d/1000#	6.04	5.44	6.41	6.20	6.02
FS§	lb/d/1000#	0.74	0.47	1.13	1.10	0.86
COD‖	lb/d/1000#	6.11	5.61	6.00	6.00	5.93
BOD_5#	lb/d/1000#	1.36	1.36	1.30	1.20	1.31
N**	lb/d/1000#	0.31	0.30	0.30	0.33	0.31
P††	lb/d/1000#	0.11	0.094	0.10	0.12	0.11
K‡‡	lb/d/1000#	0.24	0.21	0.20	0.26	0.23
C:N§§		11	10	12	10	10.75

*Average daily production for weight range noted; increase solids and nutrients by 4% for each 1% feed waste more than 5%. † Total solids, the sum of the volatile solids and the fixed solids. ‡ Volatile solids. § Fixed solids. ‖ Chemical oxygen demand. # Biochemical oxygen demand. ** Nitrogen. †† Phosphorus.
‡‡ Potassium. §§ Carbon to nitrogen ratio.

For this discussion, an average was calculated across all the dairy cattle and an average was calculated across all the beef cattle to provide a simpler basis for comparisons, as shown in Table 6.

Table 6: Comparison of average as excreted dairy and beef waste characteristics.

Component	Units	Dairy average	Beef average	Percent difference
Weight	lb/d/1000#	82.33	57.88	42.24
Volume	ft^3/d/1000#	1.30	0.93	39.78
Moisture	%	88.40	88.05	0.40
TS†	% w.b.	11.60	11.95	3.01
	lb/d/1000#	9.55	6.88	38.81
VS‡	lb/d/1000#	8.12	6.02	34.88
FS§	lb/d/1000#	1.42	0.86	65.12
COD‖	lb/d/1000#	8.57	5.93	44.52
BOD_5#	lb/d/1000#	1.37	1.31	4.58
N**	lb/d/1000#	0.37	0.31	19.35
P††	lb/d/1000#	0.05	0.11	120
K‡‡	lb/d/1000#	0.24	0.23	4.35
C:N§§		12.33	10.75	14.70

† Total solids, the sum of the volatile solids and the fixed solids. ‡ Volatile solids. § Fixed solids. ‖ Chemical oxygen demand. # Biochemical oxygen demand. ** Nitrogen. †† Phosphorus.
‡‡ Potassium. §§ Carbon to nitrogen ratio.

Total solids (TS), fixed solids (FS), volatile solids (VS), chemical oxygen demand (COD), and phosphorus (P) percent differences are all greater than 34 percent. The percent differences are even larger when the characteristics of the waste during storage are compared, as shown in Table 7.

Table 7: Comparison of dairy and beef stored waste characteristics.

		Anaerobic dairy lagoon		Beef feedlot runoff pond		Percent difference	
Component	**Units**	**Supernatant**	**Sludge**	**Supernatant**	**Sludge**	**Supernatant**	**Sludge**
Moisture	%	99.75	90.00	99.70	82.80	0.05	8.69
TS†	% w.b.	0.25	10.00	0.30	17.20	20.00	72.00
VS‡	lb/1000 gal	9.16	383.18	7.50	644.83	22.13	68.28
FS§	lb/1000 gal	11.66	449.82	17.50	788.12	50.08	75.21
COD	lb/1000 gal	12.50	433.16	11.67	644.83	7.11	48.87
BOD_5#	lb/1000 gal	2.92					
N**	lb/1000 gal	1.67	20.83	1.67	51.66	0.00	148.01
NH_3-N††	lb/1000 gal	1.00	4.17	1.50		50	-
P‡‡	lb/1000 gal	0.48	9.16		17.50		91.05
K§§	lb/1000 gal	4.17	12.50	7.50	14.17	79.86	13.36
C:N‖		3	10				

† Total solids, the sum of the volatile solids and the fixed solids. ‡ Volatile solids. § Fixed solids. || Chemical oxygen demand. # Biochemical oxygen demand. ** Nitrogen. †† Ammonia-nitrogen. ‡‡ Phosphorus.
§§ Potassium. |||| Carbon to nitrogen ratio.

There is a 148 percent difference in sludge nitrogen levels between the dairy and beef and a 91 percent difference in phosphorus sludge levels. The total solids, volatile solids, and fixed solids levels have percent differences exceeding 68 percent.

The differences are even larger when you consider the characteristics of beef feedlot manure in Table 8 with the average dairy as excreted characteristics. Table 9 shows a percent difference in moisture content of over 76 percent, nearly a 330 percent difference in total solids, a 76 percent difference in nitrogen levels, and a 180 percent difference in phosphorus levels. These differences make it extremely difficult to determine a manure and wastewater treatment method that will be effective for all livestock in this subcategory.

Table 8: Beef waste characterization – feedlot manure (adapted from NRCS, 1992).

			Surfaced lot†		
Component	**Units**	**Unsurfaced lot***	**High forage diet**	**High energy diet**	**Average**
Weight	lb/d/1000#	17.50	11.70	5.30	11.50
Moisture	%	45.00	53.30	52.10	50.13
TS‡	% w.b.	55.00	46.70	47.90	49.87
	lb/d/1000#	9.60	5.50	2.50	5.87
VS§	lb/d/1000#	4.80	3.85	1.75	3.47
FS‖	lb/d/1000#	4.80	1.65	0.75	2.40
N#	lb/d/1000#	0.21			0.21
P††	lb/d/1000#	0.14			0.14
K‡‡	lb/d/1000#	0.03			0.03
C:N§§		13			13

*Dry climate (annual rainfall less than 15 inches), annual manure removal. †Dry climate, semiannual manure removal. ‡ Total solids, the sum of the volatile solids and the fixed solids. § Volatile solids. ‖ Fixed solids. # Nitrogen.
** Ammonia-nitrogen. †† Phosphorus.
‡‡ Potassium. §§ Carbon to nitrogen ratio.

Table 9: Comparison of average dairy (as excreted) and beef feedlot characteristics.

Component	Units	Dairy as excreted	Beef feedlot	Percent difference
Weight	lb/d/1000#	82.33	11.50	615.91
Volume	ft^3/d/1000#	1.30		
Moisture	%	88.40	50.13	76.34
TS*	% w.b.	11.60	49.87	329.91
	lb/d/1000#	9.55	5.87	62.69
VS†	lb/d/1000#	8.12	3.47	134.01
FS‡	lb/d/1000#	1.42	2.40	69.01
COD§	lb/d/1000#	8.57		
BOD_5‖	lb/d/1000#	1.37		
N#	lb/d/1000#	0.37	0.21	76.19
P**	lb/d/1000#	0.05	0.14	180.00
K††	lb/d/1000#	0.24	0.03	700.00
C:N‡‡		12.33	13	5.43

* Total solids, the sum of the volatile solids and the fixed solids. † Volatile solids. ‡ Fixed solids. § Chemical oxygen demand. ‖ Biochemical oxygen demand. # Nitrogen. ** Phosphorus. †† Potassium. ‡‡ Carbon to nitrogen ratio.

Subcategory D: Swine, Poultry, and Veal

Tables 10, 11, and 12 depict the waste characteristics for the livestock that make up subcategory D: swine, poultry, and veal. Even within species, there are significant differences in waste characteristics.

Table 10: Swine waste characterization – as excreted* (adapted from NRCS, 1992).

				Sow				
Component	**Units**	**Grower (40-220 lb)**	**Replacement gilt**	**Gestating**	**Lactating**	**Boar**	**Nursing/ nursery pig**	**Average**
Weight	lb/d/1000#	63.40	32.80	27.20	60.00	20.50	106.00	51.65
Volume	ft^3/d/1000#	1.00	0.53	0.44	0.96	0.33	1.70	0.83
Moisture	%	90.00	90.00	90.80	90.00	90.70	90.00	90.25
TS†	% w.b.	10.00	10.00	9.20	10.00	9.30	10.00	9.75
	lb/d/1000#	6.34	3.28	2.50	6.00	1.90	10.60	5.10
VS‡	lb/d/1000#	5.40	2.92	2.13	5.40	1.70	8.80	4.39
FS§	lb/d/1000#	0.94	0.36	0.37	0.60	0.30	1.80	0.73
COD‖	lb/d/1000#	6.06	3.12	2.37	5.73	1.37	9.80	4.74
BOD_5#	lb/d/1000#	2.08	1.08	0.83	2.00	0.65	3.40	1.67
N**	lb/d/1000#	0.42	0.24	0.19	0.47	0.15	0.60	0.35
P††	lb/d/1000#	0.16	0.08	0.06	0.15	0.05	0.25	0.13
K‡‡	lb/d/1000#	0.22	0.13	0.12	0.30	0.10	0.35	0.20
TDS§§	lb/d/1000#	1.29						1.29
C:N‖‖		7	7	6	6	6	8	6.67

*Increase solids and nutrients by 4% for each 1% feed waste more than 5%. † Total solids, the sum of the volatile solids and the fixed solids. ‡ Volatile solids. § Fixed solids. ‖ Chemical oxygen demand. # Biochemical oxygen demand.
** Nitrogen. †† Phosphorus. ‡‡ Potassium. §§ Total dissolved solids. ‖‖Carbon to nitrogen ratio.

Table 11: Poultry waste characterization – as exereted* (adapted from NRCS, 1992).

Component	Units	Layer	Pullet	Broiler	Turkey	Average
Weight	lb/d/1000#	60.50	45.60	80.00	43.60	57.43
Volume	ft^3/d/1000#	0.93	0.73	1.26	0.69	0.90
Moisture	%	75.00	75.00	75.00	75.00	75.00
TS†	% w.b.	25.00	25.00	25.00	25.00	25.00
	lb/d/1000#	15.10	11.40	20.00	10.90	14.35
VS‡	lb/d/1000#	10.80	9.70	15.00	9.70	11.30
FS§	lb/d/1000#	4.30	1.70	5.00	1.25	3.06
COD‖	lb/d/1000#	13.70	12.20	19.00	12.30	14.30
BOD_5#	lb/d/1000#	3.70	3.30	5.10	3.30	3.85
N**	lb/d/1000#	0.83	0.62	1.10	0.74	0.82
P††	lb/d/1000#	0.31	0.24	0.34	0.28	0.29
K‡‡	lb/d/1000#	0.34	0.26	0.46	0.28	0.34
TDS§§				2.89		
C:N‖‖		7	9	8	7	7.75

*Increase solids and nutrients by 4% for each 1% feed waste more than 5%. † Total solids, the sum of the volatile solids and the fixed solids. ‡ Volatile solids. § Fixed solids. ‖ Chemical oxygen demand.
Biochemical oxygen demand. ** Nitrogen. †† Phosphorus. ‡‡ Potassium. §§ Total dissolved solids. ‖‖Carbon to nitrogen ratio.

Table 12: Veal waste characterization – as excreted (NRCS, 1992).

Component	Units	Veal feeder
Weight	lb/d/1000#	60.00
Volume	ft^3/d/1000#	0.96
Moisture	%	97.50
TS*	% w.b.	2.50
	lb/d/1000#	1.50
VS†	lb/d/1000#	0.85
FS‡	lb/d/1000#	0.65
COD§	lb/d/1000#	1.50
BOD_5‖	lb/d/1000#	0.37
N#	lb/d/1000#	0.20
P**	lb/d/1000#	0.03
K††	lb/d/1000#	0.25
C:N‡‡		2

* Total solids, the sum of the volatile solids and the fixed solids. † Volatile solids. ‡ Fixed solids. § Chemical oxygen demand. ‖ Biochemical oxygen demand. # Nitrogen. ** Phosphorus. †† Potassium. ‡‡ Carbon to nitrogen ratio.

The comparisons in waste characteristics among subcategory D animals are most telling of the problems associated with using the current subcategories for evaluating the potential of manure and wastewater treatment technologies. The percent difference in volatile solids for poultry and veal is over 1229 percent. The differences in total solids and fixed solids ranged from about 12 to 900 percent. Percent differences in nutrients among the three species range from 25 to 866. These differences make identifying a single treatment technology that is effective for the entire category nearly impossible.

Table 13: Comparison of average swine, veal, and poultry wastes – as excreted.

		Averages			Percent differences		
Component	**Units**	**Swine**	**Poultry**	**Veal feeder**	**Swine-veal**	**Swine-poultry**	**Poultry-veal**
Weight	lb/d/1000#	51.65	57.43	60.00	16.17	11.19	4.48
Volume	ft^3/d/1000#	0.83	0.90	0.96	15.66	8.43	6.67
Moisture	%	90.25	75.00	97.50	8.03	20.33	30.00
TS*	% w.b.	9.75	25.00	2.50	290.00	156.41	900.00
	lb/d/1000#	5.10	14.35	1.50	240.00	181.37	856.67
VS†	lb/d/1000#	4.39	11.30	0.85	416.47	157.40	1229.41
FS‡	lb/d/1000#	0.73	3.06	0.65	12.31	319.18	370.77
COD§	lb/d/1000#	4.74	14.30	1.50	216.00	201.69	853.33
BOD_5‖	lb/d/1000#	1.67	3.85	0.37	351.35	130.54	940.54
N#	lb/d/1000#	0.35	0.82	0.20	75.00	134.29	310.00
P**	lb/d/1000#	0.13	0.29	0.03	333.33	123.08	866.67
K††	lb/d/1000#	0.20	0.34	0.25	25	70.00	36.00
C:N‡‡		6.67	7.75	2	233.50	16.19	287.50

* Total solids, the sum of the volatile solids and the fixed solids. † Volatile solids. ‡ Fixed solids. § Chemical oxygen demand. ‖ Biochemical oxygen demand. # Nitrogen. ** Phosphorus. †† Potassium. ‡‡ Carbon to nitrogen ratio.

Summary

The characteristics of the manure and wastewater must be considered in treatment technology selection and design. To do otherwise is an exercise in failure. The data in Tables 2 through 13 and the analyses of differences between manure and wastewater characteristics serve to show that EPA's current subcategorization of livestock severely impairs the process of identifying successful treatment technologies. To apply the current subcategorization is to assume that there is a "magic bullet" for manure and wastewater treatment. This is simply untrue; manure and wastewater treatment selection and design must be site-specific, taking into account the characteristics of the waste, climate, geology, and facility management. To ignore the inherent differences in manure and wastewater characteristics is serious lapse in knowledge of livestock facilities, treatment technologies, and professional judgment. EPA's current subcategorization of livestock is completely arbitrary and creates a situation where the methodology for evaluating treatment technologies is fatally undermined.

G. EPA Failed to Consider Alternative Technologies with the Capability to Reduce Fecal Coliform and Pathogen Levels in an Agricultural Setting.

In addition to the flaws in EPA's proposal, discussed above, EPA's analysis of technologies available to meet the BCT test is inadequate and incomplete. In developing its Proposed Rule, EPA subjected a small, carefully limited selection of technologies to its two-part cost effectiveness test. The technologies analyzed by EPA, not surprisingly, offer little performance or cost advantage over the ELGs designated in the 2003 Final Rule. EPA failed to analyze several promising technologies that have the potential to significantly reduce pathogen pollution from CAFOs at a reasonable, affordable cost to the industry and its members.

The signatories to this letter provided information regarding the availability and desirability of such technologies during meetings and correspondence with EPA staff leading up to the Proposed Rule. *See* letters from NRDC, Sierra Club, and Waterkeeper Alliance to EPA

dated July 20, 2005, August 15, 2005, and June 19, 2006, attached at Exhibit 29. None of the technologies discussed in these presentations was fully considered by EPA. Instead, the Agency relied almost exclusively on information about control technologies which was contained in the administrative record leading up to the 2003 Final Rule. *See* 71 Fed. Reg. 37764-68. In failing to open the public record for comment upon other, available pathogen control technologies, EPA arbitrarily and capriciously limited the information before it to out-of-date, potentially inaccurate data about technology performance and affordability, artificially constrained the amount of information and number of alternatives subject to the Agency's analysis, and ignored more recent research and field investigation projects that demonstrated the feasibility of advanced pathogen control technologies within certain sectors of the CAFO industry.

In its Proposed Rule, EPA listed eight candidate technologies for its BCT review. No fewer than four of these were carry-overs from the 2003 Final Rule administrative record:

9) Anaerobic Digestion: Option 6 in 2003;
10) Fluidized Bed Incinerators;
11) Chemical Disinfection;
12) Deep Stacking and Composting of Poultry Litter and General Composting Practices;
13) Ground Water Controls: Option 3 in 2003;
14) No Discharge Option: Option 5 in 2003;
15) Production Area Management Practices: reducing catastrophic spills; and
16) Land Application Timing Restrictions: Option 7 in 2003.

66 Fed. Reg. 37764. It is unclear why EPA added Fluidized Bed Incinerators and Chemical Disinfection to the list of technologies subject to its review. As the Agency admits, "incinerators are not widely used in the United States to manage animal manure because they re generally not affordable." 71 Fed. Reg. 37765. Likewise, chemical disinfection "is not commonly practiced in the United States for treatment of animal wastes." 71 Fed. Reg. 37766. EPA's inclusion of these technologies gives the appearance that they were chosen to fail, and precluded substantive review of more agriculturally appropriate technologies.

By focusing on these inappropriate technologies, EPA gave insufficient attention to technologies that are either in common agricultural practice or have been developed to deal specifically with the waste quantities and concentrations particular to Large CAFOs. At a July 7, 2005 meeting with EPA staff, Commenters presented detailed information about several such technologies following the *Waterkeeper* decision. Specifically, these technologies included:

Aerobic Digestion

- Effectively reduces pathogens by 95-99%;
- Reduces odor, methane, ammonia emissions;
- Second Generation Autothermal Thermophilic Aerobic Digestion promises enhanced pathogen reduction and improved economics over older models;
- Additional benefits, in at least one study, of antibiotic residue removal. [61]

Anaerobic Digestion

- Analyzed in EPA AgSTAR Dairy Cattle Manure Study (March 2003) (mesophilic anaerobic digestion);
- 99.9 % Reduction in fecal coliform;
- Other pathogens reduced approximately 99%;
- Retains nutrient value, but with volume reduction;
- At design capacity, would recoup capital costs within three years, then add $86,587; annually to farm income. "[S]ignificant economic incentive to realize the environmental quality benefits."[62]

Combined Systems Approach

- Smithfield Agreement : Environmentally Superior Technologies;
- Phase II Determination;
- Super Soils;
- Solid separation, with liquid waste treatment by biological and chemical processes, including nitrification, denitrification and phosphorus reduction. Solids further processed to yield value-added compost;
- High reduction of fecal coliforms and other pathogens;
- Some beneficial impact on airborne pathogens;
- ORBIT;
- High Solids Anaerobic Digester ("HSAD") (thermopilic), followed by further processing of residual sludge;
- >3.7 to >5.3 $\log_{10}$ reductions in fecal coliform and *E. coli;*
- Some beneficial impact on airborne pathogens;
- Practical implementation and field trials show potential for reduced cost, increased environmental benefit.[63]

In this proposed rule, EPA has failed to give adequate, or in some cases, any consideration to the above technologies. *See* 71 Fed. Reg. 37764-68. Conspicuously, EPA failed to give significant consideration to compelling research indicating the efficacy, practicality, and affordability of these and other alternative technologies to control fecal coliform and other pathogens. These technologies were amply discussed in Waterkeeper Alliance, *Understanding Alternative Technologies for Animal Waste Treatment*, February 2005, a copy of

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[61] *See* Exhibit 30 Blackburn, J.W., et al, "Aerobic Thermophilic Digestion: A Technical and Practical Option for Swine Manure Management"; Staton, Kevin L. and James E. Alleman, "2nd Generation Autothermal Thermophilic Aerobic Digestion.

[62] *See* Exhibit 31, Martin, John H. "A Comparison of Dairy Cattle Manure Management with and without Anaerobic Digestion and Biogas Utilization."

[63] *See* Williams, C.M (Mike), et al., "Development of Environmentally Superior Technologies: Phase I Report," available at http://www.cals.ncsu.edu/waste_mgt/smithfield_projects/phase1report04/phase1report.htm. Also in the Administrative Record at EPA-HQ-OW-2005-0037-0083 or DCN 1-01192.

which is in the administrative record for this rulemaking at EPA-HQ-OW-2005-0037-0121, or DCN 1-01147. Summaries of these appropriate technologies, including references to relevant research articles, are attached at Composite Exhibit 32.[64] EPA has ignored evidence that the implementation of these technologies, even at small livestock facilities, often has economic benefits that allow operators to recoup capital costs and achieve short-term profits. *See, e.g.*, J. H. Martin, Jr., et al., *Evaluation of the Performance of a 550 Cow Plug-flow Anaerobic Digester Under Steady-State Conditions*, Ninth International Animal, Agricultural and Food Processing Wastes Proceedings of the 12-15 October 2003 Symposium (Research Triangle Park, North Carolina USA), Oct. 2003, at 350-359, attached at Exhibit 33; Wright, Peter, et al., *Reductions of Selected Pathogens in Anaerobic Digestion*, *Id.* at 74-82; attached at Exhibit 34; Keener, H.M., et al., *Optimizing Design and Operation of Dairy Manure Composting Systems Using Pilot and Full Scale Kinetic Studies*, *Id.* at 310-324, attached at Exhibit 35; Henry, C.G., et al., *Application and Performance of Constructed Wetlands for Runoff from Small Open Lots*, *Id.* at 132-43, attached at Exhibit 36.

In particular, EPA has failed to consider the pioneering work conducted under the auspices of the Agreement between the North Carolina Attorney General, Smithfield Foods and Premium Standard Farms. This program sought to analyze and identify Environmentally Superior Technologies that conferred significant pathogen reduction while meeting defined affordability measures.

In July 2000, the North Carolina Attorney General signed an Agreement with Smithfield Foods, Premium Standard Farms and Frontline Farmers, which provided funding for the evaluation of Environmentally Superior Technologies ("ESTs") for hog manure treatment. This Agreement was structured such that a Designee (NC State University) was given sole authority to determine if a candidate technology met the environmental and economic parameters (to be developed as part of this process) to be designated as an EST. The Designee appointed an Advisory Committee composed of representatives from industry, government, the farming and environmental communities. Once an EST was designated, Smithfield Foods and Premium Standard Farms agreed to convert their company-owned farms within three years. As part of this agreement, NCSU has released the third in a series of three reports (Phase 3 on March 8, 2006)[65] on the evaluation of these technologies. The Phase III report includes a number of environmental standards, including the reduction of pathogens by 4 log (99.99%) relative to levels found in raw manure.

Briefly described, the five treatment systems determined by NCSU to meet strict environmental performance standards including a 4 log reduction in pathogens are:

[64] Effective removal of pathogens, including fecal coliform, from dairy wastewater through a variation on a constructed wetland technology is discussed in Morgan, Jennifer, et al., *Evaluation of Pathogen Removal from Dairy Wastewater Using an Ecological Treatment System*, ASABE Meeting Paper 067018 (July 2006), attached at Exhibit 37.

[65] Available at http://www.cals.ncsu.edu/waste_mgt/smithfield projects/phase3report06/phase3report.htm

Super Soils (a. solids separation and water treatment; b. solids composting)

Two of the approved ESTs are components that are linked to provide a complete treatment system: the Super Soils solids separation and water treatment (conditional approval in Phase 1), and the Super Soils solids compost treatment (conditional approval in Phase 2 report.) (However, the solids separated by the Super Soils system could also be processed by any of the other approved solids treatment technologies.) The water treatment system removes nearly all the nitrogen and phosphorus from the liquid phase by converting them to benign end products (di-nitrogen or N_2) or capturing them within the solids (phosphorus). The treated liquid is then either used to flush the barns or applied to land to irrigate crops.

The Super Soils solids composting technology transports solids to a centralized location, converting them into various soil products targeting the specialized needs of the burgeoning plant nursery and golf course industries.

A second generation of Super Soils technology has been proposed and recently funded that promises to streamline the process and reduce costs while maintaining environmental performance. The second generation testing will also be evaluating the processing of the separated solids for co-firing in a coal power plant (at up to 5%.)

High Solids Anaerobic Digestion

The ORBIT technology (conditional approval in Phase 1 report) uses bacteria to treat solids in an enclosed vessel, capturing the ammonia and breaking down odor compounds. Importantly, this technology also produces and captures biogas (methane) from hog waste solids, which can be burned as a renewable energy source. It is unique among anaerobic digesters in that it can process waste with up to 50% solids contents. (Raw hog manure is about 6% solids; in the lagoon liquid, about 0.5% solids.) The ORBIT technology will likely combine hog waste with other high solid wastes to produce a material with the proper percentage of solid. There are many such solids available in eastern North Carolina: for example, poultry litter. The residual solids are free of pathogenic bacteria and can be used as a fertilizer. Currently the North Carolina Department of Transportation is examining the potential for using these solids on roadside vegetation.

Gasification

A gasifier is a nonbiological process that converts solid waste into combustible gases. This process produces a clean-burning gas from hog manure (or poultry litter.) The gases could be burned to produce electricity or converted into fuels such as ethanol and hydrogen gas. The residual ash is free of pathogenic bacteria and can be used as a feed supplement or a fertilizer. The approved gasifier was part of the RECYCLE technology project.

Combustion in a Fluidized Bed Reactor

This technology (part of the Biomass Energy Sustainable Technologies project) burns dried hog waste solids (or poultry litter). While it meets the environmental parameters set forth

in the Attorney General's Agreement, all ESTs must also qualify for all other appropriate environmental permits. Any emissions that have not been considered by the Agreement (i.e., emissions other than ammonia, pathogens, and odor) would need to be evaluated by the appropriate agencies for approval. For combustion of animal waste solids, emissions of oxides of nitrogen (NOx), particle pollution (soot) and air toxics (e.g., mercury, arsenic) would need to be separately evaluated and permitted. This technology has focused on converting the solids to ash, reducing its volume to a few percent of its original state. The ash could be used as a fertilizer or feed amendment. While not examined in this evaluation, combustion also holds the potential for electricity generation.[66]

Among the most contentious topics discussed during NC State University's research on cleaner hog waste technologies was the determination of economic feasibility. Two models were developed to estimate the costs of the technologies on 21 different categories of hog farms and to predict the impact of those costs on the competitiveness of industry in North Carolina.

The cost analysis, or Task 1 Model, assembled the costs at the farms where technologies were being evaluated and converted those costs to farms in each of 21 categories. The competitive impact analysis, or Task 2 model, used the cost estimates (from the Task 1 model) for the 21 categories of farms to predict the reduction in hog farm inventory. In the Phase III report, the economic feasibility threshold for increased costs associated with conversion to alternative technologies, (i.e. the level of expenditure at which the industry could sustain its competitiveness) was set at a cost associated with a 12% reduction in inventory.

The 12% inventory reduction was based upon historic acceptance of this cost level in 1993, when state environmental regulations (.0200 rules) were passed in North Carolina. At that time, the hog industry predicted the costs would close 12% of the farms – but the 12% reduction never occurred. Instead, the industry more than tripled in size from 1993 to 1997, when the moratorium on new and expanding farms was passed

There are many reasons to support the case that the predicted reductions in hog inventory in NC would also not occur today if the industry were to convert to cleaner treatment technologies. Costs of technologies based upon first generation systems are always predicted to be higher than they turn out to be. Engineering improvements always bring down costs.

It is worth noting that the economic analysis conducted on alternative technologies in North Carolina did not include a correction for a learning curve. EPA has included a correction for the learning curve in the past (*See* Clean Air Nonroad Diesel Rule; http://www.epa.gov/nonroad-diesel/2004fr.htm, beginning at page 6-25; also attached below at Exhibit 38) EPA determined in the nonroad diesel rule that a 20% reduction in cost could be expected as new technologies for a given doubling of production. Based upon the discussion in the Nonroad Diesel Rule, new animal waste treatment technologies would also fit the description of a technology where a learning curve (perhaps higher than 20%) should be considered in the calculation of the cost of to the livestock production industry.

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[66] While EPA did evaluate this last technology option, it's analysis does not appear to be informed by the NCSU data or experience. *See* 71 Fed. Reg. 37765-66.

In the spring of 2006, Environmental Defense and Frontline Farmers, a group of contract hog farmers, joined in proposing a voluntary Early Adoption Program to provide cost share funding to hog farmers willing to install proven alternative technologies. The premise behind the program is by getting a sufficient number of alternative technologies on the ground, the cost of installation would come down as a result of the learning curve, as engineering efficiencies and economies of scale were released. Market development for value-added products would also help to increase the revenue, potentially leading to positive revenue generation.

In June of 2006, a USDA Conservation Innovation Grant was awarded to a team of partners, headed up by NCSU and including NC Department of Transportation, Duke, Environmental Defense, Frontline Farmers and two technology providers, Super Soils and Nature Works, to evaluate the performance and market potential of two alternative technologies and the value added products which they produce.

We urge EPA to conduct an adequate review of the animal waste treatment technologies identified by NCSU and their economic impacts and respond to them in the final rulemaking. Specifically, EPA should include an analysis of how the correction for the learning curve for developing technologies would affect their overall affordability and effectiveness.[67]

As a result of these combined deficiencies, EPA's proposal is arbitrary and capricious because the Agency failed to consider important facts that are central to its ability to conduct a full and reasoned analysis. *See Natural Resources Defense Council, Inc. v. U.S. E.P.A.*, 790 F.2d 289, 305 (3d Cir. 1986). Furthermore, in ignoring the importance, effectiveness, and availability of these technologies, EPA cannot satisfactorily articulate an explanation for the results of the BCT technology selection and analysis. *See People of State of Cal. v. F.C.C.*, 905 F.2d 1217, 1230 (9th Cir. 1990) (citations omitted); *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994).

H. EPA Failed to Evaluate the Application of the Pathogen Reducing Requirements Contained in 40 C.F.R. Part 503 Relating to Human Sewage Sludge.

Despite the immediate applicability to the problem of addressing pathogen discharges from animal manure, EPA steadfastly refuses to consider transferring the pathogen control requirements associated with the agricultural use of human "manure." Since 1993, EPA regulations have sanctioned the application of sewage sludge to agricultural fields provided these "bio-solids" are treated to the pathogen reduction standards contained in 40 C.F.R. Part 503. Significantly, many of the technologies that have been used successfully to reduce pathogen concentrations in human waste sludge are directly applicable to the treatment of livestock waste. *See* EPA Memorandum, *Assessment of the Necessity for Controlling Potentially Infectious Microorganisms in Animal Wastes*, 2003 Final Rule DCN 321038, attached at Exhibit 40. *See*

[67] Additional information on a certified EST, composting manure with the addition of cotton gin waste, may be found in Vanoti, Mattias, et al., *Aerobic Composting of Swine Manure Solids Mixed with Cotton Gin Waste*, ASABE Meeting Paper 064061 (2006), attached at Exhibit 39.

generally, US EPA, *Environmental Regulations and Technology: Control of Pathogens and Vector Attraction in Sewage Sludge*, Revised July 2003, attached at Exhibit 41.

1. EPA's Regulation of Pathogens Discharged By CAFOs Is Inconsistent With Its Regulation of Other Pathogen-bearing Wastes.

EPA's regulatory scheme for CAFOs, reduced to its essentials, is a program that claims to recover valuable nutrients from manure, i.e., collected feces and urine from livestock production operations. EPA also administers the Clean Water Act derived program for ensuring that the nation's waters are not contaminated by pollutants released when biosolids are used as agricultural fertilizer. *See* 40 C.F.R. Part 503. The Clean Water Act authorizes the beneficial use of sewage sludge subject to regulations published by EPA. *See* CWA §§ 405(b) & (d). Some significant differences adhere to the regulations which govern the disposal of sewage sludge versus animal manure. Most importantly, the statute requires that human sewage sludge be treated with acceptable management practices to reduce exposure to toxic pollutants. *See* CWA § 405(d)(2). Pursuant to Clean Water Act section 405, EPA promulgated regulations establishing a maximum allowable concentration of pathogens in sludge that is land applied as fertilizer. *See* 40 C.F.R. § 503.32.[68]

The properties in waste from livestock operations are substantially similar to human sewage sludge. The Agency is aware that livestock manure contains greater concentrations of organic compounds and nutrients. *See* 2003 Final Rule Comment Response Document at 10-292 (2003 Final Rule DCN 321846). The risk of pathogen contamination from fields fertilized with animal manure is comparable to or greater than the risk of similar contamination from areas where sewage sludge has been applied. *See* 2003 Final Rule Comment Response Document at 20-4. And yet, in both the 2003 Final CAFO Rule and this Proposed Revised Rule, EPA has not analyzed the direct applicability or costs or benefits associated with the imposition of similar measures for the pre-treatment of animal wastes that offer comparable degrees of protections against fecal coliform and other pathogens. *See* 68 Fed. Reg. 7224.[69] It is arbitrary and capricious for EPA to allow unregulated pathogen discharges from one class of facilities while providing stringent restrictions on pathogen discharges from another class of facilities.

As one example of cross-over technologies applicable to the treatment of animal waste, composting is an effective means of destroying many pathogens. *See, e.g.*, 2003 Final Rule Comment Response Document at 10-301. Sufficient levels of heat can be obtained by composting sewage sludge. *See id.* EPA staff have "strongly recommended that intervention measures be taken to protect human and ecological health including our food and water resources. This is best accomplished by properly treating the animal wastes." EPA Memorandum, *supra*, DCN 321038, Exhibit 10. The Agency's refusal to require comparable treatment and effluent standards for livestock waste is arbitrary and capricious.

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[68] 40 C.F.R. Part 503 also establishes maximum allowable concentrations for other pollutants, including metals and nutrients (nitrogen and phosphorus). *See* 40 C.F.R. § 503.13.

[69] Note that sewage sludge is essentially the end product of a pre-treatment process, one that requires specific measures to reduce concentrations of pathogens, nutrients, and other pollutants. *See* CWA §§ 304(b)(1)(B) & 304(d), 40 C.F.R. Part 133.

2. EPA Ignored the Advice of Its Own Experts.

EPA scientists have long argued that the biosolids regulations, and the technologies used to meet their criteria, should be applied to the pre-application treatment of animal wastes used as fertilizer:

> Over the years of the evolving National program for the management of biosolids, cost effective technologies have been developed to generate, treat, store, transport and use or dispose of this human equivalent of animal manures. The physical and chemical properties of biosolids are similar to the analogous physical and chemical properties of animal manures such that the above-captioned treatment technologies for biosolids could be applied in a cost effective manner to animal manures as well.
>
> ...
>
> A whole host of biosolids treatment technologies offer the potential to be used on manures. These technologies include dewatering, digestion, composting, heat drying and/or pelletization and chemical stabilization techniques.

Rubin, Alan, Ph.D, Senior Scientist, Biosolids Team/EPA Office of Water, *Technologies Transferable from Biosolids Management to the Management of Animal Manures: Abstract*, attached at Exhibit 42. Mr. Rubin further points out that:

> The United States Environmental Protection Agency has developed a comprehensive program for managing the Nation's biosolids at the Federal level. The 40 CFR Part 503 Regulation for the Use or Disposal of Biosolids provides a comprehensive technical basis for regulating this material in an appropriate manner as a resource for a variety of beneficial use projects. Most States have adopted the key elements of the Part 503 Rule as the basis of their technical regulations for biosolids. Most of the regulatory requirements contained in Part 503 could be applied to animal manures, either as a regulatory requirement or issued as guidance for the States to subsequently use in regulations. In particular, the pathogen reduction and vector attraction reduction requirements, site controls, and agronomic rate requirements of the Part 503 Biosolids Rule have direct applicability to controlling animal manures and lessening their human health and environmental impacts.

Id. Nor is Mr. Rubin the only expert so ignored by EPA in developing the Proposed Rule. The Agency has continued to ignore the findings contained in the administrative record leading to the 2003 Final Rule. *See, e.g.*, *Assessment of the Necessity for Controlling Potentially Infectious Microorganisms in Animal Wastes*, 2003 Final Rule DCN 321038. The Agency's continuing failure to contemplate the regulation of animal wastes according to standards similar to those in Part 503, and its rejection of its own experts' advice to do so, is arbitrary and capricious and not entitled to deference by a reviewing court. *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 685 (D. D.C. 1997).

I. Mounting Evidence Shows that Nutrient Management Planning Fails to Provide Meaningful Reductions in CAFO Fecal Coliform and Pathogen Pollution.

In both the 2003 Final Rule and the Proposed Rule, EPA maintains that the application of animal waste as fertilizer, in compliance with approved Nutrient Management Plans, will effectively reduce fecal coliform and other pathogen pollution from CAFOs. *See* 71 Fed. Reg. 37773. This assertion is directly contradicted by emerging research.

The Michigan Department of Environmental Quality has recently undertaken a study of the biological and water chemistry in two creeks that drain a large dairy. Michigan Department of Environmental Quality, Water Bureau, Staff Report, *A Biological and Water Chemistry Survey of Mill and Pine Creeks in the Vicinity of the Hartford Dairy Concentrated Animal Feeding Operation, Berrien and Van Buren Counties, Michigan, July through September 2005*, (MI/DEQ/WB-06/035), attached at Exhibit 43. The dairy applies waste as fertilizer to fields that drain into the creek, and does so according to the terms of an NPDES permit and a comprehensive nutrient management plan. *Id.* at 2. Samples were gathered at numerous stations, over several months, and spanning numerous precipitation events. *Id.* at 8. Sampling for *E. coli* revealed numerous exceedences of water quality standards and high levels of *E. coli*, especially following rainfall events. *Id.* at 9. MDEQ researchers found that "[m]anure management activities of Hartford Dairy appear to be contributing to extreme increases in *E. coli* concentrations in Pine Creek during rainfall events. However, the investigation did not discover high levels on nutrients in this farm drainage. *Id.* at 12. The implication of this initial study, which will require further research to confirm, is that nutrient management planning that achieves successful agricultural utilization of manure nutrients will provide insufficient treatment of *E. coli* and other enteric pathogens.

This field investigation directly contradicts EPA's determination that NMP implementation will provide meaningful levels of treatment of fecal coliform and other pathogens discharged from CAFO land application areas. EPA's over-reliance on computer models to project fecal coliform and pathogen treatment levels is undermined by this, and other, hard-data field studies. It is arbitrary and capricious for EPA to ignore the implications of actual research and continue its support for the Proposed Revised Rule based primarily on its computer modeling.

J. EPA's Reliance on the G.L.E.A.M.S. Model Is Fatally Flawed Because G.L.E.A.M.S. Is Not A Valid Computer Model for Forecasting Flows and Reductions in Fecal Coliform and Other Bacterial Contaminants.

EPA maintains that a Nutrient Management Plan, and the other miscellaneous measures included in Option 2 BCT, will reduce pathogen discharges from CAFOs by 46%. *See* 68 Fed. Reg. 7239; *see also* US EPA, *Environmental and Economic Benefit Analysis of Final Revisions to the National Pollutant Discharge Elimination System Regulation and Effluent Guidelines for Concentrated Animal Feeding, December 2002*, at ES-10. This determination is, in fact, both unsupported by analysis and directly contrary to the overwhelming weight of relevant materials within the Administrative Record for both the 2003 Final Rule and the Proposed Revised Rule.

As with its claims for other pollutant reductions, EPA's pathogen benefit assertion is based not on actual measurements, but on the results of an elaborate computer modeling exercise using a computer program called G.L.E.A.M.S to predict pathogen loadings under different regulatory scenarios. *See* US EPA, *Pollutant Loading Reductions for the Revised Effluent Limitation Guidelines for Concentrated Animal Feeding Operations (December 2002) ("Pollutant Loadings Analysis")* at 14. Problematically, G.L.E.A.M.S. was not designed to model pathogens, but instead was specifically developed to predict water, sediment, pesticide, and nutrient loadings. *See* Polluant Loadings Analysis at 14; *see also* The Southeast Watershed Research Laboratory, South Atlantic Area, GLEAMS Y2K Update,[70] printout attached at Exhibit 44. The program is a tool for comparative analysis of complex pesticide chemistry, soil properties, and climate, and is not designed to be used as an absolute predictor of pollutant loadings. *See id.*

The agency's reliance on G.L.E.A.M.S. is contrary to its practice in other water quality regulatory programs. The agency opted to recommend different, perhaps more accurate, models in its guidance to state agencies developing TMDLs for pathogens. *See* EPA, *Protocols for Developing Pathogen TMDLs*, EPA 841-R-00-002, January 2001 at 6-5. This departure is particularly notable, given that the TMDL program is directed towards the control of wastewater discharges from feedlots that fail to meet the minimum size threshold for CAFO designation. *See id.* at 2-6.

In order to simulate pathogen discharges, EPA derived pathogen concentrations from a mathematical formula based on phosphorus loads in the belief that pathogens act like pesticides. *See* Pollutant Loadings Analysis at 14. Taking a further step from realistically measured pathogen concentrations and flows to surface waters, EPA based it phosphorus to pathogen conversion on a coefficient that assumed that pathogens would behave similarly to copper. *See id.* at 17. EPA offered no explanation of the methodology of this substitution, verification of its accuracy, or justification for failing to undertake an alternative pathogen analysis. *See id.* While computer model results are commonly checked for accuracy against actual measurements or studies, EPA's attempts to verify its pathogen simulation fall far short of acceptable standards. EPA cites only a single literature reference to compare the accuracy of its simulated pathogen loadings against actual, measured loadings.[71] EPA offers a conclusory statement that simulated results are within range of values measured in one other study but offers no presentation of either data set for comparison. *See id.* at 44. Such a scant analysis is inadequate. "A regulation cannot stand if it is based on a flawed, inaccurate, or misapplied study." *Texas Oil and Gas Ass'n.*, 161 F.3d 923 at 935.

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[70] *Available at* <http://sacs.cpes.peachnet.edu/sewrl/Gleams/gleams_y2k_update.htm>, last accessed 15 August 2006.

[71] EPA's sole basis for the factors it built into its variation on the G.L.E.A.M.S. model apparently derived from one study of pathogen concentrations in one field in Arkansas receiving poultry waste. *See* Pollutant Loading Analysis at 43.

EPA's inappropriate use of a computer model not suited to model pathogens, and reliance on the results of that modeling, is arbitrary and capricious. In a similar case, OSHA's inaccurate and unresponsive reliance on its projections resulted in remand to the agency. *See Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1505-07 (D.C. Cir. 1986). Other courts have rejected EPA's similarly inscrutable attempts at justification. The Court of Appeals for the District of Columbia Circuit remanded a set of Clean Air Act regulations where the Agency offered conclusory statements, meaningless analysis, and inadequate data:

> The agency should provide an explanation, in intelligible if not plain English, that at a minimum reveals how it determined which of its costs are recoverable, the justification(s) underlying its choice of cost allocation methods, and a reasoned basis for the agency's belief that it incurs the same costs for a carryover certification as it does for a new certification.

Engine Mfrs. Ass'n v. EPA, 20 F.3d 1177, 1182-83 (D.C. Cir. 1994). Here, because of its overwhelming reliance on an inappropriate computer model, EPA has failed to offer a reasonable explanation for its failure to require CAFOs to adopt measures that will reduce or eliminate the flow of pathogens to the nation's waters. *State Farm* instructs reviewing courts to reverse agency decisions and rulemaking exercises when the agency fails to "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *accord Public Citizen v. Mineta*, 340 F.3d 39, 53 (2d Cir. 2003).

K. EPA's BCT Analysis is Undermined by the Agency's Refusal to Consider Actual Federal Cost-Share Programs Implemented to Fund Compliance with the 2003 Final CAFO Rule.

In the analysis leading up to the 2003 Final Rule, EPA declined to consider the impact that federal funding of conservation practices would have on the affordability of advanced technologies for treating animal waste. *See Waterkeeper*, 399 F.3d at 517. Over the objections of the Environmental Petitioners, the Second Circuit deferred to this decision because

> EPA still believed, at the time it conducted its final economic analysis, that the benefits of the EQIP program were still to speculative to count on because it remained unclear what the actual funding levels would be, what limits might be placed on the types of waste management practices covered, and what share of dollars would be allocated to confinement facilities…

Id. Over the course of the intervening five years since EPA's Final Rule analysis, those uncertainties have been erased.

Following significant revisions to the EQIP program in the 2002 Farm Bill, revisions which eased eligibility requirements to allow CAFOs to recoup 75% cost share for waste management structures and practices, USDA spending for animal waste practices expanded dramatically. *See* NRCS Fact Sheet, *Farm Bill 2002 Environmental Quality Incentives Program*, Oct. 2002, attached at Exhibit 45. Under a FY2004 budget allocation, USDA paid for animal

waste practices implemented in the prior eight years. EQIP payments for practices implemented in FY2002 rose to $17,337,674, over four times the amount expended the previous year. FY2004 expenditures for animal waste management practices implemented from FY2002 through FY2004 equaled $59,374,286 according to one set of data provided by USDA/NRCS. USDA/NRCS, *Environmental Quality Incentives Program FY-2004 Payments for 1997-2004 Animal Waste Practices plus Fences*, attached at Exhibit 46. Other USDA/NRCS documents reveal that actual EQIP spending on confined livestock cost-share programs was even higher: $142,673,244 in FY2004 alone; $105,254,024 in FY2003. USDA/NRCS, *Environmental Quality Incentives Program FY-2004 Cost-Share Approved by Livestock Type* and USDA/NRCS, *Environmental Quality Incentives Program FY-2003 Cost-Share Approved by Livestock Type*, attached at Exhibit. 47.[72]

In the face of such economic certainties, EPA must revisit the economic calculations that informed its BCT analysis and include the cost-offsets realized by the availability (and distribution) of these federal funds. CAFO compliance costs have, and will continue to be, offset by contributions from federal grant and tax credit programs. It would arbitrary and capricious for EPA to continue to consider these contributions as speculative and to fail to account for them in its BCT cost analysis.[73]

CONCLUSION

We urge EPA to revise its proposal to correct the deficiencies we have outlined in our comments to meet the requirements of the Clean Water Act, the Second Circuit's decision in *Waterkeeper Alliance v. EPA*, and to protect public health and the environment.

Submitted by,

Melanie Shepherdson
Jon Devine
Natural Resources Defense Council

Eric Huber
Sierra Club

Jeffrey Odefey
Janelle Hope Robbins
Waterkeeper Alliance

[72] All documents referenced in this paragraph are available at http://www.nrcs.usda.gov/programs/eqip/.

[73] In addition, Senator Hagel (R-NE) recently introduced the "CAFO Tax Credit Act" which "will help livestock producers meet the costs of complying with Environmental Protection Agency (EPA) regulations." Press Release, Office of Senator Chuck Hagel, *Hagel Introduces Bill to Provide Tax Credit for Livestock Producers*, July 29, 2006, attached at Exhibit 48.

EXHIBITS

We have submitted all 48 of the Exhibits to these comments, listed below, on an enclosed cd.

1. Environmental Assessment of Proposed Revisions to the NPDES Regulation and Effluent Guidelines for CAFOs.

2. Final Rule Administrative Record Index.

3. Memorandum from Craig Simons to Virginia Kibler & George Townsend (Aug. 25, 2000).

4. Eastern Research Group, Inc. Memorandum for EPA Region 9, Ponderosa Dairy CWA Violation (Apr. 27, 1999) & Department of Justice Press Release (Jan. 21, 1999).

5. U.S. EPA, Environmental Assessment of Proposed Revisions to the National Pollutant Discharge Elimination System Regulation and the Effluent Guidelines for Concentrated Animal Feeding Operations, at exhibits 4-16, 4-22 & 4-25 (Jan. 2001)

6. TetraTech, Inc. for U.S EPA, State Compendium: Programs and Regulatory Activities Related to Animal Feeding Operations at 5-6 (May 2002).

7. Environmental Integrity Project, Threatening Iowa's Future: Iowa's Failure to Implement and Enforce the Clean Water Act for Livestock Operations (May 2004).

8. NC DNR, Temporary restraining order issued against Orange County swine producer whose operation discharged waste Friday.

9. Brief for U.S. EPA, *Waterkeeper Alliance, Inc. v. U.S. EPA* (Mar. 23, 2004).

10. Final Report, ECCSCM Water Monitoring Project, 2001-2003.

11. Janet Kauffman, "A Dirty River Runs Beneath It."

12. "Farmland Drainage and the Nitrate Problem."

13. U.S. EPA Review of Ohio EPA's Programs, Excerpts from the Final Report (Feb. 13, 2003).

14. General Accounting Office, Livestock Agriculture: Increased EPA Oversight Will Improve Environmental Program for Concentrated Animal Feeding Operations (Jan. 2003).

15. Dinnes, Dana L., et al., *Nitrogen Management Strategies to Reduce Nitrate Leaching in Tile-Drained Midwestern Soils*, Agron. J. 94:153-171 (2002).

16. Cook, M.J. and J.L. Baker, *Bacteria and Nutrient Transport to Tile Lines Shortly after Application of Large Volumes of Liquid Swine Manure*, Transactions of the ASAE, Vol. 44(3): 495–503 (2001).

17. Texas Administrative Code, Public Notice of Air Quality Applications.

18. Woodside, Michael D. and Benjamin R. Simerl, "Land Use and Nutrient Concentrations and Yields in Selected Streams in the Albemarle-Pamlico Drainage Basin, North Carolina and Virginia, USGS Open File Report 95-457.

19. Daniel, T.C., et al., "Effect of Extractable Soil Surface Phosphorus on Runoff Water Quality," Transactions of the ASAE 36(4), 1079-1085 (1993).

20. Comis, Don, *Smoking Out Worms*, Agricultural Research, Sept. 2005.

21. Geohring, Larry D. , et al., *Preferential Flow of Liquid Manure to Subsurface Drains*, Drainage in the 21st Century: Food Production and the Environment, Proceedings of the Seventh Annual International Drainage Symposium, March 8-10, 1998.

22. Harrigan, Tim, *Manure Application on Tile-Drained Cropland*, Michigan Dairy Review, January 2005.

23. Memorandum, Kenneth Huffman to Jack Ferguson, *Estimated Frequency of CAFO Holding Pond Overflows Caused by Chronic Rain Events*, April 8, 2003. Memorandum, Kenneth Huffman to Jack Ferguson, *Water Quality Violations Caused by Wet Weather CAFO Lagoon Overflows*, July 16, 2002.

24. NRCS CPS 590.

25. K.M. Manel and J.D. Slates, *Farmer Estimates of Manure Application Rates*, Ninth International Animal, Agricultural and Food Processing Wastes Proceedings of the 12-15 October 2003 Symposium (Research Triangle Park, North Carolina USA).

26. Rose, Dept. of Fisheries and Wildlife Michigan State University, *Risks to Human Health Associated with Water and Food Contaminated with Animal Wastes*, August 16, 2005.

27. Judson Jaffe, Comments on EPA's Implementation of the BCT Cost Test for Fecal Coliform in its June 30, 2006 Proposed Rulemaking.

28. National Research Council, The Scientific Basis for Estimating Air Emissions from Animal Feeding Operations.

29. Letters from NRDC, Sierra Club, and Waterkeeper Alliance to EPA dated July 20, 2005, August 15, 2005, and June 19, 2006.

30. Blackburn, J.W., et al, "Aerobic Thermophilic Digestion: A Technical and Practical Option for Swine Manure Management,"); (Staton, Kevin L. and James E. Alleman, "2nd Generation Autothermal Thermophilic Aerobic Digestion:)

31. Martin, John H. "A Comparison of Dairy Cattle Manure Management with and without Anaerobic Digestion and Biogas Utilization."

32. Factsheets on Aerobic Digestion, Anaerobic Digestion, Black Soldier Flies, Composting, Constructed Wetlands, and Vermicomposting.

33. J. H. Martin, Jr., et al., *Evaluation of the Performance of a 550 Cow Plug-flow Anaerobic Digester Under Steady-State Conditions*, Ninth International Animal, Agricultural and Food Processing Wastes Proceedings of the 12-15 October 2003 Symposium (Research Triangle Park, North Carolina USA), Oct. 2003, at 350-359.

34. Wright, Peter, et al., *Reductions of Selected Pathogens in Anaerobic Digestion,* Ninth International Animal, Agricultural and Food Processing Wastes Proceedings of the 12-15 October 2003 Symposium (Research Triangle Park, North Carolina USA), Oct. 2003.

35. Keener, H.M., et al., *Optimizing Design and Operation of Dairy Manure Composting Systems Using Pilot and Full Scale Kinetic Studies,* Ninth International Animal, Agricultural and Food Processing Wastes Proceedings of the 12-15 October 2003 Symposium (Research Triangle Park, North Carolina USA), Oct. 2003, at 310-324.

36. Henry, C.G., et al., *Application and Performance of Constructed Wetlands for Runoff from Small Open Lots,* Ninth International Animal, Agricultural and Food Processing Wastes Proceedings of the 12-15 October 2003 Symposium (Research Triangle Park, North Carolina USA), Oct. 2003, at 132-43.

37. Morgan, Jennifer, et al., *Evaluation of Pathogen Removal from Dairy Wastewater Using an Ecological Treatment System*, ASABE Meeting Paper 067018 (July 2006).

38. Clean Air Nonroad Diesel Rule.

39. Vanoti, Mattias, et al., *Aerobic Composting of Swine Manure Solids Mixed with Cotton Gin Waste*, ASABE Meeting Paper 064061 (2006).

40. EPA Memorandum, *Assessment of the Necessity for Controlling Potentially Infectious Microorganisms in Animal Wastes*, 2003 Final Rule DCN 321038.

41. US EPA, *Environmental Regulations and Technology: Control of Pathogens and Vector Attraction in Sewage Sludge*, Revised July 2003.

42. Rubin, Alan, Ph.D, Senior Scientist, Biosolids Team/EPA Office of Water, *Technologies Transferable from Biosolids Management to the Management of Animal Manures: Abstract.*

43. Michigan Department of Environmental Quality, Water Bureau, Staff Report, *A Biological and Water Chemistry Survey of Mill and Pine Creeks in the Vicinity of the Hartford Dairy Concentrated Animal Feeding Operation, Berrien and Van Buren Counties, Michigan, July through September 2005*, (MI/DEQ/WB-06/035).

44. The Southeast Watershed Research Laboratory, South Atlantic Area, GLEAMS Y2K Update.

45. NRCS Fact Sheet, *Farm Bill 2002 Environmental Quality Incentives Program*, Oct. 2002.

46. USDA/NRCS, *Environmental Quality Incentives Program FY-2004 Payments for 1997-2004 Animal Waste Practices plus Fences.*

47. USDA/NRCS, *Environmental Quality Incentives Program FY-2004 Cost-Share Approved by Livestock Type* and USDA/NRCS, *Environmental Quality Incentives Program FY-2003 Cost-Share Approved by Livestock Type.*

48. Press Release, Office of Senator Chuck Hagel, *Hagel Introduces Bill to Provide Tax Credit for Livestock Producers*, July 29, 2006.

Mr. COHEN. Thank you, Mr. Kennedy.

I will normally ask questions first, but I am going to reserve that right and yield to other Members who might have questions.

Mr. Franks, do you have questions? Ranking Member Franks?

Mr. FRANKS. Mr. Chairman, I may have questions in a moment.

I am going to, if it is all right, yield to my colleague, Steve King, here first.

Mr. KING. Thank you, Mr. Franks, our Ranking Member, and, Mr. Kennedy, for your testimony.

I regret that I have not read deeply through a lot of the material that you have put out, but it is clear to me that you put a lot of material out. It is also clear to me that you have made a visit or two to Iowa.

I just reflect back upon a meeting in Clear Lake a few years ago and a quote that I recall would be—I believe, actually, this would be exact—"Large scale hog producers were a greater threat to the United States and democracy than Bin Laden's terrorist network."

Is that an accurate quote?

Mr. KENNEDY. I don't know if that is accurate, but I believe it and I support it. And the reason for this is the same reason Teddy Roosevelt said it.

Teddy Roosevelt said this Nation would never be destroyed by a foreign enemy, but he said that "Malefactors of great wealth, working from within, would erode and subvert American democracy."

And if you look, again, not from me, but from the "Raleigh News and Observer," a five-part series on "Boss Hog," it shows how this industry meticulously subverted and corrupted virtually every relevant public official in the state.

Mr. KING. Mr. Kennedy, excuse me, I have got a lot of questions to ask. But I think——

Mr. KENNEDY. Because this——

Mr. COHEN. Let the witness answer the question, Mr. King, please.

Mr. KENNEDY. I am answering your question, sir. And you asked me an inflammatory question, and I am giving you an answer for it.

There are laws now——

Mr. KING. Your statement, Mr. Kennedy, you are telling me that your statement is an inflammatory question when I asked if you can confirm it.

Mr. KENNEDY. I am telling you that I can confirm it, and I am explaining it to you so that you understand what I am talking about.

Mr. KING. I would be happy to introduce your op-ed into the record, if you could just suspend for a moment.

Mr. COHEN. If we cannot have a colloquy here—Mr. Kennedy, you go ahead and respond and if we need extra time for Mr. King to ask questions, we will provide it to Mr. King, to be fair to him.

But I think it is fair that when the witness is asked a question, he be allowed to respond.

Mr. Kennedy, proceed.

Mr. KENNEDY. Today, in 14 states, there are laws that make it illegal to criticize food from factory farms. Now, you may say this

is anti-American. I think it is. I think it violates our first amendment rights.

And you may say this couldn't be true, but ask Oprah Winfrey, who sent for a 6½ week jury trial to Texas, because she criticized, on her show, factory farm food.

Do you think that is American? Do you think that that is democratic?

And three state legislatures have now passed laws that make it illegal to photograph a factory farm or a factory farm animal from a public road. And Maryland and North Carolina, many other states, have laws that make it illegal for the public to learn where factory farms are located, even though the government has this information.

This is an assault on our democracy. Wherever you see environmental injury, you will also see the subversion of democracy. And that is what I talked about when I made that statement.

Osama Bin Laden has no power over this country to make us change our laws. We do. And the biggest threat to our country is if legislatures, and particularly those in the possession of large businesses, begin restricting our rights at home to do what the Constitution says that we can do.

Osama Bin Laden can't make us alter our own Constitution, but that is happening in this country every day because of the power of this industry.

Mr. COHEN. Thank you, sir.

Mr. King, you are recognized, and we will give you the time that you need for questions.

Mr. KING. Thank you, Mr. Chairman.

And consistent with Mr. Kennedy's response, I have in my hand an op-ed dated Tuesday, May 14, 2002, in *The Des Moines Register,* titled, "I'm serious: Hog lots threaten democracy," by our witness, Mr. Robert F. Kennedy, Jr., and it is part of a public document, but I would ask unanimous consent to enter that into the record, and I think that does flesh out the statement that he has made.

I would also ask——

Mr. COHEN. Without objection.

[The information referred to follows:]

Family farms disappear because of government policies orchestrated by a few industrial meat barons.

I'm serious: Hog lots threaten democracy

By ROBERT F. KENNEDY JR.

I stand by the statements I made in Clear Lake last month that factory meat integrators are more threatening to American democracy than Osama bin Ladin. As Teddy Roosevelt recognized, the gravest threats to America arise not from a foreign foe, but from "malefactors of great wealth" who subtly corrode our democracy from within.

A single pork factory can generate more waste than America's largest cities, far more than is needed to fertilize fields. The disposal costs of properly treating this waste make factories uncompetitive with traditional farms unless they violate at least four federal and many state environmental laws.

Traditional farms are exempt from these laws because they spread manure at agronomic rates for fertilizer. The integrators' business plan relies on the assumption that pork factories will evade prosecution by improperly influencing government enforcement officials. In other words, they must disable our democracy to prevail in the market.

The industry lulls the public and media with slick spokesmen, skilled lobbyists and sophisticated ad campaigns, purchases power and tames regulatory agencies with endless dollars and hounds to obscurity politicians who dare stand against it. Indentured sharecroppers known as "contract farmers" who live and die at the industry's whim are its preferred spokesmen because they lend it the patina of the "family farm."

The industry routinely uses bullying lawyers, and illegal intimidation, threats, harassment and violence to terrorize and silence critics. Neighboring farmers are often sued for participating in public hearings or exercising First Amendment rights. I have been targeted. Wherever I travel, industry goons shadow and attempt to intimidate or silence me.

Family farmers have seen firsthand how factory pork bullies erode democracy and bully America's most vulnerable communities.

Free flow of information is critical to the functioning of a democracy. The industry's acuity at suppressing sound science is described in frightening detail in the 1997 best-seller "And the Waters Turned to Blood," which describes its campaign to crush North Carolina State University scientist Dr. JoAnn Burkholder, who proved the link between hog-factory discharges and the deadly Pfisteria virus.

In Iowa, the integrators have used their political clout to suppress scientific papers by USDA scientist Dr. Jim Zahn, proving that toxic air discharges from Iowa hog factories are so poisonous that they violate the federal superfund laws. Zahn also discovered that millions of antibiotic-resistant bacteria move by air from hog factories every day, endangering public health and neighboring farms. Under industry pressure, USDA has forbidden Zahn from publishing or speaking publicly about these taxpayer-financed studies.

Pollution from the integrators has killed and sickened thousands of Americans since 1993, far more than anthrax. The widespread epidemic of drug-resistant superbugs caused by the industry's routine abuse of human antibiotics arguably poses a far greater threat than most biological or chemical weapons.

In North Carolina, the industry has polluted hundreds of miles of once-pristine river systems, killed billions of fish, subjected millions of farm animals to unspeakable and unnecessary cruelty, dramatically diminished property values, shattered rural economies, turned neighbor against neighbor and put thousands of fishers and family farmers out of business.

Two decades ago, there were 27,000 family hog farmers in North Carolina. They have been replaced by nearly 3,000 hog factories, mostly owned or indentured to a single multinational — Smithfield. Each factory replaces 10 high-quality agricultural jobs with two dangerous and degrading minimum-wage jobs filled by itinerant labor, largely alien.

Robert F. Kennedy Jr., center, spoke at the Waterkeeper hog summit in Clear Lake last month. Shown with him are Don Webb, left, a former hog farmer from Stanfonberg, N.C., and Larry Green of Worthington, Minn.

Iowa is experiencing the same consolidation, having lost 41,000 independent hog farmers since 1984 with almost half of the remaining 10,500 controlled by the integrators.

There is nothing inevitable about this devolution. It would be a huge mistake for Iowans to believe this industry propaganda that immutable global forces or "economics of scale" are causing the disappearance of America's family farms.

Family farms are disappearing because of deliberate, purposeful government policies that have been orchestrated by a few giant industrial meat barons and promoted by the Farm Bureau.

The hundreds of family farmers, who attended my speech and responded with a standing ovation, have seen firsthand how factory pork bullies erode democracy and bully America's most vulnerable communities.

One of the greatest sources of frustration to America's family farmers is public and media indifference to the cataclysmic struggle for control of the American landscape. They alone seem to understand that consolidation of America's food production by a tiny cabal of pirate multinationals with no demonstrated loyalty to our nation or its laws threatens our national security.

It also threatens America's culture, our values and our democracy. By occupying America's landscapes and displacing the traditional farmer, this industry is fixing the final nail into the coffin of Thomas Jefferson's vision of an American democracy rooted in tens of thousands of independent yeoman freeholds, each with a strong, personal stake in our system.

ROBERT F. KENNEDY JR. is president of Waterkeeper Alliance, a New York environmental group.

Mr. KING. Thank you. And I would also ask that a *Des Moines Register* article dated April 10, 2002, that is a news article that stipulates some of the same dialogue that took place in Iowa back then, unanimous consent to enter it into the record, as well.

Mr. KENNEDY. I am happy to have that entered in the record with the proviso that the information in that article—that article is not necessarily true.

Mr. COHEN. The articles speak for themselves.

Mr. KENNEDY. It was taken from representatives of the Pork Producers Council and the American farmer.

Mr. KING. Point of order, Mr. Chairman.

Mr. COHEN. Without objection, the statement will be allowed in and the statement only speaks to what——

[The information referred to follows:]

Big hog lots called greater threat than bin Laden;R.F.K. Jr. lashes out at 'enemy within' Des Moines Register April 10, 2002 Wednesday

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Des Moines Register

April 10, 2002 Wednesday

SECTION: MAIN NEWS; Pg. 1A

LENGTH: 974 words

HEADLINE: Big hog lots called greater threat than bin Laden;
R.F.K. Jr. lashes out at 'enemy within'

BYLINE: Eller Donnelle, Staff

BODY:
By DONNELLE ELLER

REGISTER BUSINESS WRITER

Large-scale hog producers are a greater threat to the United States and U.S. democracy than Osama bin Laden and his terrorist network, says **Robert F. Kennedy** Jr., president of the Waterkeeper Alliance, a New York environmental group.

"We've watched communities and American values shattered by these bullies," Kennedy said in an interview Tuesday, reiterating comments he made to 700 Iowans at a conference on sustainable hog operations Friday night in Clear Lake.

Luke Kollasch, an Algona hog producer, said it is irresponsible to compare the pork industry to the man blamed for the largest terrorist attack against the United States. Kollasch and three other people walked out during Kennedy's speech. "You have to be a complete wandering idiot to make that statement," said Kollasch, whose family owns several hog farms and feed and construction companies in northwest Iowa.

"To compare pork producers with a regime that kills and terrorizes Americans, that blew my mind," said Craig Christensen, a producer who farms with his father and uncle near Ogden.

"He put Grant Wood and Osama bin Laden side-by-side and said they were the same," said Christensen, who also heard Kennedy's Friday speech.

Kennedy visited Iowa last week as the Legislature debates controversial measures to reduce air and water pollution from major hog confinements. Among the provisions is one that would give local governments and residents say in where livestock confinements are located.

Kennedy, who has gained notoriety for efforts to clean up the nation's waterways, said Tuesday that corporations such as ConAgra Foods, Smithfield Foods and Premium Standard Farms are the "enemy within."

Corporations buy political support with campaign contributions to strong-arm lawmakers to pass favorable laws and hobble enforcement agencies, said Kennedy, the son of assassinated U.S. senator and attorney general **Robert F. Kennedy.**

"The first thing they do is attack democracy by removing local control," Kennedy said. "The very people who bear the burden of the operations have no right to object."

Then corporate farms take advantage of "an exemption" given small farmers to apply hog waste to cropland, Kennedy said. "Hogs produce 10 times the waste that humans do, so if you have 100,000 head of hogs, it's creating the same waste as a million people, spread out on the land."

"A city with a million people would have to build a sewage treatment facility," Kennedy said.

Treating hog waste would "add $1.75 to the price of a pig at kill-weight," Kennedy said, adding that corporations would be unable to compete with small family operations with that expense.

"The only way for corporations to make money is by cheating and breaking the law every single day," he said. "The only way to function is to disable the enforcement agency."

Comments challenged

Ross Harrison, a spokesman for the Iowa Department of Natural Resources, challenged Kennedy's assessment of Iowa's regulatory environment.

"No one has exemptions to pollute the state's waterways," Harrison said.

The state agency determines where hog confinement operations can be located. Part of that process requires that large operations file manure management plans that outline how much waste is applied to cropland, he said.

The content of that waste is analyzed, and the state allows only the amount of waste that farmland can support.

"There is no conscious effort to allow corporate operations to pollute," Harrison said, adding that sometimes spills occur. "They're investigated and fines are assessed."

Kennedy provides "a little bit of fact and the rest is misunderstanding of how the system works."

Christensen said Kennedy claims to only be after corporate or "factory farms" but defines them as any operation that uses hog confinements.

Scott Tapper, a hog producer who lives near Webster City, said that describes "90-plus percent of the family farms in Iowa."

"He has some warm fuzzy picture of what family farming is, but that's not reality," said Tapper, a board member of the Iowa Pork Producers Association, based in West Des Moines.

Gary Hoskey, president of the Iowa Farmers Union, a sponsor for the Clear Lake event, agrees with Kennedy that large-scale corporate operations undermine democracy.

Hoskey said hog corporations foul Iowa waterways, drive out small producers and kill rural communities.

Iowa numbers

Iowa hog operations have dropped from 64,000 in 1980 to 10,500 last year, state records show. Hoskey said more hogs are concentrated on fewer farms.

"Ask a person who can't go outside of their home, or whose kids are ostracized at school if they feel like they've lost their democratic right and you'll get an answer in a hurry," Hoskey said.

Kennedy said he received a standing ovation in Clear Lake following his speech.

What the bill would do

The comprehensive plan to tighten regulation of hog confinements and other large livestock operations includes these provisions:

* Charge livestock confinement owners a fee based on the animal capacity of their facilities.

* Hire 12 more environmental inspectors with up to $1 million in fee revenue.

* Lower the size threshold for animal-feeding operations requiring construction permits.

* Use a new scoring system that takes into account environmental and community factors to help county and state officials evaluate proposed confinement sites.

* Leave the final decision on site approval with the Iowa Department of Natural Resources.

* Authorize air-pollution monitoring of livestock operations that leads to enforcement of new air quality standards.

* Ban the building of livestock confinements in 100-year floodplains.

* Regulate land application of manure based on how much algae-feeding phosphorus the material contains.

GRAPHIC: Kennedy

LOAD-DATE: October 15, 2002

Source: Legal > / . . . / > **Des Moines Register (Iowa)**
Terms: **"Robert F. Kennedy"** (Edit Search | Suggest Terms for My Search)
View: **Full**
Date/Time: Wednesday, February 4, 2009 - 10:39 AM EST

Mr. KING. Point of order, Mr. Chairman.

Mr. COHEN. Yes, sir.

Mr. KING. Is the witness allowed to object to a unanimous consent request?

Mr. COHEN. Well, no, he can't and he didn't. He did, but it wasn't permitted, and he is out of order. But we understand that and that he didn't understand necessarily the rules on admitting something into the record, because it doesn't stand for the veracity of what is contained therein.

Thank you, Mr. King. You are recognized.

Mr. KING. Thank you, Mr. Chairman, I appreciate that.

And I would be very happy to go deeply into this hog issue, and I will just make this statement into the record, and that is that on a per head basis, today's hog production in Iowa and around the country is far, far more favorable to the environment than anything we have ever had before and it gets better every single day.

Our water is cleaner. Our soil is cleaner. We are doing a far better job of taking care of that livestock. And we had more hogs in Iowa in 1952 than we have today, and they are far safer today than they were in 1952.

But I think the point——

Mr. KENNEDY. You have got more family farmers——

Mr. KING. I will get to you with a question, and you will have an opportunity to answer, Mr. Kennedy.

I think the point that the panel is going to be interested in is not so much debating the hog industry in Iowa, although I think——

Mr. COHEN. Mr. King? Mr. King?

Mr. KING [continuing]. It is an industry——

Mr. COHEN. Mr. King, for the record, without objection, you have an additional 3 minutes, if you so desire.

Without objection.

Mr. KING. Thank you, Mr. Chairman.

But I think the point that this panel is going to be interested in is the statement that the hog industry has corrupted public officials. I think at one point you said every public official in the state that had effect on this.

And I think it impugns all elected public officials, and I think that is a very broad statement, and I think your record of making very broad statements, I think, causes us to take a look at the rest of your testimony here today with a bit of a jaundiced eye.

And I will give you an opportunity to respond to that.

Mr. KENNEDY. What I said was that the "Raleigh News and Observer" concluded that—and with strong documentation, a five-part series that won the Pulitzer Prize—that every relevant public official in the state of North Carolina had been corrupted by that industry.

I urge you to go read that article.

Now, what happened, once they did it in North Carolina, they dropped the price of hogs to $0.08 a pound at kill weight. At that point, states like Iowa, like your state, where the public officials could not be that easily corrupted, had to adopt the same system or they would have been out of business.

But it has put out, as you probably know, almost 100,000 independent hog farmers in Iowa. It put out 28,700 independent hog farmers in North Carolina.

Mr. KING. Again, I am going to take it from that response that you do agree with the statement that every public official in the state had been corrupted by this process.

Mr. KENNEDY. I said that that is what the "Raleigh News and Observer" concluded.

Mr. KING. Since you have introduced that into the record, I am going to take it that you are endorsing that statement, and you believe it.

Mr. KENNEDY. I am saying that that—I didn't investigate every public official in the state. I am saying that is what the "Raleigh News and Observer" concluded.

Mr. KING. And I will just allow the panel——

Mr. KENNEDY. They won the Pulitzer Prize for it, and maybe not every single one was corrupted, I can't tell you.

Mr. KING. There may be some exceptions.

Mr. KENNEDY. I didn't do the report.

Mr. KING. Thank you. And is it also your belief that manure is a hazardous toxic waste?

Mr. KENNEDY. Manure, when it is applied at agronomic rates as a fertilizer has a beneficial use, but when it is applied beyond agronomic rates, then it becomes a poison to the land and the water and people.

Mr. KING. And you understand, Mr. Kennedy, that we do have regulations that limit the rate of application so that it is not a pollutant.

Mr. KENNEDY. If you think those regulations are enforced, if you think those regulations are effective, I beg you to come to North Carolina with me and look around. Come even to Iowa and look around.

That is what the captive agencies are saying, and it is complete baloney.

Mr. KING. Mr. Kennedy, I would remind you that I live in the middle of this and the wind blows in four directions and the water runs downhill, and I have lived here all my life——

Mr. KENNEDY. I would ask you——

Mr. KING [continuing]. And I do not see the description you described to the panel, and I have got to take exception to it.

Mr. KENNEDY. I would ask you how much in contributions you receive from the Farm Bureau and from the Pork Producers Council.

Mr. KING. I would have to look. I would ask you how you got into this industry in the first place.

Mr. KENNEDY. How did I get into it?

Mr. KING. Yes.

Mr. KENNEDY. Because they are the worst polluter in America.

Mr. KING. Weren't you assigned to do some public service that got you started in this, Mr. Kennedy?

Mr. KENNEDY. You mean in protecting the environment? No.

Mr. KING. I mean assigned to 800 hours of public service that was your gateway into this Hudson River issue.

Mr. COHEN. Time has expired.

Mr. Kennedy——

Mr. KING. You impugn my character with your question, Mr. Kennedy, and I don't question yours.

Mr. KENNEDY. No. If you are asking me how I got into——

Mr. COHEN. Time has expired, and I am afraid, while this was very interesting, we are not going to be able to continue it. It does conjure up all thoughts of Barry Goldwater and extremism in the defense of liberties is no vice, moderation should be no virtue.

Mr. Watt, do you seek recognition?

Mr. WATT. Yes, sir.

Mr. COHEN. You are on.

Mr. WATT. Thank you, Mr. Chairman. I appreciate the Chairman having this hearing.

This is a classic case where we have not only gone into the weeds, but into the hog farms, which gets us back pretty much to where Mr. King ended here, because he said there were regulations in effect and Mr. Kennedy said those regulations are not being followed.

The hearing, interestingly enough, is about whether the regulations even will be in effect, because when we don't protect ourselves from these kind of midnight rulemaking procedures, then we have the prospect at least that not even the regulations will be in effect.

There will be a new set of regulations that have wiped out the past ones in the middle of the night.

So for us to focus on any one of the particular—not that this testimony hasn't been interesting and entertaining, and I am sure there are other people here who will focus on other rules that were either changed or not changed at the last minute, the real policy question we are confronted with is how can we protect ourselves against this kind of midnight rulemaking.

And that really has no substantive content to it. It is a policy content, because sometimes when we protect ourselves against midnight rulemaking, it will be protecting ourselves against rule changes that we would like to have made and sometimes it will be protecting ourselves against changes that we would not like to have made.

And on that score, I think I am fully—although I haven't looked at the details of Mr. Nadler's bill, I am fully supportive of the concept of his bill and would just give one illustration where there was bipartisan agreement that the rules should not be changed.

I happen to sit on the Financial Services Committee and chaired the Oversight Subcommittee, and we had a hearing about the real estate procedures, closing process.

The rules that were proposed right at the end of the Bush administration, Republicans—there wasn't a single person who showed up who supported the changes that were being proposed, either Republican, Democrat, conservative, liberal however you wanted to categorize them.

Everybody testified against the changes that were being proposed and, sure enough, in the dark of night, at a time when it appeared that the Administration couldn't do—the new Administration wouldn't be able to do anything about it, except in a very limited way by going within 60 days and, under the Congressional Review

Act, going through something as difficult as those rules and trying to understand them, there was no way to reverse them.

So the concept, the policy of having a more transparent process I hope Mr. King isn't disagreeing with, even though he might want to go at the witness on the weeds or the hogs or whatever it is that he was questioning.

The real policy question is should an Administration that is on the way out, Republican or Democrat, because there will be a Democratic administration at some point, on the way out, remember that, is it a good policy practice to allow them just willy-nilly to change the rules that have been in play for so long?

And I hope there is nobody here who disagrees with the policy that that is a bad idea, and I would have to say it is a bad idea whether—regardless of the content of what the new rule is and regardless of whether it is an outgoing Republican administration or an outgoing Democratic administration.

That is what we need to be dealing with in this Committee.

I didn't ask Mr. Kennedy any questions, but I hope you will just say you agree with that or you don't.

Mr. KENNEDY. The caveat I have about that is that under the current regimen, the way that the regulatory process works, there are so many obstacles to big regulations being passed that it takes—in fact, I had a lawsuit against the Federal Government, against the EPA, in which this became a contention and was settled by the court.

And they said that if a regulatory agency jumps through all the hoops that it is supposed to do from the beginning, from the original notice and comment to the end of the regulatory process, the average regulation takes about 8 years to get through the regulatory process.

Mr. WATT. But you can't have this both ways, Mr. Kennedy.

Mr. KENNEDY. No. All I am saying——

Mr. WATT. And as a policy matter, it is hard for us to be on both sides of this issue.

I understand the concern about the length of time that it takes to do rulemaking, but if every Administration is operating under the same set of procedures, they have to get through that process either far enough in advance of the time so that the new incoming Administration—or they shouldn't be able to do it at midnight on January 19, when they are going out on January 20.

Mr. KENNEDY. Here is the thing, Congressman, is that during the Clinton administration, many of these—the Administration tended to go through all of those steps carefully in the regulatory process and, at the end, they ended up with a big balloon of regulations that they had done through the last couple months.

But in this Administration, a lot of these midnight regs—the regulatory process just began in May or June or July or August and in one case, the case of the Endangered Species Act, they received tens of thousands of comments.

The comment reviewers had an average—had to review an average of nine comments per minute in order to get the regulations out.

Also, they weren't doing what they were supposed to do. These are genuine midnight regulations that didn't receive——

Mr. WATT. I think we are generally on the same side of the issue.

Mr. COHEN. Time has expired.

Mr. WATT. I just want to be sure that neither Democrats nor Republicans can game the regulatory system by doing this. That is the point I am trying to make.

I yield back.

Mr. COHEN. Thank you, sir.

The gentleman concurs with the Ranking Member and the Chair in that this should be bipartisan.

Are there others seeking recognition to question Mr. Kennedy?

Mr. FRANKS. Mr. Chairman?

Mr. COHEN. Ranking Member Mr. Franks?

Mr. FRANKS. Thank you, Mr. Chairman.

Mr. Chairman, first of all, I know that a Committee like we have is often difficult to keep bipartisan, but I think I heard some common ground in what Mr. Watt was saying.

It is one of those rare moments that I want to express a sense of gratitude to him for that, because I know that he was the Ranking Member of a Committee that oversaw or essentially handled a special project, the Administrative Law Process and Procedure Project for the 21st hcentury, and I think that they came up with a number of very good proposals.

And I think that he has hit on the central point here. It is that a lot of the conservatives had equally strenuous policy criticisms that we leveled against the Clinton administration for these midnight regulations.

And one can debate whether these are good or bad policy things, but I do think that Mr. Watt is correct in that he is suggesting that regardless of what the policy is, we have to ascertain what the process should be and it, of course, has to be done within the constraint of the Constitution and some, hopefully, reasonable fashion that whoever is in the White House can move forward with their constitutional duties and, at the same time, it would be consistent, and at least everyone can agree on the process.

So with that, thank you, Mr. Watt.

Mr. Kennedy, I know that you have a number of policy concerns with the Bush administration's late-term regulations. They call them the midnight rules, I guess, if that is what everyone wants to call them. I hate to use that terminology.

But can you, however, identify for us the key administrative process concerns that you have about the way in which all presidential Administrations go about promulgating so-called midnight rules?

Mr. KENNEDY. Well, I think you put your finger on the key issue, Congressman Franks, which is that there is a process in place and that process, if you—if that process is complied with, you can still pass a regulation on January 15 or January 17, and I don't consider that a midnight regulation, if they have gone through the process of notice and comment and adequately reviewed those comments.

It could still be a bad regulation, but at least it is complied with the process that is out there.

The problem with these regulations is they didn't comply with the process. They skirted the process. They took shortcuts. They

did things that they weren't supposed to do in order to get these out the door, because they were essentially gifts to these industries at the last minute.

Mr. FRANKS. Mr. Chairman, I have to suggest to you that apart from the discussion of process, that—and I always hate it when we say, "Well, they did it or they did it," because I don't think that is a good argument here.

I think we should have principle persuasion be our watermark here. But I have to contend that the Bush administration was certainly as diligent in trying to get input and do these things as the other Administrations were.

Now, again, that is not the best argument in the world, because I am not sure that any of the Administrations perhaps would have gotten all the input and specificity that some of us might wish, but the reality is that the Bush administration certainly has no apologies to offer to the Clinton administration or the Carter administration related to how they moved forward with this process.

You can attack the policy for partisan reasons or for whatever reasons, whatever your convictions might be, but the Bush administration certainly more than comported with the trends of the past.

And so I think our focus should be on reforming this process, and then we can debate the policy in the midst of all of that.

So with that, Mr. Chairman, I would yield back.

Mr. COHEN. Thank you, Mr. Franks.

God has given us this place in 2009 and so this is the Administration we have to look to. But you are right, we should look prospectively at all Administrations and that two wrongs don't make a right and all those other things.

Mr. Kennedy, what are the particular rules that came into place in the last 90 days or so that are most dangerous to the environment?

Mr. KENNEDY. The rules that I mentioned, which are the buffer zone rule that got rid of the 100-foot buffer around streams; the hazardous waste exemption rule, this is the rule that exempts hazardous waste that can be burned as fuel, that can be burned in incinerators, it is about three million tons of highly toxic hazardous waste every year.

What we know about that waste is that about 80 percent of the people who handle that, now they are exempt from all the requirements of RCRA that they safely handle it, that they safely transport it, that they inventory it and document it; that the people who transport that, 80 percent of them have been cited in the past for violating the laws in this area.

For example, trucking companies, small trucking companies that take a load of PCBs and instead of bringing them to the dump and documenting them, they just dump them out on the road or something like that.

And essentially all of this waste, anything that essentially can be burned in an incinerator, is now exempt from the requirements of RCRA.

Under the Endangered Species Act, another regulation which is very, very damaging, which we think, again, is one of the ones we

have selected that ought to be reviewed under the Congressional Review Act.

Normally, if the Department of Defense takes an action that is going to endanger a species, that is going to further endanger a listed species, they have to do a consultation with the Fish and Wildlife Service and with the Corps and with NIMPs.

In the past, there have been 70,000 of these consultations done and only 5 percent of the actions have been altered or stopped. So it is not a huge administrative burden. It doesn't stop the agency from doing things that it wants to do, but it plays a valuable role.

Now, what the new rule says is that they don't have to do that consultation. They can do an internal evaluation about whether or not there is going to be a problem and then just go ahead and do it, without consulting, without any public notice, without consulting any of the other agencies of government.

Again, the CAFO rule, the factory farm rule is another critical one.

One of the midnight rules was an oil shale leasing rule that waives any kind of sensible or just fundamental controls for oil shale drilling on 20 million acres of public land in the western states.

We don't know what the oil shale drilling is going to look like. We don't know what the industry is going to look like. The industry doesn't exist today.

We ought to be able to look at the industry, say here are the best available technologies, let us do this. Instead, the new regulation just says here are two million acres and do anything you want with it and we are not going to have any Federal controls over what you do.

It doesn't make any sense.

Mr. COHEN. Let me ask you this. I understand the policy considerations that you have and that we share. But are you familiar with procedural defects in the implementation of any of these regulations that we should specifically look at and in terms of reforming or repealing these regulations if there was due process denial?

Mr. KENNEDY. Well, yes. The endangered species regulation, for example, and this is in the testimony, received something like 150,000 in the narrow comment period that they opened and then each comment—some of these comments were 20 or 30 pages long.

They were very well thought out. They were filed by interest groups all over the country.

These comments were given, on average—the reviewers who were charged with reviewing them were given, on average, a minute to review every nine of those comments.

Some of those comments could have been 20 or 40 pages long and they had to review nine a minute.

So this is not what we think of when we think of American Democracy, where there is an opportunity to——

Mr. COHEN. Was there a problem there with the regulatory review process that is in law or, in fact, there is a——

Mr. KENNEDY. No, there is not.

Mr. COHEN [continuing]. Process that was used?

Mr. KENNEDY. Again, I would focus less on the process than on looking at some of these regulations and how they were done rath-

er than reforming the whole regulatory review process, which I think is burdensome enough to pass the regulations.

I would hesitate to put more burdens on passing of regulations. I think that it takes 8 years at this point to pass a regulation if you do it properly.

What I would do is look at these specific regulations, how they were done, and many of this violated the current regulatory process in order to get passed, and I would take a look at that.

That is outlined in my testimony, and I assume the testimony of the other panelists, that they experience the same kind of problems with their regulations, where there were shortcuts taken, where there were regulatory procedures that were ignored, and that these regulations just slipped through.

They literally were midnight regulations. They weren't just regulations that happened to be passed during January or December. They were literally jammed through and ignored the regulatory process.

Mr. COHEN. Does another Member of the panel seek recognition?

Mr. COBLE. Mr. Chairman?

Mr. COHEN. Mr. Coble?

Mr. COBLE. Move to strike the last word.

Mr. COHEN. Without objection.

Mr. COBLE. It is good to have the panel with us.

Is Mr. Watt still here?

Mr. Watt, I am going to revisit briefly the weeds and the hog farm just a minute.

Mr. Kennedy, by the way, good to have all of you here.

Mr. Kennedy, I realize you were quoting from the article, but I take umbrage with the conclusion that every elected official in North Carolina had been corrupted by that issue. But I realize that was not your conclusion.

Mr. WATT. Would the gentleman yield?

Mr. COBLE. Yes, sir.

Mr. WATT. You all are ignoring one word. It was every "relevant" government official.

I take the word "relevant" to be the people who were actually impacting that process.

I didn't take it personally. I am from North Carolina, too, and I hope the Chairman won't take it personally. Not that he is irrelevant, but I don't think he is relevant in the sense that they were talking about.

Mr. COBLE. I want to be heard on that matter.

Mr. Chairman, this has been an enlightening hearing thus far. I think one of the issues that we need to—well, strike that. Let me say it a different way.

You, Mr. Chairman, and the Ranking Member both indicated that the Bush administration did not create a case of first impression about midnight regulation. Many Administrations have done it, and I am not really that bothered by it, unless the process abrogates or undermines the Administrative Procedures Act.

Now, that brings it right into focus, I think, if that is, in fact, the case.

Mr. Kennedy, do you have any specific concerns about what midnight regulations that may have erupted, for more of a better way,

in the Bush or Clinton administrations, that did perhaps undermine the process?

Mr. KENNEDY. Yes, sir. And again, that is outlined in detail for each of these regulations in my testimony, in the submitted testimony, the specific ways that the Administrative Procedure Act was undermined in order to jam through these regulations.

That is why we call the midnight regulations. Listen, on NRDC's Web site, we have 460 just bad regulations, environmental rollbacks, listed there.

We are not targeting those. We think those were bad, but they went through the administrative process.

The midnight regulations that we are talking about here were regulations that basically skirted the process in order to be jammed through during the last 60 days.

So all of them have that kind of problem.

Mr. COBLE. Well, I thank you for that.

Mr. Chairman, I still don't believe this is a crisis. It may be a problem, but I don't think it is a crisis. And I look forward to seeing what develops subsequent.

And I yield back.

Mr. COHEN. Thank you, Mr. Coble.

If there are no other Members seeking recognition—Mr. Franks?

Mr. FRANKS. Mr. Chairman, just briefly, the one point I would make, a lot of these regulations take 8 years at the present circumstance.

So how in the world can a President that is going to be here 8 years do anything but midnight regulations?

Mr. KENNEDY. Well, again, when I use the term "midnight regulations," I am not using the term to refer to regulations that went through that regulatory process over the 8 years and then happened to be passed in the last month of his Administration.

I am using the term to refer to regulations that were conceived and passed during the last 2 months and really skirted that whole administrative process.

I think the regulatory process takes much too long, but, in fact, that is what happens. And if you go through that process, I have no complaint. I might not like the regulation, but I have no complaint, from an administrative point of view.

Mr. COHEN. Mr. Kennedy, we thank you for your time.

If there are no other questions, and with deference to Wilson Pickett, we will continue to refer to it as midnight regulations.

You are excused, and I appreciate your time and your attendance.

Mr. KENNEDY. Thank you, Chairman.

Mr. COHEN. For the rest of the panel, we will start. We thought we had votes 40 minutes ago, but Congress operates in its own.

Our second witness will be Dr. Gary D. Bass. Dr. Bass is the founder and executive director of the OMB Watch, a nonprofit research and advocacy organization that promotes greater government accountability and transparency and increased citizen participation in public policy decisions.

He is well known for assisting nonprofit organizations in better understanding Federal rules affecting their groups and constitu-

encies and, in 2003, created NPA Action as a one-stop Web site on building nonprofit advocacy.

He has coauthored several books. "Seen, But Not Heard" is the book in 2007; "Strengthening Nonprofit Advocacy," which was published by the Aspen Institute.

Prior to founding OMB Watch, Dr. Bass was president of Human Services Information Center, where he wrote other books and numerous articles on human services issues and published the "Human Services Insider," a bimonthly newsletter on the politics of Federal human services programs.

He, most notably, has worked on the preparation of the first annual report to Congress on implementation of IDEA, education for all handicapped children, and served as special assistant to Wilbur Cohen, then chair of Michigan's governor's task force on the investigation, prevention of abuse in residential institutions.

Our third witness will be Lynn Rhinehart. Ms. Rhinehart is associate general counsel for the AFL/CIO, a federation representing 55 affiliated unions and 10 million working men and women, and has been in that position since 1996.

Among her responsibilities is the coordination of the Federation's legal work on occupational safety and health issues, advising the Federation's health and safety department on legislative and regulatory issues pertaining to safety and health.

Ms. Rhinehart clerked for 2 years for the Honorable Joyce Green on the U.S. District Court for the District of Columbia, and from 1987 to 1990, she worked as a professional staff member of the Senate Subcommittee on Labor, chaired by the late Howard Metzenbaum.

She has published legal writings and has served as contributing author to Occupational Safety and Health Law, the leading treatise on workplace safety and health laws.

Our fourth witness is Veronique de Rugy, senior research fellow at the Mercatus Center. She was previously a resident at the American Enterprise Institute, a policy analyst at the Cato Institute, and a research fellow at the Atlas Economic Research Foundation.

Her research interests include the Federal budget, homeland security, tax competition, and financial privacy issues.

Coauthor of "Action ou Taxation," published in Switzerland in 1996; currently on the board of directors of the Center for Freedom and Prosperity; previously, director of academic programs at the Institute for Humane Studies-Europe and France.

And our fifth witness is Mr. Michael Abramowicz. He specializes in law and economics, spanning areas including intellectual property, civil procedure, corporate law, administrative law, and insurance law at The George Washington Law School.

He has published numerous law reviews, and his book, "Predictocracy: Market Mechanisms for Public and Private Decision-Making," was published by the Yale University Press.

Before coming to GW, he was at George Mason School of Law. He also has served as visiting assistant professor at Northwestern School of Law and associate professor at the University of Chicago School of Law.

And our final witness will be Curtis Copeland, a specialist at American National Government at CRS. Dr. Copeland's expertise, appropriately relevant to today's hearing, is Federal rulemaking and regulatory policy.

He has previously testified before this Subcommittee as one of three CRS experts who are assisting the Subcommittee in the conduct of its administrative law projects.

His contributions to the project are deeply appreciated.

Prior to joining CRS, he held a variety of positions at the Government Accountability Office over a 23-year period.

I thank all the witnesses for being here and for acquiescing to Mr. Kennedy's schedule.

With that, Dr. Bass, will you proceed with your testimony?

TESTIMONY OF GARY D. BASS, Ph.D., EXECUTIVE DIRECTOR, OMB WATCH

Mr. BASS. Thank you, Mr. Chairman. And I commend you and the Committee for having this hearing, the first out of the box.

I think it is 25 years I have been following regulatory issues at the Federal level. This is the first time I have seen Congress jump in with great energy, and the last witness demonstrated that energy. So very interesting.

I also want to come back to your opening comment, where you described this issue of midnight regulation as one of both procedure and substance. And I think we had this conversation with Mr. Kennedy's statement where both issues were being talked about almost simultaneously.

The breadth of what we are calling midnight regulations is overwhelming, and that is why it creates an emotional issue. It touches not only the environmental issues that Mr. Kennedy talked about, but it ranges everywhere from issues dealing with privacy of workers under the family medical leave.

It deals with issues all the way over to low income families getting health care services under Medicaid. It deals with a range of issues of auto protections and consumer protections. I am thinking of the extension, if you will, of the number of consecutive hours that truck drivers can drive, all the way down to privatizing public toll roads.

The point is this range of midnight regulations is so extensive that it has engendered so much energy and emotion, because we have got to keep in mind, these rules affect people.

They affect everyone in this country. And I understand the energy that just occurred in the interchange because of that.

I don't think the issue is the number of rules that fall into this midnight regulation category. I think it is an issue about what impact it has had on people, and I think it is also about a consistent tone that Mr. Kennedy referred to about deregulation and serving certain interests.

I think it is also that it wouldn't matter, in my mind, whether it occurred at midnight or whether it occurred at the beginning of an Administration or the middle.

It is the amazing amount of regulation that was put together in a short time span that is reason enough for Congress to bring congressional oversight to this issue.

Congressman Watt, in response to your questions, I think this is not just an issue about ending midnight regulation. Government must continue to do its work, valuable work, to protect health, safety, environment, consumer protection, a range of services on the regulatory front.

We might be having a vastly different discussion if the Administratione, the last Administration used its waning time to address, say, financial regulatory issues or if it addressed chemical security or if it addressed food safety.

It chose to use its time for these other kinds of agendas that make it much more troubling and make it harder to determine whether or not you should just end midnight regulation as a concept.

We want to keep government working, we want the best of government, and we want to weed out the bad parts.

Having said that, I think the Bolton memo that the Chairman referred to at the very opening was nothing more than camouflage for a strategy to tie the hands of the next Administration in many ways.

The idea of that memo, although the deadlines all slipped, the idea of the memo was to make sure that the rules were published, that is, printed in the Federal Register as final, and made effective before the next Administration came in, thereby tying the next Administration's ability to undo many of those rules.

Mr. Kennedy referred to the endangered species rule as almost a mockery of democracy, when he had nine, I had seven comments were reviewed per minute. I think that the Bolton memo established a speedy process that greatly undermined the ability of the agencies to do their work in the right kind of manner.

While it may have not violated law in certain cases, it certainly violated the spirit of doing rulemaking in a prudent and effective manner.

So what are we concerned about in the public interest world? There are really three categories of these midnight rules that we are concerned with—those that are still rules in the pipeline. That is the kind that the past Administration put a handcuff on one wrist of the incoming Administration.

The second are rules that got published as final rules, but are not yet effective. That is putting the handcuff on the other wrist, too.

Then the third category are final rules that were published and are effective, and that is being hogtied.

Those are the ones—probably a bad choice of words.

Let me just conclude by saying that the Obama administration fixed the first two with the Rahm Emanuel memo and the OMB Director Orszag memo, did not address that final category and that is what we need to be doing.

[The prepared statement of Dr. Bass follows:]

PREPARED STATEMENT OF GARY D. BASS

Testimony of
Gary D. Bass, Ph.D.
Executive Director, OMB Watch

Before the
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
US House of Representatives
On
Midnight Rulemaking: Shedding Some Light

February 4, 2009

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to testify before you today. I am Gary Bass, Executive Director of OMB Watch. OMB Watch is a nonprofit, nonpartisan research and advocacy center promoting an open, accountable government responsive to the public's needs. Founded in1983 to remove the veil of secrecy from the White House Office of Management and Budget (OMB), OMB Watch has since then expanded its focus beyond monitoring OMB itself. We currently address four issue areas: right to know and access to government information; advocacy rights of nonprofits; effective budget and tax policies; and the use of regulatory policy to protect the public. OMB Watch does not receive any government funding.

My testimony today focuses on: 1) President George Bush's midnight regulation strategy, and 2) President Barack Obama's response to those midnight regulations. Before addressing these points, I want to acknowledge the trend of presidents to issue a rush of regulations at the close of their administrations. This should not be surprising: presidents often work furiously to leave a legacy or to achieve their priorities especially towards the end of their terms. Too often, however, these last minute rules are hurried through a very complex rulemaking process and may be poorly vetted. This approach may not only lead to poor policy decisions but may greatly endanger public health and safety, workplace protections, civil rights and liberties, and environmental quality.

Recent presidents have made it a common practice to try to complete as many regulations as possible in the waning days of their administrations. It has also become common practice for new presidents to issue memoranda and take other actions they deem appropriate to stop the rules just completed by the previous administration (assuming the new president is of the opposite party). This back-and-forth between administrations adds yet one more disruptive feature to the monumental task, especially at the level of federal regulatory agencies, of preparing a new presidential administration for governing. It also highlights the increasingly

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partisan use of the rulemaking process to achieve policy goals that an administration may not be able to achieve through legislative means.

I. President Bush's Midnight Regulations

I want to focus my testimony on the Bush administration's midnight rulemaking activities. I will not discuss how President Bush's approach varied from previous presidents or whether it was better or worse than President Clinton's last months. There are empirical studies that allow comparison among administrations and identify trends in midnight rulemaking that provide valuable historical perspectives on these topics.[1] Our perspective, however, is that the discussion of midnight regulations is not a question of whether President Bush had more or fewer regulations than another president. The issue is the substance and impact of the regulatory decisions. It would not matter if a flurry of bad regulations were published at midnight or noon time in an administration's life span. Bad rules that run counter to legislative intent and public interests should be rectified.

A May 9, 2008, memo from Bush White House Chief of Staff Joshua Bolten directed federal agencies to submit by June 1 proposed rules that they wished to finalize before the administration's term ended except in "extraordinary circumstances." The memo also indicated that all final rules to be published by this administration should be completed by November 1, thereby eliminating the possibility of "midnight regulations."

The first paragraph of the Bolten memo reads, in part:

> "The President has emphasized that the American people deserve a regulatory system that protects and improves their health, safety and environment, secures their rights, and ensures a fair and competitive economic system, while respecting their prerogative to make their own decisions and not imposing unnecessary costs. We need to continue this principled approach to regulation as we sprint to the finish, and resist the historical tendency of administrations to increase regulatory activity in their final months."[2]

The country soon learned, however, that the language in the memo was more smokescreen than good government policy. The deadlines in the memo were ignored as the administration set out to finalize and get into effect a serious of deregulatory actions. By getting these rules into effect, the hands of the next administration – whether Democrat or Republican – would be tied, thus extending the policy priorities of the Bush administration into the future. In reality, the memo simply changed when the clock reached midnight in order to insulate potentially controversial rules from disapproval by a new administration.

The responsibility for implementing the Bolten memo was assigned to the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). OIRA has the responsibility for reviewing agencies' significant regulations under Executive Order 12866,

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[1] See, for example, Jerry Brito and Veronique de Rugy, "For Whom the Bell Tolls: The Midnight Regulation Phenomenon", *Mercatus Policy Series*, Policy Primer No. 9. Arlington, VA: Mercatus Center at George Mason University, December 2008, available at http://www.mercatus.org/PDFDownload.aspx?contentID=25654. See Anne Joseph O'Connell, *Cleaning Up and Launching Ahead: What President Obama Can Learn from Previous Admininstrations in Establishing his Regulatory Agenda*, Washington, DC: Center for American Progress, January 2009, available at http://www.americanprogress.org/issues/2009/01/pdf/presidential_appointments.pdf.

[2] See [http://www.ombwatch.org/regs/PDFs/BoltenMemo050908.pdf] for a copy of the memorandum.

Regulatory Planning and Review (E.O. 12866). The current regulatory process, with its numerous requirements, obstacles, and reviews, generally means that it takes 3-5 years for significant regulations to be completed. For some agencies it takes far longer to promulgate rules – sometimes a decade or more. The Bush administration, which was particularly anti-regulatory, was reluctant to regulate in many areas such as environmental quality, workplace safety, and consumer protection unless under court ordered deadline, an emergency situation, or pressure from Congress.

Ironically, the Bush administration chose to use regulations at the end of its term to promote its anti-regulatory philosophy. Many of the Bush midnight regulations were deregulatory actions or favors to special interests. As Table I illustrates, the deadlines in the Bolten memo were largely irrelevant as the administration sought to cement its policy preferences. Table I looks at final rules that were published by the Bush administration, starting one month before the November 1 deadline in the Bolten memo, and that have been identified as troublesome by a broad coalition of organizations. By no means is this a comprehensive list of all troublesome rules; but this does capture many problematic ones.

Table I
Troublesome Midnight Regulations Published Since October 1, 2008: Compliance with the Bolten Memo

Regulation Agency	**Proposed after June 1, 2008**	**Finalized after Nov. 1, 2008**
Country-of-origin labeling Agricultural Marketing Service		X (1/15/2009)
Partner Vetting System U.S. Agency for International Development		X (1/2/2009)
Pledge requirements for HIV/AIDS grantees Department of Health and Human Services		X (12/24/2008)
Exemption of information reporting for federal contractors Wage and Hour Division	X (10/20/08)	X (12/19/2008)
Privatization of public toll roads Federal Highway Administration	X (10/8/08)	X (12/19/2008)
Access to reproductive health services Department of Health and Human Services	X (8/26/08)	X (12/19/2008)
Certification for the Employment of H-2B Aliens Employment and Training Administration		X (12/19/2008)
Burning of hazardous waste Environmental Protection Agency		X (12/19/2008)
Revisions to the H-2A guestworker program Employment and Training Administration		X (12/18/2008)

Table I (continued)

Regulation Agency	Proposed after June 1, 2008	Finalized after Nov. 1, 2008
Air pollution reporting from farms Environmental Protection Agency		X (12/18/2008)
Endangered species consultation - Fish and Wildlife Service/National Oceanic and Atmospheric Administration	X (8/15/08)	X (12/16/2008)
Mountaintop mining Office of Surface Mining		X (12/12/2008)
Gun safety in national parks National Park Service		X (12/10/2008)
Vertical tandem lifts Occupational Safety and Health Administration		X (12/10/2008)
Emergency land withdrawals Bureau of Land Management	X (10/10/08)	X (12/5/2008)
Rerouting hazmat rail shipments Pipeline and Hazardous Materials Safety Administration		X (11/26/2008)
Rail transportation security Transportation Security Administration		X (11/26/2008)
Runoff from factory farms Environmental Protection Agency		X (11/20/2008)
Truck driver hours of service Federal Motor Carrier Safety Administration		X (11/19/2008)
Oil shale development Bureau of Land Management	X (7/23/08)	X (11/18/2008)
Family and medical leave Wage and Hour Division		X (11/17/2008)
Medicaid outpatient services Centers for Medicare and Medicaid Services		X (11/7/2008)
Definition of solid waste Environmental Protection Agency		(10/30/2008)
Employment verification by social security records Department of Homeland Security		(10/28/2008)
Union annual reports for trusts Office of Labor-Management Standards		(10/2/2008)
Total: 25 troublesome rules	**6 missed deadline**	**22 missed deadline**

Not only were six of the controversial rules proposed after the June 1st deadline, but more importantly, 22 of the 25 rules became final after the November 1 deadline. As it turns out, the November 1 deadline was actually a strategic marker for the Bush administration, not really a deadline. The Bush administration did not want the next administration to do as it did to the Clinton regulations: put a hold on them and possibly scuttle them. So the Bush administration wanted its final rules to become effective before January 20, 2009, when the new president took over.[3] This meant that November 20, 60 days before the inauguration of the new president, was the first real deadline for major rules. The absolute final date was December 20, 30 days before the inaugural. As might be expected, 15 of the 25 controversial rules have become effective since January 1, 2009 – literally the last weeks of the Bush administration – and five of these became effective in the last 60 hours of the administration. For example:

- The Environmental Protection Agency (EPA) published a final rule December 18th exempting factory farms from reporting air pollution emissions from animal waste; the rule became effective January 20th.

- The Department of Health and Human Services (HHS) published a final rule December 19th that will likely limit women's access to health services by requiring health care providers to certify that they will allow their employees to withhold services on the basis of religious or moral grounds or risk losing federal funds; the rule became effective January 20th.

- The Department of Transportation published a final rule November 19th allowing truck drivers to drive up to 11 consecutive hours and shortening mandatory rest times; the rule became effective January 19th. (The rule is nearly identical to a rule struck down in the DC Court of Appeals in 2007.)[4]

Despite the delays and complexities of the regulatory process, the Bush administration was able to complete several rules in an unusually short period of time. In some cases, agencies shortened public comment periods in order to accelerate a rule's progress. The result was that important rules were completed in a few months; some were never even announced in the Unified Agenda which lists agency regulatory work plans every six months. Table II contains a list of rules that were proposed and completed in a remarkably short time.

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[3] A rule is considered "final" when it is published in the *Federal Register*; there is a subsequent waiting period, either 30 or 60 days depending on the significance of the regulation, before the rule become "effective" and is implemented.

[4] For a large but partial list of midnight regulations, see the chart at the end of this written testimony.

Table II
Examples of Rushed Regulations

Regulation - Agency	**Timeline**	**Length of comment period**	**Evidence of a rush toward completion**
Pledge requirements for HIV/AIDS grantees - Department of Health and Human Services	Proposed April 17, 2008; Finalized Dec. 24, 2008; ***Elapsed time of about eight months.***	Originally 32 days, reopened for another 32 days.	The regulation went into effect on Jan. 20, only 27 days after final publication. Under the Administrative Procedure Act, agencies must wait at least 30 days before considering a rule effective.
Gun safety in national parks - National Park Service	Proposed April 30, 2008; Finalized Dec. 10, 2008; ***Elapsed time of about 7.5 months***	Originally 61 days, reopened for another 30 days.	The agency changed provisions in the final rule without soliciting public comment. The agency included a provision in the final rule allowing guns to be carried in national parks located in states with conceal and carry laws (all but Illinois and Wisconsin). The proposed rule said guns would only be allowed to be carried in national parks located in states that allowed guns to be carried in state parks.
Oil shale development - Bureau of Land Management	Proposed July 23, 2008; Finalized Nov. 18, 2008; ***Elapsed time of about four months.***	61 days	The agency published the proposed rule in FY 2008, even though an appropriations rider prohibited it from using funds to prepare or finalize regulations on oil shale development.
Endangered species consultation - Fish and Wildlife Service/National Oceanic and Atmospheric Administration	Proposed Aug. 15, 2008; Finalized Dec. 16, 2008; ***Elapsed time of four months.***	Originally 31 days, extended by another 29 days.	According to the final rule, the agency received approximately 235,000 comments on the proposal. The Associated Press reported that agency officials pressured staff to review all the comments in just one week. One calculation estimated the staff assigned to reviewing comments would have to review seven comments per minute. The agency added new material to the final rule (a provision forbidding the consideration of global warming in species decisions) without soliciting public comment.
Access to reproductive health services - Department of Health and Human Services	Proposed Aug. 26, 2008; Finalized Dec. 19, 2008; ***Elapsed time of less than four months.***	30 days	The White House Office of Management and Budget reviewed a draft of the proposed regulation in only hours, a process usually measured in weeks or months. The proposal was published online by HHS later that same day.

Table II (continued)

Regulation - Agency	**Timeline**	**Length of comment period**	**Evidence of a rush toward completion**
Exemption of information reporting for federal contractors - Wage and Hour Division	Proposed Oct. 20, 2008; Finalized Dec. 19, 2008; ***Elapsed time of two months***	30 days	Although the rule was deemed significant, it does not appear to have been reviewed by OMB at either the proposed or final stage. The agency did not extend the comment period beyond 30 days, despite requests from Congress to do so.
Emergency land withdrawals - Bureau of Land Management	Proposed Oct. 10, 2008; Finalized Dec. 5, 2008; ***Elapsed time of less than two months.***	17 days	The agency allowed only 17 days for public comment on the rule. An Interior Department official defended the shortened comment period, saying the public already had been given a chance to comment on an earlier draft of the rule that was released in 1991.

From September 1st through the end of 2008, OIRA approved 157 final rules according to data on RegInfo.gov. The office reviewed 83 rules during the same time period in 2007, 92 in the last quarter of 2006, and 81 rules over the same time period in 2005.[5] On average, OIRA spent 61 days in 2008 reviewing rules but completed many of these rules far more quickly. For example, OIRA reviewed the HHS final rule mentioned above in 11 days; it reviewed a Department of Interior rule in four days.[6]

In addition, in order to hurry through regulations like those in Table II, agencies often reduced the time allowed for public comment from the normal 60 days to 30 days or even less. For example, the Department of Interior rule noted above consisted of a 17 day comment period. The rule is hardly a minor rule by the definitions in E.O. 12866[7]; it runs contrary to federal law by eliminating Congress's authority to preserve land from development in emergency situations.

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[5] See Reece Rushing, et al, *After Midnight: The Bush Legacy of Deregulation and What Obama Can Do*. Washington, DC: a joint publication of the Center for American Progress and OMB Watch, January 2009, p.3. Available at http://www.americanprogress.org/issues/2009/01/after_midnight.html and http://www.ombwatch.org/article/articleview/4453/1/432?TopicID=3.

[6] Ibid., p. 4.

[7] E.O. 12866 Section 3(f) reads: (f) "Significant regulatory action" means 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.

The Bush administration's shrewd timing handcuffs the Obama administration from repealing Bush-era regulations without expending significant resources. Had Bush waited until January to finalize those controversial regulations — thereby missing the opportunity to close the 30- or 60-day effective date window during his term — the Obama administration would have had an opportunity to delay the rules' effective dates and/or reevaluate the content of the regulations. (The Bush administration employed such a strategy upon taking office, delaying dozens of controversial Clinton-era regulations.)

II. President Obama's Response to Bush's Midnight Regulations

Just hours after President Barack Obama took the oath of office on Jan. 20, new White House Chief of Staff Rahm Emanuel issued a memo to executive branch agency heads setting out the Obama administration's policy for dealing with some regulations of the Bush administration.[8] The Emanuel memo:[9] 1) puts a freeze on all regulations still in the pipeline (i.e., proposed and final rules that have not yet been published in the *Federal Register*), and 2) gives agencies leeway to deal with those Bush-era final regulations already published in the *Federal Register* (*i.e.*, finalized), but not yet effective (i.e., being implemented). However, the memo does not address the many regulations made final and effective by January 20, when Obama became president. A follow-up memo was issued on Jan. 21 by OMB Director Peter Orszag explaining to agency heads how to implement part of the Emanuel memo.[10]

Regulations in the Pipeline

The Emanuel memo states, "No proposed or final regulation should be sent to the Office of the Federal Register (the "OFR") for publication unless and until it has been reviewed and approved by a department or agency head appointed or designated by the President after noon on January 20, 2009." The memo also requests agencies to "Withdraw from the OFR all proposed or final regulations that have not been published in the Federal Register so that they can be reviewed and approved by a department or agency head." It makes exceptions for regulations that address "urgent circumstances relating to health, safety, environmental, financial, or national security matters," as well as regulations needed to meet statutory or judicial deadlines.

The moratorium covers all regulations in any stage of the rulemaking process not yet finalized – a figure that likely numbers in the hundreds. For example:

- In August 2008, the Department of Labor proposed a rule that would change the way federal regulators calculate estimates for on-the-job risks. The rule would also add an extra comment period to new worker health standards, creating unnecessary delay.

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[8] The memo is addressed to the heads of all executive branch agencies, which presumably includes independent regulatory agencies such as the Securities and Exchange Commission and the Consumer Product Safety Commission.

[9] See [http://frwebgate1.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=32781035761+0+2+0&WAISaction=retrieve] for the text of this memo in the *Federal Register*.

[10] See http://www.whitehouse.gov/omb/asset.aspx?AssetId=424 for the text of the memorandum.

- In July 2008, the Justice Department proposed a rule that would expand the power of state and local law enforcement agencies to investigate potential criminal activities and report the information to federal agencies. The rule would broaden the scope of activities authorities could monitor to include organizations as well as individuals, along with non-criminal activities that are deemed "suspicious."

- In September 2008, the Mine Safety and Health Administration proposed a rule that would require mine operators to test employees in "safety-sensitive" positions (defined as, "Any type of work activity where a momentary lapse of critical concentration could result in an accident, injury, or death.") for drug and alcohol use.

The Emanuel memo provides a useful vehicle for stopping ill-advised Bush regulations that are still being worked on by agencies. This is no different than Bush's approach to dealing with Clinton's midnight regulations.

Final Regulations Not yet in Effect

The Emanuel memo allows agencies to reevaluate those Bush-era regulations that were published in the *Federal Register* as final rules but which have not yet taken effect. The memo requests agencies to:

> " Consider extending for 60 days the effective date of regulations that have been published in the Federal Register but not yet taken effect. . .for the purpose of reviewing questions of law and policy raised by those regulations. Where such an extension is made for this purpose, you should immediately reopen the notice-and comment period for 30 days to allow interested parties to provide comments about issues of law and policy raised by those rules."

Agencies are encouraged to take "appropriate further action" if there are questions about a regulation. The complementary Orszag memo identifies eight criteria agencies may use to reconsider regulations that have not yet taken effect. For example, agencies may extend the effective dates of the regulations if they find regulations that do not meet legal muster or were not developed in an open and transparent manner.

A review of many of the Bush midnight regulations should lead to questions about the reduced comment periods, whether comments were adequately considered, and the hurried nature of the process by which the regulations were formulated. It would not be surprising to see several, perhaps many, rules withdrawn or amended substantially as a result of this review process. In fact, the eight considerations listed in the Orszag memo contain a clear enumeration of the kinds of problems this hurried process can lead to:

> "(1) whether the rulemaking process was procedurally adequate; (2) whether the rule reflected proper consideration of all relevant facts; (3) whether the rule reflected due consideration of the agency's statutory or other legal obligations; (4) whether the rule is based on a reasonable judgment about the legally relevant policy considerations; (5) whether the rulemaking process was open and transparent; (6) whether objections to the rule were adequately considered, including whether interested parties had fair opportunities to present contrary facts and arguments; (7) whether interested parties had the benefit of access to the facts, data, or other analyses on which the agency relied; and (8) whether the final rule found adequate support in the rulemaking record."

Some of the final regulations not yet in effect and, therefore, covered by the Obama administration's moratorium include:

- An EPA regulation that alters the way industrial facilities count their emissions under the New Source Review program. Under the regulation, industrial facilities are not required to combine all their emissions when determining whether they meet federal emissions thresholds, if the emissions are for two or more different purposes. EPA published the regulation Jan. 15, and it is scheduled to go into effect Feb. 17.

- A Department of Agriculture (USDA) regulation that sets requirements for country-of-origin labeling on meat, seafood, and other perishable food items. The rule exempts "processed" foods, defined very broadly, from labeling requirements. USDA published the regulation Jan. 15, and it is scheduled to go into effect March 16.

The Orszag memo points agency officials to the Administrative Procedure Act which allows agencies to postpone effective dates for regulations under judicial review "when an agency finds that justice so requires."

Regulations Not Covered by the Moratorium

The Bush administration was able to finalize many regulations in time to make them effective before Bush left office. This means the Obama administration will be unable to freeze or easily stop them. Accordingly, the Emanuel memo does not directly address how to deal with troublesome Bush regulations made effective in the waning days of the last administration. The Emanuel memo also has a narrow definition of "regulation," which may mean it does not apply to other types of agency actions like guidelines or policy statements that have the effect of regulations (although not legally binding). It may be easy for OMB to send the message to agency heads that these non-regulatory policy directives are intended to be covered by the Emanuel and Orszag memos.

The Bush administration finalized dozens of regulations that drew fire from environmental, consumer, worker, and healthcare advocates. I noted several of them above and a longer list of regulations now in effect is included at the end of this testimony.

The options for delaying or overturning the Bush regulations in effect that were poorly done, violate statutory intent, or differ significantly from the policy priorities of the Obama administration are limited. The most likely option for the administration is for the agencies to conduct a new rulemaking for any rule an agency wishes to amend significantly or reverse. There are different scenarios for how a new rulemaking might proceed. If a Bush rule is generally unacceptable to the agency and yet the Obama administration wants to regulate in a particular area, the agency could treat it as an entirely new rulemaking. A new rule would likely take years to complete using the current process. The new rulemaking could be triggered by a petition for reconsideration filed a by any interested person or initiated by the agency.

The agency could issue a revised rule as an interim final rule while it undertakes a new procedure to revise or replace the questionable regulation. After reviewing the process by which the rule was promulgated and the substance of the rule, the agency could issue an interpretive rule – an explanation of how the agency views the rule and the statute directing the agency to regulate. This is most likely when the agency thinks the midnight rule doesn't need a complete overhaul.

Another approach for undoing troublesome Bush administration regulations is through the courts. Since many of the midnight regulations are controversial, court challenges have been, or will be, lodged against rules. The Orszag memo opens the door for expedited court settlements on both final regulations not yet in effect and final regulations in effect if suits have been filed challenging the rules before the effective date.

A court ruling invalidating one of Bush's midnight regulations would give agencies two options: kill the regulation and do nothing more, or issue a notice and comment for a new (or revised) regulation substantially different from the Bush rule. Of course, a court may choose to invalidate the Bush rule and instruct the agency to continue using the rule in existence prior to the Bush regulation. The Orszag memo reminds agencies that they may choose not to defend Bush-era regulations – both effective and not effective – in court. The memo states, "In special cases ... you may consider the appropriateness of not defending a legally doubtful rule in the face of a judicial challenge."

Congressional action

Congress may also take action to stop midnight regulations. First, Congress could disapprove regulations on a case-by-case basis using the Congressional Review Act (CRA). Our current political circumstances, with an incoming president and a new Congress of the same party, make the use of the CRA a more realistic option than in other circumstances. This option, which affords an expedited, non-amendable, non-filibusterable procedure in Congress, is much faster than regular legislative processes or even proceeding with a new rulemaking . Congress would have to propose and pass a resolution of disapproval for each rule it wishes to contest, however. The CRA has only be used once successfully and is perceived to come with great political cost in using it. Thus, the time it would take to do many rules and the political cost associated with this option would likely be a great distraction from other significant issues Congress and the administration may want to address. Moreover, if Congress was to employ the CRA to stop certain rules, it may still leave the agency with the need to do a rulemaking since the agency may need a regulation to implement its statutory responsibilities.

Second, Congress could also use other legislative vehicles, such as free-standing legislation or amendments to authorizing legislation, to overturn the rule. Unlike the CRA procedures which forbid a filibuster in the Senate, the proposed legislation would be subject to a filibuster and amendments.

Third, Congress could seek structural reforms that prevent or limit the promulgation of rules in the manner that typifies the midnight regulation phenomenon. The reforms would require careful constitutional analysis to avoid a direct separation of powers confrontation with the executive branch similar to the confrontation with the Bush administration over its view of the expansive powers of a unitary executive. An example of a structural reform bill is Rep. Jerrod Nadler's (D-NY) Midnight Rule Act (H.R. 34), introduced Jan. 6, that would prevent midnight rules from going into effect until 90 days after a new agency head has been appointed. This extension of the effective date would allow the agencies time for review of midnight rules.

Fourth, Congress may wish to withhold funding for the implementation of some or all parts of a midnight regulation. While this may be attractive it raises several concerns. First, withholding funding for implementation of a rule is not the same as killing the rule. Some rules are self-enforcing. Second, withholding funding does not allow the agency to move forward with a proper regulation (unless, Congress allows the agency to proceed with a notice and comment rulemaking). Finally, withholding funding would have to be done year after year.

All of these options need careful consideration of the regulatory standards that would result from any action. In some situations, reversing a Bush midnight regulation could result in having no regulatory standard when a weak standard would be better than none; in other instances, it could result in the former standard being reinstated. Action on each rule requires careful consideration.

The bottom line is that there is no one-size-fits-all solution to the troubling Bush regulations that are now effective. Instead, a careful review of each regulation and application of the appropriate strategy will need to be employed. Without question, Congress and the Obama administration will need to be coordinated on this effort.

Appendix
Troublesome Midnight Regulations Published Since October 1, 2008

Regulation Agency	Description	Publication of final rule	Effective date
Country-of-origin labeling Agricultural Marketing Service[1]	The rule established country-of-origin labeling requirements for beef, lamb, chicken, goat, pork, fish and shellfish, certain nuts, and other perishable agricultural commodities. However, an overly broad definition of "processed foods" could exempt "over 60 percent of pork, the majority of frozen vegetables, an estimated 95 percent of peanuts, pecans, and macadamia nuts, and multi-ingredient fresh produce items such as fruit salads and salad mixes" from the labeling requirements, according to Wenonah Hauter, Executive Director of Food and Water Watch.	1/15/2009	3/16/2009
Partner Vetting System U.S. Agency for International Development[2]	The rule creates the Partner Vetting System (PVS) which would screen charities, and their "principle" employees, who receive or apply for USAID funding for possible ties to terrorists. The government would then screen these employee names against classified databases (USAID will not specify which databases) that has information on terrorists. The rule also states, "The decision as to whether to implement PVS will be made by the incoming Obama Administration."	1/2/2009	2/2/2009
Pledge requirements for HIV/AIDS grantees Department of Health and Human Services[3]	The rule requires HIV/AIDS grantees to choose between adopting government policy (explicitly and unequivocally opposing prostitution and sex trafficking) for their entire organizations or setting up completely separate affiliated organizations. However, the degree of separation proposed is so severe that it is impractical to implement.	12/24/2008	1/20/2009
Exemption of information reporting for federal contractors Wage and Hour Division[4]	The rule exempts contractors covered by the Davis-Bacon Act and the Copeland Anti-Kickback Act from including in weekly payroll record reports to the federal government the social security numbers and home addresses of workers. This will make it more difficult for the government to verify the accuracy of reports.	12/19/2008	1/18/2009
Privatization of public toll roads Federal Highway Administration[5]	The rule could lead to an increase in the privatization of public toll roads by forcing states to accept bids from private companies when reorganizing or transferring authority for operating toll roads.	12/19/2008	1/18/2009

Appendix (continued)

Regulation Agency	Description	Publication of final rule	Effective date
Access to reproductive health services Department of Health and Human Services[5]	The rule could limit women's access to reproductive health services. The rule requires health care providers to certify they will allow their employees to withhold services on the basis of religious or moral grounds or risk losing federal funding.	12/19/2008	1/20/2009
Certification for the Employment of H-2B Aliens Employment and Training Administration[7]	The rule eliminates the requirement that the government certify employers' compliance with H-2B program requirements, instead allowing for self attestation.	12/19/2008	1/18/2009
Burning of hazardous waste Environmental Protection Agency[8]	The rule reclassifies thousands of tons of hazardous waste as fuel, allowing it to be burned instead of sensitively disposed of. The emissions generated by burning the waste would be more toxic than emissions from burning fossil fuels.	12/19/2008	1/20/2009
Revisions to the H-2A guestworker program Employment and Training Administration[9]	The rule weakens wage protections and housing standards for agricultural workers. The rule could also allow employers to hire more foreign workers without giving due consideration to U.S. workers.	12/18/2008	1/17/2009
Air pollution reporting from farms Environmental Protection Agency[10]	The rule exempts factory farms from reporting air pollution emissions coming from animal waste.	12/18/2008	1/20/2009
Endangered species consultation Fish and Wildlife Service/National Oceanic and Atmospheric Administration[11]	The rule alters implementation of the Endangered Species Act by allowing federal land-use managers to approve projects like infrastructure creation, minerals extraction, or logging without consulting federal habitat managers and biological health experts responsible for species protection. Consistent with consultation had been required. The rule also forbids global warming from being considered as a factor in species decisions.	12/16/2008	1/15/2009
Mountaintop mining Office of Surface Mining[12]	The rule allows mining companies to dump the waste, or spoil, from mountaintop mining into rivers and streams.	12/12/2008	1/12/2009
Gun safety in national parks National Park Service[13]	The rule lifts the 25-year-old ban on carrying loaded weapons in national parks.	12/10/2008	1/9/2009
Vertical tandem lifts Occupational Safety and Health Administration[14]	The rule allows maritime port operators to lift two or more empty containers secured together at the same time.	12/10/2008	4/9/2009

Appendix (continued)

Regulation Agency	Description	Publication of final rule	Effective date
Emergency land withdrawals Bureau of Land Management[15]	The rule removes existing regulations that provide for emergency land withdrawals. Specifically, the rule change revokes Congress's authority to require the agency to bar land from being developed in emergency situations. The rulemaking is largely in response to a June 25th Congressional Resolution which ordered BLM to immediately remove public lands adjacent to the Grand Canyon from uranium mining claims.	12/5/2008	1/5/2009
Rerouting hazmat rail shipments Pipeline and Hazardous Materials Safety Administration[16]	The rule requires railcars carrying hazardous materials to reroute around densely populated areas; but it gives control of rerouting to the railroad industry without federal oversight or local input.	11/26/2008	12/26/2008
Rail transportation security Transportation Security Administration[17]	The rule requires railcars carrying hazardous materials to reroute around densely populated areas; but it would give control of rerouting to the railroad industry without federal oversight or local input.	11/26/2008	12/26/2008
Runoff from factory farms Environmental Protection Agency[18]	The rule could allow the runoff from concentrated animal feeding operations, i.e. factory farms, to pollute waterways without a permit. The rule circumvents the Clean Water Act, instead allowing for self-regulation.	11/20/2008	12/22/2008
Truck driver hours of service Federal Motor Carrier Safety Administration[19]	The rule allows truck drivers to drive up to 11 consecutive hours and shortens mandatory rest times between work weeks. It is nearly identical to a regulation struck down in the D.C. Court of Appeals in 2007.	11/19/2008	1/19/2009
Oil shale development Bureau of Land Management[20]	Capitalizing on a recent decision by Congress to let the ban on oil shale development to expire, the BLM rule opens 2 million acres of western land to leasing. Environmentalists say oil shale development, which involves extracting liquid oil from solid rock by heating it, increases greenhouse gas emissions and requires intensive water use.	11/18/2008	1/17/2009
Family and medical leave Wage and Hour Division[21]	The rule limits employee access to family and medical leave. Among other things, the rule makes it more difficult for workers to use paid vacation or personal time to take leave and allows employers to speak directly to an employee's health care provider. The rule also expands leave opportunities for military families.	11/17/2008	1/16/2009

Appendix (continued)

Regulation Agency	Description	Publication of final rule	Effective date
Medicaid outpatient services Centers for Medicare and Medicaid Services[22]	The rule narrows the definition of outpatient hospital services to reduce Medicaid beneficiaries' access to those services, such as dental and vision care.	11/7/2008	12/8/2008
Definition of solid waste Environmental Protection Agency[23]	The rule guts standards for the recycling of hazardous wastes under the Resource Conservation and Recovery Act (RCRA). "In this proposed rulemaking, EPA clings to a concept of 'discard' that would exclude from regulation, by their own estimation, over 3 billion pounds of hazardous waste from over 4600 facilities in 530 industries," according to comments submitted by the Sierra Club, U.S. Public Interest Research Group, National Environmental Trust, and Safe Food and Fertilizer.	10/30/2008	12/29/2008
Employment verification by social security records Department of Homeland Security[24]	The supplemental to a 2007 final rule instructs employers how to respond to a "no-match" letter from the Social Security Administration indicating that an employee's name and social security number do not match SSA records. But as is often the case, a no-match letter could be triggered by a database error, such as a misspelled name, and does not necessarily mean a person is an illegal immigrant. "Because many employers mistakenly assume that the letter provides information about the immigration status of the individual workers named in it, they immediately fire, lay-off, or demote such workers without giving them a chance to correct discrepancies," according to the National Immigration Law Center.	10/28/2008	10/28/2008
Union annual reports for trusts Office of Labor-Management Standards[25]	The rule imposes new trust reporting requirement that is more onerous than requirement adopted in 2006. Treats employer contributions as equivalent of union contributions without explanation. The rule, meant to replace a rule vacated in federal court in July 2007, is widely seen as a political effort to overload labor unions with paperwork.	10/2/2008	12/31/2008

[1] "Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts," U.S. Department of Agriculture Agricultural Marketing Service, 74 FR 2658. Available at: http://edocket.access.gpo.gov/2009/pdf/E9-600.pdf.

[2] "Privacy Act of 1974, Implementation of Exemptions," U.S. Agency for International Development, 74 FR 9. Available at: http://edocket.access.gpo.gov/2009/pdf/E8-31131.pdf.

[3] "Office of Global Health Affairs; Regulation on the Organizational Integrity of Entities that are Implementing Programs and Activities Under the Leadership Act," Department of Health and Human Services, 73 FR 78997. Available at: http://edocket.access.gpo.gov/2008/pdf/E8-30686.pdf.

[4] "Protecting the Privacy of Workers: Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction," U.S. Department of Labor, Wage and Hour Division, 73 FR 77504. Available at: http://edocket.access.gpo.gov/2008/pdf/E8-29886.pdf.

[5] "Fair Market Value and Design-Build Amendments," U.S. Department of Transportation Federal Highway Administration, 73 FR 77495. Available at: http://edocket.access.gpo.gov/2008/pdf/E8-30147.pdf.

[6] "Ensuring Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law," U.S. Department of Health and Human Services, 73 FR 78072. Available at: http://edocket.access.gpo.gov/2008/pdf/E8-30134.pdf.

[7] "Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H–2B Workers), and Other Technical Changes," U.S. Department of Labor Employment Training Administration, 73 FR 78020. Available at: http://edocket.access.gpo.gov/2008/pdf/E8-29995.pdf.

[8] "Expansion of RCRA Comparable Fuel Exclusion," U.S. Environmental Protection Agency, 73 FR 77954. Available at: http://edocket.access.gpo.gov/2008/pdf/E8-29956.pdf.

[9] "Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement," U.S. Department of Labor Employment and Training Administration, 73 FR 77110. Available at: http://edocket.access.gpo.gov/2008/pdf/E8-29309.pdf.

[10] "CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances From Animal Waste at Farms," U.S. Environmental Protection Agency, 73 FR 76948. Available at: http://edocket.access.gpo.gov/2008/pdf/E8-30003.pdf.

[11] "Interagency Cooperation Under the Endangered Species Act," U.S. Department of the Interior Fish and Wildlife Service and U.S. Department of Commerce National Oceanic and Atmospheric Administration, 73 FR 76272 Available at: http://edocket.access.gpo.gov/2008/pdf/E8-29701.pdf.

[12] "Excess Spoil, Coal Mine Waste, and Buffers for Perennial and Intermittent Streams," U.S. Department of the Interior Office of Surface Mining Reclamation and Enforcement, 73 FR 75814. Available at: http://edocket.access.gpo.gov/2008/pdf/E8-29150.pdf.

[13] "General Regulations for Areas Administered by the National Park Service and the Fish and Wildlife Service," U.S. Department of the Interior National Park Service and Fish and Wildlife Service, 73 FR 74966. Available at: http://edocket.access.gpo.gov/2008/pdf/E8-29249.pdf.

[14] "Longshoring and Marine Terminals; Vertical Tandem Lifts," U.S. Department of Labor Occupational Safety Administration, 73 FR 75246. Available at: http://edocket.access.gpo.gov/2008/pdf/E8-28644.pdf.

[15] "Land Withdrawals; Amendment of Regulations Regarding Emergency Withdrawals," U.S. Department of the Interior Bureau of Land Management, 73 FR 74039. Available at: http://edocket.access.gpo.gov/2008/pdf/E8-28742.pdf.

[16] "Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments," U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration, 73 FR 72182. Available at: http://edocket.access.gpo.gov/2008/pdf/E8-27826.pdf.

[17] "Rail Transportation Security," Department of Homeland Security Transportation Security Administration, 73 FR 72130. Available at: http://edocket.access.gpo.gov/2008/pdf/E8-27287.pdf.

[18] "Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines: Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision," U.S. Environmental Protection Agency, 73 FR 70418. Available at: http://edocket.access.gpo.gov/2008/pdf/E8-26620.pdf.

[19] "Hours of Service of Drivers," U.S. Department of Transportation Federal Motor Carrier Safety Administration, 73 FR 69567. Available at: http://edocket.access.gpo.gov/2008/pdf/E8-27437.pdf.

[20] "Oil Shale Management; General," U.S. Department of the Interior Bureau of Land Management, 73 FR 69414. Available at: http://edocket.access.gpo.gov/2008/pdf/E8-27025.pdf.

[21] "The Family and Medical Leave Act of 1993," U.S. Department of Labor Wage and Hour Division, 73 FR 67934. Available at: http://edocket.access.gpo.gov/2008/pdf/E8-26577.pdf.

[22] "Medicaid Program: Clarification of Outpatient Hospital Facility (Including Outpatient Hospital Clinic) Services Definition," U.S. Department of Health and Human Services Centers for Medicare and Medicaid Services, 73 FR 66187. Available at: http://edocket.access.gpo.gov/2008/pdf/E8-26554.pdf.

[23] "Revisions to the Definition of Solid Waste," U.S. Environmental Protection Agency, 73 FR 64668. Available at: http://edocket.access.gpo.gov/2008/pdf/E8-24399.pdf.

[24] "Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Final Regulatory Flexibility Analysis," U.S. Department of Homeland Security, 73 FR 63843. Available at: http://edocket.access.gpo.gov/2008/pdf/E8-25544.pdf.

[25] "Labor Organization Annual Financial Reports for Trusts in Which a Labor Organization Is Interested, Form T–1," U.S. Department of Labor Office of Labor-Management Standards, 73 FR 57412. Available at: http://edocket.access.gpo.gov/2008/pdf/E8-22853.pdf.

Mr. COHEN. Thank you, Dr. Bass. Your time is up, and I appreciate you not using any of the language that was in the Rahm Emanuel memo.

Ms. Rhinehart, will you begin your testimony?

TESTIMONY OF LYNN RHINEHART,
ASSOCIATE GENERAL COUNSEL, AFL-CIO

Ms. RHINEHART. Thank you, Mr. Chairman and Members of the Subcommittee. Thank you for the opportunity to testify here today and for holding this important hearing.

Representative Franks, I am sorry about the loss in the Super Bowl, but coming from Michigan, with the 0-16 Lions, we respect the fact that your team was able to get as far as it did.

To fully appreciate the impact of the Bush administration's last-minute rules as they affect working people, it is important to contrast what the Administration did do in its final months in office with what it didn't do during the 8 years that the Bush administration was in charge.

The Bush administration was one that, with rare exception, refused to issue significant rules to protect worker health and safety, refused to issue rules to improve workers' wage and hour protections, except in unusual circumstances.

The only major wage and hour rulemaking that the Administration conducted was to weaken overtime protections for workers.

And then suddenly, this same Administration, ratcheted up its rulemaking activity in its final months and rushed out a number of rules that are harmful to workers.

I have described a number of these rules in my written testimony, rules on conflicts of interest in providing investment advice to workers receiving 401(k)s; rules making it harder for workers to take Family and Medical Leave Act leave; rules that increase the number of hours truckers can be required to drive to the detriment of their health and the public's health and safety.

But in the time that we have available this morning, I would like to highlight the Department of Labor's last-minute rules on the H2A and H2B visa programs, because I think they are illustrative of midnight rulemaking at its worst, significant rules that are rushed through the process in a deliberate effort to cement an outgoing Administration's policy views and hoist them on the incoming Administration, to the detriment of workers.

The H2A and H2B visa programs provide visas to allow employers to hire foreign workers on a temporary basis in agriculture and seasonal industries, in situations where there are not enough workers available for the jobs.

For years, the system had safeguards in place to protect U.S. and foreign workers and to prevent abuse.

For example, there was a government pre-hire certification process through which the Federal Government and state agencies verified employers' claims that there were not enough domestic workers to do the jobs in question.

The H2A question had wage standards, other labor protections, like the 50 percent rule, that created incentives for employers to hire U.S. workers rather than going and hiring foreign workers.

The H2B program was limited to temporary jobs of no more than 10 months duration. Under the new rules, "temporary" has now been redefined as up to 3 years, which is hardly a temporary job.

These protections were eliminated by the Bush administration in its new H2A and H2B rules, rules that were rushed through the process, issued in December, well after the supposed November 1 deadline in the Bolton memo, and allowed to take effect in the minimum 30 days allowed by the Administrative Procedure Act rather than the usual 60 or more days that is typical for significant rules of this nature.

We are very concerned that these new rules are going to disadvantage U.S. workers, drive down wages, and weaken protections for both U.S. and H2B and H2A foreign workers.

They are a prime example of midnight regulations that need to be stopped through a congressional rider or through disapproval under the Congressional Review Act.

So what can be done about rules like this?

As I had mentioned, Congress has tools available through legislative riders and through the Congressional Review Act. The administrative agencies also have tools available to them to undo what they view as problematic rules.

As other witnesses have commented, of course, the problem is that doing new rulemaking takes time. And with respect to the H2A/H2B rules and many of these other midnight rules, the rules are already in effect.

And so the clock is ticking and the harmful consequences of the new rules are taking hold during the time period that the new Administration is doing a new rulemaking to try to undo these harmful effects of the rule.

So there is some urgency to taking action to address what are viewed as the most egregious, problematic midnight rules.

There is also a resource impact on agencies. Every dollar spent by agencies undoing a bad rule is a dollar that they don't have available to spend on issuing new, good, protective rules.

So we would urge Congress to take this into consideration and to make sure that the regulatory agencies have the money in hand to both deal with problems left by the prior Administration, as well as to get on with the business of protecting workers and the public health and environment in this new Administration.

I would like to just make one last comment, which is I think you are hearing some agreement here today that not all midnight rules are the same. There are midnight rules where we might disagree with the policy outcome or the policy decision of the former Administration, and there are examples where we do, but the rules didn't shortcut the process.

There were lengthy public comment periods. There was lengthy deliberation of the rules. Nobody was really surprised that the rules came out. They might have been disappointed, but they weren't surprised.

I would say that the Family and Medical Leave Act rules are an example of that. We knew those rules were coming. We don't like aspects of them. We don't object to other aspects of them. And we hope that the new Administration, working with Congress, will address the problems in those rules. But they weren't really midnight

in the same sense of the H2A/H2B rules, the rules on investment advice that I mentioned, that were started and finished and made effective in the very few last months of the Bush administration.

That is the category of midnight rules that are of particular concern to us and I would think would be of particular concern to the Congress.

Thank you.

[The prepared statement of Ms. Rhinehart follows:]

PREPARED STATEMENT OF LYNN RHINEHART

Mr. Chairman and Members of the Subcommittee:

My name is Lynn Rhinehart, and I am an Associate General Counsel for the AFL-CIO, a federation of 55 national unions representing more than 10 million working men and women across the United States. Thank you for the opportunity to testify today about the negative impact some of the Bush Administration's last-minute regulations will have on workers, and about the tools available to the Obama Administration and Congress for preventing these harms.

It is not uncommon for outgoing administrations to produce more regulations at the end of their tenure.[1] These rules are sometimes the product of lengthy and thoughtful rulemaking proceedings involving full public participation, and in that sense, it is hard to label these rules "midnight." But the Bush Administration issued a remarkable number of final regulations in its final months that were truly "midnight" rules in the worst sense of the term—last-minute regulations on important, substantive issues that were rushed through the process, short-circuiting public participation along the way, in order to cement the outgoing administration's policy views and impose them (at least temporarily) on the incoming administration. The Bush Administration issued, or tried to issue, a disturbing number of midnight regulations that would undermine worker protections. The Bush Administration also took steps to make sure that many of its last-minute rules would take effect before President Obama took office, making it more difficult for the incoming Obama Administration to modify or undo these rules.

On May 9, 2008, White House Chief of Staff Joshua Bolten issued a memorandum to executive agencies that instructed agencies to avoid engaging in midnight rulemaking.[2] The memo directed agencies to finish rules by no later than November 1, 2008 (except in extraordinary circumstances), and to propose rules no later than June 1, 2008 (except in extraordinary circumstances) if the agency wanted to finish the rulemaking during the Bush Administration.

But in the waning months of the Bush Administration, it became clear that the Bolten memo was mere windowdressing. Agencies violated the Bolten memo with impunity and with no apparent consequences.

In the final months of the Bush Administration, the Department of Labor pumped out numerous proposals and final rules, including many rules that undermined worker protections. It is important to understand that this activity was carried out by the same Department of Labor that for eight years had set a low water mark for failing to pursue rulemakings of significance to *improve* worker protections, except when required to act by Congress or as the result of litigation.

Take, for example, the crucially-important area of worker safety and health. After President Bush took office, the Occupational Safety and Health Administration (OSHA) removed dozens of important workplace safety and health rules from its regulatory agenda and failed to issue any significant OSHA regulations except as a result of litigation. Yet in the waning months of the Bush Administration, political operatives at the Department of Labor tried to rush through a rule on risk assessment that would slow down an already-glacial OSHA standard setting process and impose new barriers to setting strong rules to protect workers from toxic substances on the job.[3] The proposed rule was developed by political appointees at the Depart-

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[1] T3See "Cleaning Up and Launching Ahead," Center for American Progress (January 2009) (finding that regulatory output increased in the final years of the Reagan, George H.W. Bush, and Clinton administrations); "After Midnight: The Bush Legacy of Deregulation and What Obama Can Do," Center for American Progress and OMB Watch (January 2009) (finding that the George W. Bush administration's regulatory output in 2008 far exceeded prior years).

[2] *See* Memorandum to Heads of Executive Departments and Agencies from Joshua Bolten (May 9, 2008) ("We need to . . . resist the historical tendency of administrations to increase regulatory activity in their final months.")

[3] *See* 73 Fed. Reg. 50909 (Aug. 29, 2008); *see also* Testimony of Peg Seminario, Director of Safety Health, AFL-CIO, before the U.S. House of Representatives' Committee on Education and

ment of Labor, not career staff. It was never listed on the Department's semi-annual regulatory agenda, as required by Executive Order 12866, and literally came out of nowhere. In their haste to rush the rule through, DOL allowed interested parties only 30 days to comment on the proposed rule and denied requests from the AFL-CIO, other labor organizations, members of Congress, and public health groups, for an extension of time to submit comments and for a hearing on the proposed rule. The risk assessment rule also violated the Bolten memo, in that it was proposed on August 29, 2008—well after the supposed June 1 deadline for rules to be completed during the Bush Administration. Fortunately, the Bush Administration and the political appointees at the Department of Labor failed in their effort to rush out the secret rule on risk assessment, but the rulemaking is a telling illustration of midnight rulemaking at its worst. Hopefully the proposal will be quickly withdrawn by the Obama Administration.

Another "near miss" involved proposed rules that made changes in the Department of Labor's regulations governing the Fair Labor Standards Act, which guarantees workers the minimum wage and overtime protections. Here again, these rules were proposed by a Department that for eight years issued *no* regulations to strengthen wage and hour protections for workers. The Bush Administration's only significant wage and hour rulemaking was to change the rules on overtime eligibility. Experts estimated that the rules could deprive more than six million workers of much-needed overtime pay.[4] Against this backdrop, the Bush Administration's last-minute effort to weaken its FLSA rules is that much more objectionable. DOL described the proposed rules as merely updating its rules, but in reality, many of the proposed new rules would result in less pay for workers. For example, the proposed rules would make it easier for employers to take a credit against their minimum wage obligations for employee tips and employer-provided meals. The rules would make other changes that would enlarge the overtime exemption for some employees and limit public sector workers' ability to take compensatory time. Fortunately, here again, the political operatives at the Department of Labor were unable to rush out a final rule, and hopefully the proposal will be withdrawn by the Obama Administration.

The Bush Administration did manage to finalize a number of rules that will have harmful consequences for workers. Several examples follow. These rules are listed in a chart attached to this testimony, along with additional rules issued in the final months of the Bush Administration that need to be strengthened (e.g., MSHA rules on Belt Air and Refuge Alternatives, and OSHA's rule on vertical tandem lifts).

H2A Rules: Undermining labor standards for temporary immigrant agricultural workers

On December 18, 2008—well after the November 1 deadline set forth in the Bolten memo—the Department of Labor published final regulations that drastically lower wages, labor protections, and housing standards for farmworkers, severely limit the ability of U.S. workers to obtain employment with H2A employers, and limit the oversight and enforcement of the few protections that remain. The new rules replace a pre-hire certification process, under which DOL verified an employer's claims about labor shortages and wage standards, with a self-attestation system where employers merely attest that they have abided by the rules. The rules eliminate the current requirement that H-2A employers provide free housing that meets certain standards, replacing it with a voucher option. And the new rules eliminate the role of state workforce agencies in reviewing employers' applications.

The new H2A rules also abolish the "50 percent" rule, which required employers to hire qualified U.S. workers who apply for work until half of the season has elapsed. The 50 percent rule is an important method for granting U.S. workers a job preference over imported temporary workers, and creates an incentive for preseason recruitment of U.S. workers.

In order to ensure that the new rules would take effect before President Obama took office, the Bush Administration allowed the rules to take effect in 30 days (the minimum amount of time allowed by the Administrative Procedure Act), and not the usual 60 days for significant rules of this nature. If these new rules are allowed to stand—which we hope they are not—agricultural employers can be expected to take advantage of the new "attestation" system to recruit a flood of temporary agricul-

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Labor, Subcommittee on Workforce Protections (Sept. 17, 2008), available at http://edlabor.house.gov/testimony/2008-09-17-PegSeminario.pdf.

[4] *See* Ross Eisenbrey, Economic Policy Institute, "Longer Hours, Less Pay" (2004) (estimating that DOL's changes to the white collar rules could eliminate overtime pay for more than six million workers).

tural workers under potentially exploitative conditions, thereby driving down standards for workers in the agricultural industry.

H2B: Undermining labor standards for temporary seasonal immigrant workers

The Bush Administration also rushed to get new rules in place that undermine labor standards for temporary seasonal workers under the H2B visa program. As with the H2A rules, the final rules were issued in violation of the Bolten memo on December 19, 2008. And, as with the H2A rules, the Bush Administration allowed only 30 days—until January 18, 2009—for the new rules to take effect.

Like the H2A rules, the new H2B rules eliminate the pre-hire certification process at DOL, instead allowing employers to self-attest that they need the temporary workers and that there are not enough able and qualified U.S. workers available to do the work. The role of state workforce agencies in reviewing employer claims with respect to their need for temporary workers and the unavailability of U.S. workers is eliminated.

The rules also gut the requirement that H-2B workers be hired only into *temporary*, full-time jobs, thereby opening up many more U.S. workers to unfair competition for work. Under the prior regulations, DOL considered jobs that lasted up to ten months out of the year as "temporary." The new regulations allow employers to bring in H2B workers for a "temporary" one-time need of up to three years.

Under the new rules, employers experiencing a long-term need for a larger workforce could completely avoid the demands of the domestic labor market by serially employing H2B workers, on temporary visas, to meet this long-term need. This would drag down wages and working conditions for workers in the industry or region as a whole.

The combination of self-attestation, the elimination of the state workforce agencies, and the broadened definition of "temporary" will further depress wages in the industries in which the H2B program operates, to the detriment of U.S. workers. And, because there is an endless supply of citizens of foreign countries willing to work in the United States, and these jobs are generally classified as unskilled, employers" access to that foreign labor supply means that employers have little or no economic incentive to meet the economic demands of U.S. workers seeking a better wage. The new H2B rules need to be rescinded.

Erecting Obstacles to Workers Taking Family and Medical Leave

On November 17, 2008—after the deadline set forth in the Bolten memo, but just in time for the regulations to take effect before the end of the Bush Administration—the Department of Labor issued final regulations under the Family and Medical Leave Act. The new rules make it more difficult for employees to take family and medical leave by erecting new hurdles and procedural roadblocks, and the rules open the door to inappropriate disclosure of information to employers by allowing them to have direct conversations with a worker's private physician about the employee's need for leave. The changes were opposed by women's rights organizations, labor organizations, and others, but favored by the business community. The new FMLA rules also contain provisions implementing the FMLA amendments to the National Defense Authorization Act for FY 2008, Pub. L. 110–181, which provide for leave for military families to care for service members. Advocates generally supported the military leave provisions.

Undermining Trucker and Highway Safety

On November 19, 2008, the Department of Transportation issued final rules increasing the allowable driving hours for truck drivers from 10 consecutive hours to 11, and shortening mandatory rest times between drives. Consumer groups and labor organizations oppose these rules because of their adverse impact on driver health and safety, and on highway safety. The rules issued by DOT on November 19, 2008 are virtually identical to provisions that have twice been rejected by the U.S. Court of Appeals for the D.C. Circuit. The final rules took effect on January 19, 2009—the day before President Obama took office. A petition for reconsideration of the rules, submitted by worker and consumer advocates, was denied by DOT before the Bush Administration left office.

Weakening Safeguards Against Conflicts of Interest in Investment Advice

On August 22, 2008—again in violation of the Bolten memo—the Department of Labor's Employee Benefits Security Administration (EBSA) issued proposed rules

that allow for money managers to give conflicted investment advice to workers participating in individual retirement account plans such as 401(k)s, even if the money manager stands to profit from the advice. Labor organizations, senior citizen organizations, members of Congress and others strongly objected to the Department's proposal out of concern that it opened the door to conflicts of interest by investment advisers. Notwithstanding these objections, EBSA proceeded to finalize the rule, which was sent to the Office of the Federal Register on the last business day of the Bush Administration and published on January 21, 2009—again in clear violation of the Bolten memo.

Imposing New Reporting Burdens on Labor Organizations

In stark contrast to the Bush Administration's reticence to issue rules improving workers' health, safety, wage and hour, or pension protections, the Department of Labor issued a myriad of rules requiring increased financial recordkeeping and reporting by labor organizations and union officers. During its tenure, the Bush Administration issued four major new rules imposing heavy reporting obligations on labor organizations and their officers[5] and at the same time increased resources for investigation and regulation of labor organizations.[6]

In 2003, the Bush Administration pushed through a major expansion of the annual financial reports that the largest labor organizations are required to file—called the Form LM-2. The new rules require unions to track and report their financial transactions in minute detail. This produces an avalanche of meaningless data at an enormous cost both to the labor organizations that must file the reports and to the union members whose dues pay for the new recordkeeping and accounting systems. The AFL-CIO's report, for example, went from approximately 200 pages under the old form to approximately 800 pages under the Bush Administration's new rule.

Without studying whether the new forms actually provided workers with useful information, in May 2008, the Labor Department embarked on another round of LM-2 reforms, seeking even more detailed information from labor organizations. The new rules also proposed procedures for revoking the right of smaller unions to file a simplified financial report, if their report is delinquent or deficient. These small unions would then need to file the far-more complicated Form LM-2, which they are not set up to handle. Unions filed comments objecting to the proposed rule, but DOL proceeded to finalize the new rule, sending it to the Federal Register on the Friday before President Obama's inauguration so that it would be published on January 21, 2009—the first full day of President Obama's term. The new rules take effect on February 20, 2009. If allowed to stand—which we hope they are not—the new rules will further increase the recordkeeping and reporting burden on labor organizations with no apparent benefit to workers.[7]

Removing Information from Contractors' Payroll Records

The Bush Administration also rushed through a rule that allows contractors covered under the Davis-Bacon Act and the Copeland Anti-Kickback Act to omit social security numbers and home addresses of workers on the weekly payroll reports these contractors are required to maintain and provide to the government. The deletion of this information from the payroll reports will make it harder for the government to verify the accuracy of the reports. The rule was proposed on October 20, 2008—long after the June 1, 2008 deadline in the Bolten memo—and after a short 30-day comment period, final rules were issued on December 19, 2008, to take effect on January 18, 2009.

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[5] In addition to the massive expansion of the Form LM-2 described in the text above, in 2007 DOL promulgated a major expansion to the LM-30 report, which union officers and employees must file, that dramatically expanded the number of individuals that must file the reports to include union volunteers, and that dramatically expanded the types of transactions that individuals must report. 72 Fed. Reg. 36106 (July 2, 2007). Also, in 2006, the Department published requirements for a new T-1 report for unions to file concerning "significant trusts in which they are interested." 71 Fed. Reg. 57716 (Sept. 29, 2006). As with the prior version of this requirement, the new T-1 rule was struck down by the court. Undeterred, the Department promulgated another new T-1 rule in 2008, 73 Fed. Reg. 57412 (Oct. 1, 2008).

[6] According to an unpublished study by Professor John Lund, the Office of Labor Management Standards (OLMS) spends approximately $2,700 per labor organization under its jurisdiction, while OSHA and the Wage and Hour Division spend $26 each per covered workplace.

[7] On February 2, 2009, the Office of the Federal Register posted a notice, to be published in the Federal Register on February 3, 2009, by the Department of Labor requesting comments on a proposed 60-day extension of the effective date of the new LM2/3 rules and seeking comments on the rule generally, including the merits of retaining or rescinding the rule.

Options for Addressing the Bush Administration's Midnight Rules

It is unfortunate, given the current economic crisis and the many pressing issues facing our country, the new Administration, and Congress, that time and resources will have to be spent dealing with the Bush Administration's harmful midnight regulations—resources that should rightly be going toward the development of *protective* regulations. Fortunately both the Obama Administration and Congress have several options for dealing with rules that they find objectionable.

In considering these options, it is important to look at each midnight rule to determine the best course of action for that particular rule. No one solution fits every situation. In some cases, the best solution is to revoke a midnight rule entirely. In other cases, the better course might be to retain the midnight rule but engage in rulemaking to improve upon its deficiencies. In addition, it is important that Congress and the Obama Administration communicate with each other and coordinate their efforts, in order to facilitate the Obama Administration's efficient and prompt response to particular midnight rules of concern.

Proposed rules that were not completed by the Bush Administration, such as the proposals to weaken Fair Labor Standards Act protections or the secret rule on risk assessment, are the easiest to address. The Obama Administration's new Department of Labor can issue a notice in the Federal Register withdrawing the proposed rule in question.

For rules that were issued in final form but have not yet taken effect, the Obama Administration, via a memorandum to agencies from Chief of Staff Rahm Emanuel and a followup memo from OMB Director Peter Orszag, has instructed agencies to consider extending the effective date of particular last-minute rules and taking public comments on whether to modify or repeal the rule. Agencies will need to justify their decisions to extend effective dates and to modify or repeal particular rules, but it is clear that they have legal authority to undertake such regulatory proceedings.

Last-minute rules that have already taken effect are obviously the most problematic category of rules. The Obama Administration will need to quickly review these rules and undertake a new rulemaking to modify or repeal rules that it finds problematic. These rulemakings can be time-consuming and burdensome, and divert resources from other important agency priorities, such as proposing new rules to *improve* worker protections.

Congress can assist the Obama Administration in dealing with these problematic midnight rules in a number of ways:

- Congress can adopt a rider on the relevant appropriations bill blocking implementation of new rules that it finds objectionable, which would give the Obama Administration breathing space to reconsider, modify, or revoke the rules in question;
- Congress can facilitate review of problematic rules by passing legislation authorizing the executive branch agencies to suspend immediately the effective dates of midnight rules (e.g., rules that violated the Bolten memo) that the Congress and/or the agencies find problematic;
- Congress can disapprove any of the Bush Administration's last-minute rules under the Congressional Review Act.

In addition, Congress should appropriate sufficient funds to the executive branch agencies to enable them to both review and deal with the Bush Administration's midnight rules and engage in new, protective rulemaking. Rulemaking can be a resource-intensive, time-consuming endeavor, and it is important that these agencies have the resources they need both to deal with the problems left by the Bush Administration and to move forward with protective regulations.

Again, thank you for the opportunity to testify today. I would be happy to respond to any questions.

ATTACHMENT

LABOR-RELATED MIDNIGHT RULES BY THE BUSH ADMINISTRATION

Rule (including RIN number)	Department and Agency Issuing Rule	Brief Description of Rule	Date of Proposal	Issue Date and Effective Date	Violates Bolten Memo	
					Proposal	Final
Rules Already In Effect						
Privacy of Payroll Records (RIN 1215-AB67) under federal contracts	DOL/ESA	Contractors covered by Davis-Bacon and Copeland Anti-Kickback Acts would no longer have to include SSNs and home addresses of workers in weekly payroll record reports to federal gov't agencies (making it harder for gov't to verify accuracy of reports)	Oct. 20, 2008	Comment period closed November 19, 2008 Final rule published in FR December 19, 2008 Effective date January 18, 2009	X	X
Modernizing the Labor Certification Process and Enforcement for Temporary Agricultural Employment of H-2A Aliens (RIN 1205-AB55)	DOL/ETA & ESA (DHS issued a companion rule)	Fundamentally eliminates foundations of H2-A program, eradicating most worker protections, including wage protections and housing protections. Eliminates certification process and state workforce agency role in favor of self-attestation by employers.	February 13, 2008	Comment period closed April 14, 2008 Final Rule Published in FR December 18, 2008 Effective Date January 17, 2009 Rule is subject of lawsuit by Farm Worker Justice Fund.		X

Rule (including RIN number)	Department and Agency Issuing Rule	Brief Description of Rule	Date of Proposal	Issue Date and Effective Date	Violates Bolten Memo	
					Proposal	Final
Labor Certification for the Temporary Employment of H-2B Aliens (RIN 1205-AB54)	DOL/ETA & ESA (DHS issued a companion rule)	Eliminates labor certification process in favor of attestations by employers	May 22, 2008	Comment period closed on July 7, 2008 Final rule published in FR December 19, 2008 Effective date January 18, 2009		X
Flame Resistant Conveyor Belts, Fire Protection and Detection, and Use of Air from the Belt Entry (RIN 1219-AB59)	DOL/MSHA	Institutes measures to protect against hazards caused by belt air	June 19, 2008	Final rule published in FR December 31, 2008 Effective date December 31, 2008		Mandated by Statute
Family and Medical Leave Act (RIN 1215-AB35)	DOL/ESA	Comprehensive revisions to FMLA implementing regulations that impose additional requirements on employees who seek access to statutory leave	Feb. 11, 2008	Final rule published in FR November 17, 2008 Effective date January 16, 2009		X
Rules Finalized but Not Yet In Effect						
Vertical Tandem Lifts – Maritime Standard (RIN 1218-AA56)	DOL/OSHA	Would allow maritime port operators to lift two or more empty containers secured together at the same time, a practice that puts workers at risk	September 16, 2003	Final rule published in FR December 10, 2008 Effective date April 9, 2009		X
Refuge Alternatives for Underground	DOL/MSHA	Provides for alternative underground shelters for	June 16, 2008	Final rule published in FR December 31,		Mandated by statute

Rule (including RIN number)	Department and Agency Issuing Rule	Brief Description of Rule	Date of Proposal	Issue Date and Effective Date	Violates Bolten Memo	
					Proposal	Final
1219-AB58)				Effective date March 2, 2009		
Labor Organization Annual Financial Reports (LM-2/3) (RIN 1215-AB62)	DOL/ESA	Adds itemization and other requirements to LM-2; establishes procedures for revoking right of smaller unions to file LM-3 & requiring them to file LM-2	May 11, 2008	Comment period closed July 11, 2008 Final rule published in FR January 21, 2009 Effective date February 20, 2009		X
Investment Advice – Participants and Beneficiaries (RIN 1210-AB13)	DOL/EBSA	Removes safeguards that protect workers against receiving conflicted investment advice from money managers who stand to profit from the advice.	August 22, 2008	Comment period closed October 6, 2008 Public hearing October 21, 2008 Final rule published in FR January 21, 2009 Effective March 23, 2009	X	X
"Watch List" of Rules Not Yet Finalized						
Secret Rule on Risk Assessment (RIN-1290-AA23)	DOL/Policy	Imposes new procedural and analytic requirements on OSHA and MSHA for conducting risk assessments for health rules	August 29, 2008 Comments Due September 29, 2008	Not yet final	X	

Rule (including RIN number)	Department and Agency Issuing Rule	Brief Description of Rule	Date of Proposal	Issue Date and Effective Date	Violates Bolten Memo	
					Proposal	Final
Updating Regulations Issued under the Fair Labor Standards Act (RIN 1215-AB13)	DOL/ESA	Makes numerous changes to FLSA regulations, including curtailing overtime eligibility, easing tip credit requirements for employers and availability of fluctuating workweek method.	July 28, 2008	Not yet final (comment period closed Sept. 26).	X	
Alcohol and Drug Testing for Miners (RIN 1219-AB41)	DOL/MSHA	Requires mine operators (in coal and metal/non-metal) to implement mandatory drug and alcohol testing programs that include pre-employment, random and post-accident testing.	September 8, 2008 Comments due October 8, 2008. Hearing scheduled Oct. 14, 2008 Comments extended to Oct 29 Additional hearing scheduled Oct 28, comments extended to Nov. 10.	Not yet final	X	
Senior Community Service Employment Program (1205-AB48)	DOL – Employment and Training Administration	Weakens community service employment program. Opposed by many senior groups	August 14, 2008	Not yet final; comment period closed 10/14/08	X	

Mr. COHEN. Thank you, Ms. Rhinehart.

And now we would proceed with the testimony of Dr. de Rugy. Correct?

TESTIMONY OF VERONIQUE DE RUGY, Ph.D., SENIOR RESEARCH FELLOW, MERCATUS CENTER AT GEORGE MASON UNIVERSITY

Ms. DE RUGY. Absolutely, very impressed. But over the years, I have learned to respond to whatever name I hear.

Chairman Cohen, Ranking Member Franks and distinguished Members of the Subcommittee, it is an honor to appear before you today to discuss the problems of and solution to the midnight regulation phenomenon.

I am a senior research fellow with the Mercatus Center, a nonpartisan university-based research, education and outreach organization affiliated with George Mason University. My colleagues and I have worked on this issue extensively, and I am concerned about the effects this phenomenon has on good governance.

In his inaugural address, President Obama committed to accountable and pragmatic government. Unfortunately, at the end of every presidency, agencies trample on this value, as the issue of last-minute regulation.

If Congress does not reform things and the process today, the end of the Obama administration will likely be no different in this regard than those that have preceded it.

After all, in spite of efforts within the Bush administration to prevent an outburst of last-minute rules, little has changed since the frantic last days of the Clinton presidency.

The Mercatus Center's work over the years demonstrates that the midnight regulation phenomenon is systemic and crosses party lines. At the end of every Administration, Republican or Democrat, there is a dramatic spike in regulation.

This spike is especially pronounced when the transition is to a President of the opposite party.

The most common explanation in the literature for this phenomenon is the attempt by the Administration to extend its influence into the future.

Knowing its successor will not share its policies or priorities, there is an incentive to write in stone as many of its policies as possible.

There are two other reasons why midnight regulations are pernicious.

First, after election day, a lame-duck President faces little accountability. He will never again stand for election and won't really have to deal with Congress in the future. This lack of accountability frees the President and his Administration to enact regulations that previously had been politically impossible.

Second and more importantly, the midnight regulation phenomenon dilutes oversight by the Office of Information and Regulatory Affairs. OIRA's regulatory office exists to ensure that agencies have carefully considered alternative approaches to regulation, that they have correctly estimated the costs and benefits of these alternatives in order to find the most efficient course of action.

By its nature, this type of reasoned economic oversight of proposed regulations requires time. Unfortunately, the torrent of regulations at the end of an Administration weakens this oversight.

My colleague, Jerry Brito, and I found that in the first 7 years of the Bush administration, OIRA reviewed an average of seven

economically significant regulations per month. Over the last 3 months, however, that number had doubled to 14.

Moreover, while the number of regulations OIRA reviewed at the end of the presidential term, while it spiked, its staff and budgets remained constant. It means basically the time it has to review each regulation decreases.

Another of my colleagues, Patrick McLaughlin, has actually put out a study that shows that that review time is slashed in two.

To address this issue, we suggest a flexible cap on the number of regulations that an agency can submit to OIRA at any one time. This cap would be tied to resources available to OIRA, which could be increased, if necessary.

The midnight period, however, also highlights persistent problems with OIRA oversight during the regular process. Since its creation, OIRA staff has been cut in two and the budget, in constant dollars, has shrunk by about a third.

This downward trend hampers a President's ability to effectively manage regulation, paperwork and interagency coordination.

Any increase in staffing and spending will be useless unless Congress addresses a more fundamental issue. The ability of OIRA to carry out its mission varies both across agencies and across Administrations.

Depending on the degree of latitude granted to the OMB director and the OIRA administrator, consistent management of the quality of cost-benefit analysis has been doubling consistently.

For example, different agencies are given a pass on the quality of their regulatory analysis or on any application of that analysis for decision-making by a particular Administration. OMB is essentially told to back up in these cases.

Commerce and the executive branch must give OIRA both the resources and the ability to hold agencies accountable for producing effective and cost-efficient rules. Ensuring that these principles apply during the midnight period when accountability is reduced is even more important.

Finally, Congress should dedicate itself to writing clearer, more detailed and more definitive statutes that require sound analysis of regulation. In this way, Congress would better exercise the policy-making authority entrusted to it by the Constitution.

Thank you.

[The prepared statement of Dr. de Rugy follows:]

PREPARED STATEMENT OF VERONIQUE DE RUGY

MERCATUS CENTER
GEORGE MASON UNIVERSITY

Analysis and Solutions of the Midnight Regulations Phenomenon.

TESTIMONY

By

Veronique de Rugy, PhD, Senior Research Fellow
Mercatus Center at George Mason University

Before the Committee on the Judiciary, United States House of Representatives
Subcommittee on Commercial and Administrative Law

Wednesday, February 4, 2009 10:00 AM
2141 Rayburn House Office Building

http://www.mercatus.org/

Chairman Cohen, Ranking Member Franks, and Distinguished Members of the Subcommittee:

I appreciate the opportunity given to me today to testify on the midnight regulation phenomenon. I am a research fellow with the Mercatus Center, a university-based research, education, and outreach organization affiliated with George Mason University and located on the Arlington, Virginia campus. A core mission of the Mercatus Center is to provide a public service by conducting research in law, economics, and other social sciences that is directly relevant to the issues being deliberated by policy makers.

For over a decade, the Mercatus Center has taken a great interest in the study of regulation and the midnight regulations phenomenon in particular. In 2001, the Mercatus Center published an empirical study by scholar Jay Cochran that established the phenomenon's existence.[1] Later, my colleague Antony Davies of Duquesne University and I updated Cochran's model in a Working Paper published by the Mercatus Center in March 2008.[2] Then, in December 2008, my colleague Jerry Brito and I completed a paper published as part of the Mercatus Center Policy Series "For Whom the Bell Tolls: The Midnight Regulation Phenomenon," that updates and expands upon Cochran's work.[3] The *American University Administrative Law Review* will publish an expanded version of the paper in March 2009. The law review article will include a new section examining the attempt by the Bush Administration to stop the midnight regulation phenomenon during the president's last year last in office. My work with Jerry Brito is the basis for my current testimony.

I. The Midnight Regulation Phenomenon Does Exist.

The ability of a lame-duck president to achieve anything in the last months of his presidency has been described "like a balloon with a slow leak that shrinks with each passing week until it hits the ground."[4] However, scholars today acknowledge that in the end of a term presidents manage to promulgate large number of rules and orders before they leave office extending some of their influence into the future.

Virtually every modern president has made some significant regulatory change in the final days of his administration, but it was not until the regulatory outburst in the final days of President Jimmy Carter's presidency that the term "midnight regulation" was coined.[5] At the time, the Carter administration set the record for number of pages printed in the *Federal Register* during the midnight period—the time between Election Day and Inauguration Day—with 24,531 pages.[6]

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[1] Jay Cochran, III, "The Cinderella Constraint: Why Regulations Increase Significantly during Post-Election Quarters" (working paper, Mercatus Center at George Mason University, 2001), http://www.mercatus.org/uploadedFiles/Mercatus/Publications/The%20Cinderella%20Constraint(1).pdf.

[2] Antony Davies and Veronique de Rugy, "Midnight Regulations: An Update" (working paper 08-06, Mercatus Center at George Mason University, 2008), http://www.mercatus.org/uploadedFiles/Mercatus/Publications/WP0806_RSP_Midnight%20Regulations.pdf

[3] Brito, Jerry and Veronique de Rugy. "For Whom the Bell Tolls: The Midnight Regulation Phenomenon." *Mercatus Policy Series.* Policy Primer No. 9. Arlington, VA: Mercatus Center at George Mason University, December 2008.

[4] Carl Cannon, *The Long Goodbye*, NATIONAL JOURNAL, Jan. 27, 2001, at 33.

[5] J. Jack Faris, Small Business Focus: Watch Out for 'Midnight Regulation', NFIB Commentary, August 21 (2000) available at http://www.nfib.com/object/1609860.html

[6] Susan Dudley, *Reversing Midnight Regulations*, REGULATION MAGAZINE, Spring 2001, at 9, *available at*

This sudden outburst of regulatory activity is not just a characteristic of Democratic administrations. Late in his presidency, President George H.W. Bush's administration had instituted a regulatory moratorium,[7] but in its waning months it issued the largest number of economically significant regulations –53 rules – of the last 30 years, including a significant proposal loosening the rules on how long truck drivers could stay on the road between breaks.[8]

A. Evidence of the Midnight Regulation Phenomenon

In 2001, former Mercatus Center scholar Jay Cochran examined the number of pages in the *Federal Register* as a proxy for regulatory activity.[9] Cochran went as far back as 1948 and found that when control of the White House switched to the opposite party, the volume of regulation in the outgoing administration's final quarter-year averaged 17 percent higher than the volume of rules issued during the same period in nonelection years.[10] These pages of the *Federal Register* include executive orders, proclamations, administrative directives, and regulatory documents (from notices of proposed rulemaking to final rules).[11] According to Cochran's analysis, the sudden outbursts are systemic and cross party lines.[12]

Cochran's explanation for this phenomenon is what he calls the Cinderella constraint.[13] He explains, "as the clock runs out of time on the administration's term in office, would-be Cinderellas—including the president, cabinet officers, and agency heads—work assiduously to promulgate regulations before they turn back into ordinary citizens at the stroke of midnight."[14]

Recent Mercatus research takes a second look at the existence of the midnight regulation phenomenon.[15] It uses an extended data set—from 1948 to 2007—and examines monthly data instead of quarterly data. It also measures the extent of regulation differently than Cochran did: the number of *Federal Register* pages in the current month

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http://www.cato.org/pubs/regulation/regv24n1/dudley.pdf.

[7] Gary L. Galemore, *Federal Regulatory Reforms: An Overview*, (Congressional Research Service, RL31207, January 29, at 7, (2007), available at https://www.policyarchive.org/bitstream/handle/10207/1312/RL31207_20030129.pdf?sequence=1

[8] Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of Modern Administrative State*, 94 VA. L. REV. 889, 890 (2008).

[9] Jay Cochran, III, "The Cinderella Constraint: Why Regulations Increase Significantly during Post-Election Quarters" (working paper, Mercatus Center at George Mason University, 2001), http://www.mercatus.org/uploadedFiles/Mercatus/Publications/The%20Cinderella%20Constraint(1).pdf.

[10] Ibid., 8.

[11] The *Federal Register* is the place where the executive branch agencies promulgate new rules, announce hearings, and withdraw or modify existing regulations. Short of counting every single rule issued during the midnight period—which is impossible considering the large number of new rules and the opacity of the process—using the number of pages in the *Federal Register* to measure regulatory activity is a reasonable first approximation of the total volume of regulations issued by federal agencies. Another solution is to count the number of economically significant regulations. However, that proxy too does not tell the whole story as these regulations are only a small portion of the total of regulations issued during that period.

[12] Cochran, "Cinderella Constraint,"15.

[13] Ibid., 15. See also Jack M. Beermann, "Presidential Power in Transition," *Boston University Law Review* 83 (2002): 947, 955.

[14] Ibid., 4.

[15] Antony Davies and Veronique de Rugy, "Midnight Regulations: An Update" (working paper 08-06, Mercatus Center at George Mason University, 2008), http://www.mercatus.org/uploadedFiles/Mercatus/Publications/WP0806_RSP_Midnight%20Regulations.pdf.

is represented as a percentage of total pages published during the calendar year (as opposed to simply considering the total number of pages published). This change allows the researchers to capture the increase in regulatory activity during the post-election months for a given administration relative to the administration's annual regulatory output.

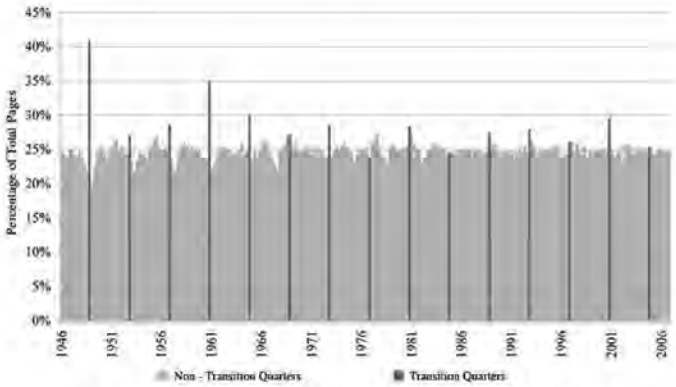

Figure 1. Pages added to the *Federal Register* in each quarter as a fraction of pages added for the calendar year[16]

Our recent research shows that transition periods usually are accompanied by outbursts in regulatory activity, especially when the presidency switches from one party to the other. Figure 1 shows the number of pages added to the *Federal Register* between 1946 and 2006 during the last three months of a calendar year as a fraction of total pages added for the entire year (the three-month moving average). Figure 1 contrasts the growth during nontransition quarters—the quarters in which no presidential election occurs—and the growth during transition quarters—the quarters in which a presidential election does occur.

The data show that, under normal circumstances, the number of pages added to the *Federal Register* during the course of a year grows at a constant rate—it is spread equally throughout the year. In other words, 25 percent of the pages added to the *Federal Register* during a calendar year will be added each quarter. However, for quarters in which a presidential election occurred, the number of pages added exceeds the 25 percent baseline 13 out of 15 times. The two exceptions followed the elections of 1976 (Ford succeeded by Carter) and 1984 (Reagan elected to a second term).

Figure 2 also illustrates the midnight regulation phenomenon. It shows the number of pages in the *Federal Register* from 1946 to 2006. The dots represent the number of pages added in a given month, and the squares highlight the number of pages added during the months of a transition period. The solid line represents a nonlinear smoother line that reveals underlying trends in the data. Figure 2 shows that the number

[16] Authors' calculation based on number of pages in the *Federal Register*.

of pages grew slowly between 1945 and 1970. After 1970, the number of pages started to grow rapidly before it decreased slightly in the 1980s. In the 1990s, it increased again, but at a slower pace than in the 1970s.

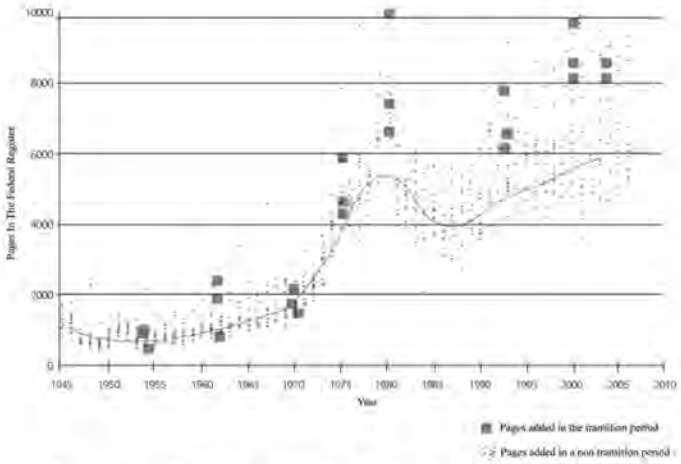

Figure 2. Number of pages added to the *Federal Register* from 1946 to 2006[17]

Pages added to the *Federal Register* during the transition periods are located well above our reference line, lending a first round of support to the theory that outgoing administrations significantly increase their regulatory activity in the months following a presidential election—especially if parties are changing. After 1970, the number of pages added to the *Federal Register* increases drastically after an election, especially in 1980, 1992, and 2000 when there was a party switch. We see a smaller increase after elections where there was no switch in the party in power, such as 1984, 1988, and 2004.

With a few exceptions, these results are quantitatively and qualitatively consistent with Cochran's findings. For instance, they confirm a positive relationship between post-election months and regulatory output.[18] There is also a correlation between Congress and the existence of midnight regulations. This would mean that the more days Congress is in session the month before the start of the midnight period, the more regulations will be promulgated.[19] It would imply that in the last days of a presidential term, Congress too is trying to push regulations out the door. However, even though there is a statistical correlation, this doesn't mean that one causes the other. In addition, the new data show a positive relationship between the rate of cabinet turnover and regulatory output.[20] The higher the rate of the executive branch turnover—for example, when the entire cabinet is

[17] Authors' count of *Federal Register* pages.
[18] Cochran., "Cinderella Constraint," 3.
[19] Ibid., 5.
[20] Ibid.

about to be replaced because the incumbent president has lost reelection—the more regulations will be issued during the midnight period. As the rate of the executive branch turnover diminishes—such as following a successful reelection—fewer regulations are issued.

B. Why Does it Happen?

So what is the cause of the midnight regulations phenomenon? It is commonly believed that as the legislative process slows down at the end of an administration's term, it becomes more difficult for a president to push through an agenda on his way out.[21] However, according to political scientists William Howell and Kenneth Mayer, this is not necessarily the case.[22] The slowdown allows the president to take actions using tools at the executive's disposal that during any other period would likely be checked and halted by the legislature.[23] The authors explain that with midnight regulations, executive orders, presidential proclamations, executive agreements, and national security initiatives, presidents have ample resources to make policy changes that would stand little chance in the regular legislative process.[24] In other words, it is easier to get things done when Congress is distracted. Another side of this argument is that during this period, the president has less political capital to get things done legislatively, so he uses tools that do not require legislative action.

Additionally, at the end of a term, the president has not only the ability, but an incentive, to use these resources to try to push through policy changes. Howell and Mayer explain that midnight regulation occurs when "political uncertainty shifts to political certitude."[25] During the last 100 days of his administration, a president knows exactly who will succeed him, as well as the new president's policy positions, legislative priorities, and the level of partisan support the new president will enjoy with the new Congress.[26] The sitting president has every incentive to promulgate last-minute rules and regulations to deftly extend his influence beyond the day he leaves office.[27] For instance, John Podesta, President Clinton's chief of staff, explained in a *New York Times* interview how "starting in early 1999, we had people down in the White House basement with word processors and legal pads making lists of things we wanted to get done before we left."[28] Talking about the current Bush administration, he added, "They've probably got people down there right now with chain saws and drilling rigs doing the same thing." And he added, "I am sure they're going to want to have an impact as they walk out the door."

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[21] William G. Howell and Kenneth R. Mayer, "The Last One Hundred Days," *Presidential Studies Quarterly* 35 (2005): 533.
[22] Ibid., 534.
[23] Ibid.
[24] Ibid.
[25] Ibid., 533.
[26] Ibid.
[27] Andrew P. Morriss et al., "Between a Hard Rock and a Hard Place: Politics, Midnight Regulations and Mining," *Administrative Law Review* 55 (2003): 557
[28] John M. Broder, "A Legacy Bush Can Control," *The New York Times*, September 9, 2007.

This is particularly true if the sitting president (or his party) has lost the election. In that case, the outgoing president not only has an incentive to issue midnight regulations to extend his influence beyond the day he leaves office, but he might also want to impose a cost on the incoming administration.[29] According to Susan Dudley, "Once a final regulation has been published in the *Federal Register*, the only lateral way an administration can revise it is through new rulemaking under the Administrative Procedure Act. Agencies cannot change existing regulations arbitrarily; instead, they must develop a factual record that supports the change in policy."[30] This may make it extremely costly for a new administration to change last-minute regulations issued by a previous administration.[31]

In fact, according to Nina Mendelson, professor of law at the University of Michigan, some last-minute rules may have such high change and deviation costs that they are close to irreversible.[32] Some last-minute decisions by an outgoing administration may also impose serious political costs, "including costs upon the new administration's ability to pursue the president elect's preferred policy agenda."[33] In other words, an outgoing administration has the opportunity to seriously complicate matters for an incoming administration.

For instance, the George W. Bush administration's decision to suspend the last-minute (January 22, 2000)[34] Clinton administration rule setting acceptable levels of arsenic in drinking water at 10 parts per million imposed serious political costs on the new administration.[35] Even though only a third of the American public approved of the rule, the suspension led to severe public criticism.[36] The Bush administration's actions on the arsenic standard became a symbol of what the press liked to call the new administration's callous attitude toward the environment.[37]

Furthermore, as Andrew Morris, professor of law and business at the University of Illinois, Roger E. Meiners, professor of economics and law at the University of Texas at Arlington, and Andrew Dorchak, a law professor at Case Western Reserve University Law Library explain, "by issuing regulations that make the life of the incoming administration harder, outgoing regulators can earn political capital with their core constituencies, position themselves for rewards in post-administration jobs with interest groups or in a future campaign or administration of their own party."[38]

Another explanation of the phenomenon is what Boston University School of Law Professor and Harry Elwood Warren Scholar Jack M. Beermann calls "waiting."[39] Waiting is a deliberate decision on the part of an administration to wait until after an election before doing something that might be perceived as controversial in order to

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[29] Ibid., 557.
[30] Dudley, "Reversing Midnight Regulations," 9.
[31] Ibid.
[32] Nina Mendelson, "Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives," *New York University Law Review* 78 (2003): 557–78.
[33] Ibid., 42.
[34] Howell and Mayer, "The Last One Hundred Days," 545.
[35] Mendelson, "Agency Burrowing," 561.
[36] Howell and Mayer, "The Last One Hundred Days," 544.
[37] Michael Kinsley (2001), "Poisoning the Well," Slate, April 13. See http://www.slate.com/id/104250/
[38] Morriss et al., "Between a Hard Rock and a Hard Place," 557.
[39] Beermann, *Presidential Power*, 947, 957.

avoid political consequences.[40] At the end of a term, the political costs of taking action decrease. Because an outgoing president is unlikely to seek elective office again, he may have little need for political support, he may no longer worry about political opposition, and he may no longer need cooperation from Congress.[41] As a result, his administration is freer to take actions that it could not have earlier in its term for fear of provoking opposition.[42]

Of course, an explanation for midnight regulations could just be that some regulations that had been under review for years end up being issued in the last months before a new president takes office.[43] However, the fact that regulations are regularly delayed for long periods of time does not explain the systematic increase in regulatory activity at the end of presidential terms. A slightly different approach to this explanation is what Beermann calls "delay,"[44] by which he means a lag between the moment the regulation is proposed and the moment it is passed. One potential explanation for the lag may simply be procrastination.[45] However, the delay is more likely to be due to external forces. For instance, a stringent judicial review has made the rulemaking process more thorough and time consuming, and has extended the time it takes for a regulation to gain approval. As a consequence, many new regulations are naturally pushed further into the president's term.[46] Also, Congress might—knowingly or otherwise—delay a regulation's issuance. For instance, Beermann explains how the Clinton administration's ergonomics rules, which set new workplace regulations to combat repetitive stress injuries, were significantly delayed by Congress through repeated appropriations riders prohibiting the Department of Labor from using any of its funds to promulgate a rule on ergonomic injuries.[47]

II. The Midnight Regulation Phenomenon is Problematic

Now that we have established that the midnight regulations phenomenon is real and systemic, we can turn to the question of whether it is problematic.

A. Often-Cited Concerns over Midnight Regulations:

Midnight regulations are the target of perennial criticism.[48] However, unless one believes that regulation of any kind is always problematic, the fact that regulatory activity increases at the end of a presidential term should not by itself be a cause for concern. It is therefore not surprising to find that objections to midnight regulations do not center simply on the increase in regulations, but on the process of their formulation.

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[40] Ibid., 957.
[41] Ibid.
[42] Ibid., 958.
[43] Dudley, "Reversing Midnight Regulations," 9.
[44] Beermann, *Presidential Power,* 956.
[45] Ibid.
[46] Ibid., 957.
[47] Ibid.
[48] See Edward Cowen, "Administration to Kill or Put Off 36 Carter 'Midnight Regulations,'" *The New York Times*, March 26, 1981, A1; "Here Come Ronald Reagan's 'Midnight' Regs," *U.S. News & World Report*, Nov. 28, 1988, 11; Elizabeth Shogren, "Clinton Readies an Avalanche of Regulations," *The Los Angeles Times*, November 26, 2000, 1.

The most common criticism relates to accountability.[49] During the midnight period—after the November election, but before a new president is sworn in—a lame duck administration might be impervious to normal checks and balances.[50] In large part, Congress and the electorate provide these checks. The electorate holds the president accountable at the ballot box, while Congress has oversight over agency activity.

In the lingo of game theory, political checks depend on "repeated game-play."[51] That is, an administration considering a regulation will not only take into account the current political costs and benefits of the decision they are making, but also how that decision will affect future interactions with other players (Congress and the electorate).[52] If there are no such future interactions, an administration will be more likely to pursue a regulatory course that might have otherwise been unpopular with Congress and the electorate.[53]

A president will not face another election if he has served two terms (Bill Clinton) or if he has been defeated at the polls (Jimmy Carter).[54] In either case, there will be an accountability deficit. Because the president knows that he will not face voters again, the president and his agencies will be less hesitant to pursue a controversial regulatory course. The accountability provided by the threat of Congressional retaliation is also weakened once the president knows that there is no "next period" in which he will need Congress's cooperation on legislative, budgetary, and other matters.[55]

Some argue that this period of unaccountability is, in fact, salutary because it may be the only opportunity an administration has to take a principled stand on issues that would otherwise face swift retaliation by powerful special interests. On the other hand, the case could be made that this is also the perfect time for an administration or its party to favor a particular special interest without fear that it will be held accountable. For example, consider the controversial last-minute pardons issued by George H. W. Bush, Bill Clinton, and indeed most presidents.[56]

Related to the concern over accountability is the criticism that midnight regulations can be undemocratic. After the election, the people have spoken, and if they have chosen a new president with policies opposite to the sitting president, then actions by the sitting president aimed at exerting power beyond his term may be seen as

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[49] See William S. Morrow, Jr., "Midnight Regulations: Natural Order or Disorderly Governance," *Administrative & Regulatory Law News*, Spring 2001, 3, 18; Morriss et al., "Between a Hard Rock and a Hard Place," 557; and Loring and Roth, "After Midnight," 1446.
[50] Morriss et al., "Between a Hard Rock and a Hard Place," 557.
[51] Ibid., 556–57.
[52] Ibid.
[53] Ibid.
[54] A two-term president might also be constrained until after the election because a controversial regulatory initiative might affect the campaign of his party's nominee to succeed her. However, once the election is decided, that constraint is removed.
[55] According to Morriss et al., the incentive to defect is strongest when the incoming president is of the opposite party [see critique above about wording. Suggest "there is minimal incentive to defer to Congress and the electorate when the incoming president…"]. Morriss et al., "Between a Hard Rock and a Hard Place," 557. This is because "the outgoing administration has little incentive to leave unfinished business for the incoming administration" whose policies will likely be opposite. Ibid.
[56] Kelly Wallace, "Former President Bush Granted Last-Minute Pardon to Contributor's Son," *CNN.com*, March 7, 2001, http://archives.cnn.com/2001/ALLPOLITICS/03/07/bush.pardon/index.html; P.S. Ruckman, "'Last-Minute' Pardon Scandals: Fact and Fiction" (delivered at the Annual Meeting of the Midwest Political Science Association, April 15–18, 2004, Chicago, IL), http://www.rvc.cc.il.us/faclink/pruckman/pardoncharts/Paper2.pdf.

undemocratic.[57] As explained earlier, one way a lame-duck president can exert power beyond his term is by adopting a procedural rule that constrains the executive's own power, but doing so only at the very end of his term so that the constraint effectively affects only his successor.[58] Another way is to force an incoming president to expend political capital reversing his predecessor's last-minute decisions. During the midnight period, an administration may issue rules in a politically charged area that it knows its successors will surely reverse.[59] Such late timing "suggests that there was no hope that the rules would actually be implemented, but rather were passed in an attempt to embarrass the new administration by forcing it to revise or repeal the rules."[60]

Another criticism of midnight regulations is the inefficiency and wastefulness inherent in trying to exert influence beyond one's administration. Putting aside concerns about democracy, enacting regulations contrary to the next president's policy agenda likely wastes the government's time and resources.[61] The outgoing administration wastes energy by enacting regulations that will no doubt be reversed, and the incoming administration must then take the time to undo them.[62]

Finally, there are criticisms based on principle. According to Beermann, "in addition to purely legal questions, the problem of 'midnight regulations' raises interesting normative questions concerning what constitutes appropriate behavior for an outgoing president and administration."[63] Federal Circuit Judge S. Jay Plager, a former OIRA Administrator under President George H W Bush, debating Clinton OIRA Administrator Sally Katzen on the question of midnight regulations, has said "he believes public virtue suffers from the rush to publish."[64] According to a report of the debate, Judge Plager criticized the rush to regulate at the end of an administration as "unseemly," and argued that "the haste with which midnight regulations are pushed out the door results in 'a certain amount of sloppiness' and 'makes control of the regulatory apparatus appear to be a Washington game.'"[65] Professor Nina Mendelson echoes Judge Plager, writing that "something about this activity strikes us as unseemly."[66]

The accountability and democracy deficits during the midnight period, as well as the perceived inefficiency and unseemliness of a rash of last-minute regulations, are frequently cited as the main problems with midnight regulations and are very serious concerns. However, in the balance of this article, we will focus on a less-touted problem of midnight regulations: the concern that an increase in the number regulations in a given period could overwhelm the institutional review process that serves to ensure that new

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[57] Mendelson, "Agency Burrowing," 6.
[58] Beermann, *Presidential Power*, 951–52. For example, Beermann explains that the Clinton Justice Department changed procedural rules that gave former DOJ employees the power to access work documents, but did so in the last few days of the administration. Mendelson, "Agency Burrowing," 600.
[59] Beermann, *Presidential Power*, 951–52.
[60] Ibid., 951.
[61] Ibid., 951, 972.
[62] Efficiency and waste is one of three concerns over midnight regulations identified by Judge Plager. Morrow, *Midnight Regulations*, 3 and 18. "[Plager] believes the ramming of regulations on the way out and the attempt to neutralize them on the way in amounts to an enormous waste of time and effort for both administrations." Ibid., 3.
[63] Beermann, *Presidential Power*, 951.
[64] Morrow, *Midnight Regulations*, 3.
[65] Ibid.
[66] Mendelson, "Agency Burrowing," 564.

regulations have been carefully considered, are based on sound evidence, and can justify their costs.

B. Midnight Regulations and Regulatory Process:

Every administration since Richard Nixon's has come to view regulatory analysis as a useful tool to ensure the effectiveness of regulation. To the extent we believe that the regulatory review is beneficial—at least marginally—then midnight regulations are problematic because they undercut the benefits of the review process.

The calculus is simple.[67] As we have seen, at the end of each administration—and especially between administrations of opposite parties—there is a dramatic spike in regulatory activity. However, there is no corresponding increase in the resources available to OIRA during those times of increased activity. If the number of regulations OIRA must review goes up significantly, and the man-hours and resources available to it remain constant, we can expect the quality of review to suffer.[68]

Since it was invested with regulatory review authority in 1981, OIRA's budget, in real 2007 dollars, has decreased from $9.4 million in 1981 to $7 million in 2007.[69] Staffing at OIRA has also decreased consistently and dramatically—from 90 full-time equivalent (FTE) employees in 1981, to just 50 today.[70] The budget and staffing decreases, however, have probably had no effect on the quality of the review process. As explained earlier, since 1993 OIRA has only had to review significant regulations, and the number of rules that it has been asked to review has dropped by 70 percent since then. Therefore, the number of rules reviewed per staffer has declined since 1981.

[67] The calculation rests of two assumptions: first that there is no slack in OIRA's current staff and that each employee is already producing at its full capacity and second, that more time will automatically mean better review.
[68] We must acknowledge that to prove this conclusively would require judging against objective criteria every OIRA-produced regulatory review issued during each period of November 8 to January 20 for the last 27 years a massive undertaking. We instead opt to make the case through circumstantial evidence and deductive reasoning.
[69] Office of Management and Budget, *Appendix to the Budget of the United States for Fiscal Year 1983*, I-C7 (OIRA's actual 1981 budget listed as $4,332,000); Office of Management and Budget, *Appendix to the Budget of the United States for Fiscal Year 2009*, 1058 (OIRA's actual 2007 budget listed as $7,000,000).
[70] Office of Management and Budget, *Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities* 30–31 (December 2002), http://www.whitehouse.gov/omb/inforeg/2002_report_to_congress.pdf (reports staffing figures for OIRA from 1981 through 2003); E-mail from John F. Morrall III, Branch Chief for Health, Transportation, and General Government in the Office of Information and Regulatory Affairs of the Office of Management and Budget, (July 3, 2008, 12:23:21 EDT) (providing OIRA staffing data for 2004 to 2008).

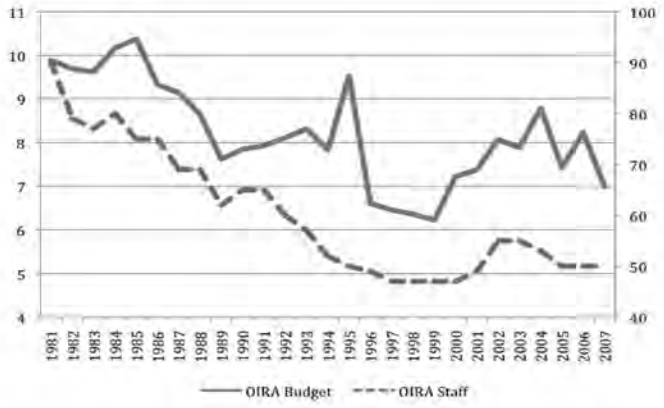


Figure 4. OIRA annual budget (in millions 2007 dollars – left axis) and staff (in number of FTEs – right axis)[71]

At the same time, we see spikes in the number of economically significant regulations OIRA must review during the final quarters of presidential terms.

[71] Office of Management and Budget, *Appendix to the Budget of the United States for Fiscal Years 1983 to 2009.*

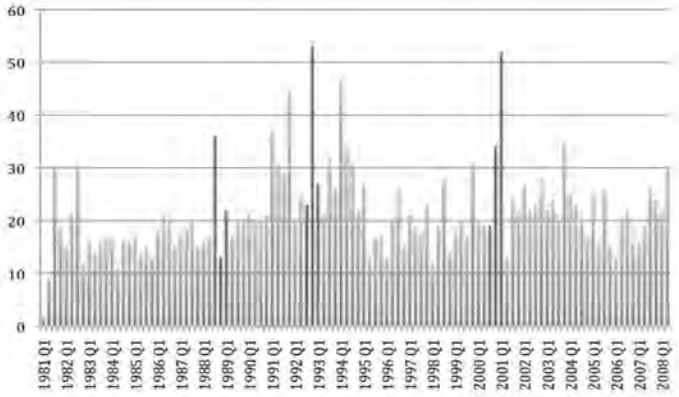
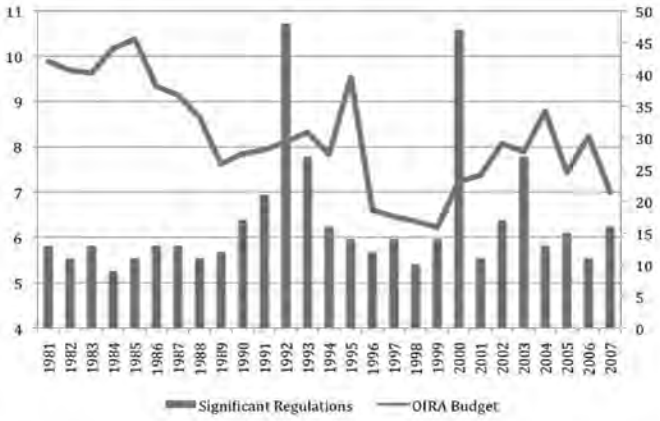


Figure 5. Economically significant regulations reviewed by OIRA (by quarter; presidential transitions highlighted)[72]

As Figure 4 shows, during midnight periods, the same number of staff, with the same resources, must review an increased number of regulations. During the midnight periods of the George H.W. Bush and Clinton presidencies, when the transition was to a president of the opposite party, we see the number of economically significant regulations that OIRA is asked to review more than double from the same period in the immediately preceding years. However, there is no concurrent increase in the resources available to OIRA.



[72] Quarterly figures generated using OIRA's online "review counts" database. General Services Administration, OIRA Review Counts Database, *RegInfo.gov*, http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init.

Figure 6. OIRA budget (in millions 2007 dollars – left axis) superimposed over number of economically significant regulations reviewed by OIRA from Nov. 8– Jan. 20 of each year (right axis)[73]

As a consequence, we can expect the amount of time and attention devoted to each regulation reviewed to be considerably less during midnight periods. One possible way to measure time and attention is by examining the number of days OIRA takes to review a proposed regulation. On its Web site, OIRA announces both the date it receives a regulation for review and the date when it completes that review.[74] New Mercatus Center research by Patrick McLaughlin examines whether increases in regulatory activity, such as those that occur during midnight periods, cause average review time to decrease.[75] He calculates the monthly average review time (i.e., how many days pass between when each rule is received and when the review is finished) and tests whether the number of regulations submitted to OIRA each month for review affects review time.[76]

While controlling for differences in administrations, McLaughlin finds that during the midnight period at the end of the Clinton administration, review time decreased significantly.[77] Relative to the mean review time between 1994 and 2007 (all full years of data available since the passage of Executive Order 12866), the Clinton midnight period witnessed a decrease in mean review time of about 27 days—a reduction by half in review time.[78] Because there is only one midnight period in the timeframe examined, McLaughlin investigates a possible underlying cause of the decreased review time: an increased workload for OIRA.

While OIRA is charged with reviewing all proposed significant regulations, the most important are those considered "economically significant"—those regulations that are expected to have an annual effect on the economy of $100 million or more. McLaughlin finds that the proportion of economically significant rules to all rules reviewed by OIRA spikes dramatically during midnight periods in general.[79] He further finds that, in or out of the midnight period, an increase in this proportion negatively affects the review time for all regulations.[80] Holding constant the number of regulations reviewed that are not economically significant, one additional economically significant rule submitted to OIRA in a given month decreases the average review time for all regulations by half a day.[81] This suggests a diminished level of scrutiny that undermines the benefits of regulatory review.

III. What Can be Done about it?

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[73] Ibid. OIRA budget derived from Office of Management and Budget, *Appendix to the Budget of the United States for Fiscal Years 1983 to 2009.*
[74] See note 96 above.
[75] Patrick A. McLaughlin, "Empirical Tests for Midnight Regulations and Their Effect on OIRA Review Time," (working paper 08-40, Mercatus Center at George Mason University, July 29, 2008). http://www.mercatus.org/uploadedFiles/Mercatus/Publications/WPPDF_Empirical%20Tests%20for%20Midnight%20Regulations.pdf.
[76] Ibid.
[77] Ibid.
[78] Ibid.
[79] Ibid., 25.
[80] Ibid., 22.
[81] Ibid., 25.

Several solutions to the midnight regulations problem have been proposed and tried. These have largely addressed the democracy deficit caused by midnight regulations. In Part III we examine some of these proposals and make our own suggestion to address the effects of midnight regulations on regulatory review.

A. Rescinding and Postponing Regulations

The most common way presidents have dealt with their predecessor's last-minute regulatory activities has been to delay the effects of new rules and to rescind unpublished rules. A new regulation cannot gain the force of law until it is published in the *Federal Register*.[82] Even then, once a regulation is published in the *Federal Register*, it does not become effective until a later time in order to allow regulated parties to come into compliance.[83] Generally, the minimum time in which a new rule can become effective after publication is 30 days, although agencies often set effective dates of 60 days or more.[84] At any point before a regulation is published in its final form in the *Federal Register*, the agency may rescind the rule at will.[85] Once a final regulation is published, however, to repeal it an agency must engage in the same type of lengthy notice-and-comment rulemaking process it undertook to create the rule.[86]

With these constraints in mind, we see that the most direct course for a new president to address his predecessor's midnight activity is to "stop the presses" at the *Federal Register* until the new administration can review unpublished rules and decide which to keep and which to rescind. As for regulations that have recently been published but have not yet become effective, the president can instruct agencies to delay their effective dates, but not postpone them indefinitely.[87]

This is precisely what Ronald Reagan did. First on January 29, 1981, the Reagan administration issued a memorandum that told agencies to postpone the effective dates of all final rules for 60 days. Then, he issued Executive Order 12291 less than a month after he took office.[88] As explained in Part II.B.1 of this paper, that order created the formal regulatory review process we know today. It also suspended the effective dates of recently published rules "to permit reconsideration in accordance with [the] Order,"[89] and

[82] *U.S. Code* 5 § 552(a)(1)(D) (2006).
[83] *U.S. Code* 5 § 553(d) (2002).
[84] Ibid. There is an exception to the 30-day rule. If an agency evokes the good cause exception, it can make the rule effective immediately.
[85] William M. Jack, "Taking Care That Presidential Oversight of the Regulatory Process is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions under the Bush Administration's Car Memorandum," *Administrative Law Review* 54 (2002): 1479, 1488–97.
[86] Beermann, *Presidential Power,* 982 84.
[87] Jack, "Taking Care," 1503–11 (explaining, *inter alia*, that while the effective dates of rules may be delayed for good cause, they cannot be delayed indefinitely, and that courts will also likely be skeptical of a simultaneous across-the-board claim of good cause by a large number of agencies). See also Peter D. Holmes, "Paradise Postponed: Suspensions of Agency Rules," *North Carolina Law Review* 56 (1987): 645. Whether delay of effective dates is legally problematic or not, the fact remains that both Ronald Reagan and George W. Bush (each one a president who took over from the opposite party) have ordered the preceding administration's rules delayed as a first order of business. Jack, note 11 and accompanying text.
[88] Executive Order 12291, *Federal Register* 46 (February 17, 1981), 13193, http://www.archives.gov/federal-register/codification/executive-order/12291.html.
[89] Ibid. § 7(a).

directed agencies to refrain from publishing any new major rules until they had undergone regulatory review.[90]

Since Reagan, most presidents taking over from a president of the opposite party have ordered a similar regulatory moratorium.[91] For instance, George W. Bush, the day he took office, issued a directive ordering agencies to halt rules from being published in the *Federal Register* and to "temporarily postpone the effective date of regulations for 60 days."[92] President Barack Obama's Chief of Staff, Rahm Emanuel, also issued a memo withdrawing rules not yet published in the Federal Register.[93]

B. Congressional Review Act

The Congressional Review Act of 1996 (CRA) presents another tool to address the problem of midnight regulations.[94] It creates an expedited process for Congress to repeal any regulation.[95] A rule can be overturned by simple majority vote in each house, and consideration of a repeal measure is fast tracked in the Senate.

The CRA requires agencies to submit all rules to Congress before they can take effect.[96] In order for the CRA's expedited repeal procedures to have effect, a joint resolution of disapproval must be introduced in either the Senate or the House within 60 days of continuous session after the rule has been submitted to Congress or published in the *Federal Register* (whichever is later).[97] If a resolution of disapproval passes both houses of Congress and the president signs it, then the regulation is repealed and "is treated as though the rule never took effect."[98] Additionally, the agency may not issue another rule that is "substantially the same" unless later "specifically authorized" by subsequent legislation.[99]

Therefore, to the extent Congress is concerned that regulations issued during the midnight period suffer from a lack of accountability or regulatory review, it could quickly act to overturn them. However, the CRA will only be an effective check on midnight regulations if the incoming president and the Congress are of the same party.[100] If the

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[90] Ibid. § 7(d).
[91] Interestingly, President Clinton didn't instruct agencies to delay the rules. On January 22, 1993, Leon E. Panetta, the Director of OMB for the incoming Clinton administration, sent a memorandum to the heads and acting heads of Cabinet departments and independent agencies requesting them to (1) not send proposed or final rules to the Office of the *Federal Register* for publication until they had been approved by an agency head appointed by President Clinton and confirmed by the Senate, and (2) withdraw from the Office of the *Federal Register* all regulations that had not been published in the *Federal Register* and that could be withdrawn under existing procedures. See http://www.prop1.org/rainbow/adminrec/930122lp.htm for a copy of this memorandum.
[92] Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, *Federal Register* 66 (January 24, 2001), 7702.
[93] Memorandum from Rahm Emanuel, White House Chief of Staff, to Heads of Executive Departments and Agencies (Jan. 20, 2009), available at http://media.washingtonpost.com/wp-srv/politics/documents/emanuel-regulatory-review.pdf
[94] *U.S. Code* 5 § 801 et seq. (2008).
[95] Daniel Cohen and Peter L. Strauss, "Congressional Review of Agency Regulations," *Administrative Law Review* 49 (1997): 97, 100–01 (explaining the expediting nature of the Act.).
[96] *U.S. Code* 5 § 801(2008).
[97] *U.S. Code* 5 § 802(a); Cohen and Strauss, *Congressional Review*, 99.
[98] Ibid., 102; *U.S. Code* 5 § 801(a)(4)(b)(1).
[99] *U.S. Code* 5 § 801(b)(2)
[100] Julie A. Parks, "Lessons in Politics: Initial Use of the Congressional Review Act," *Administrative Law Review* 55 (2003): 187, 199 (arguing that the repeal of the Clinton OSHA ergonomics standard—the only time the CRA has been used could only have occurred because the new President and the Congress were of the same party).

party of the outgoing president controls the Congress, and the incoming president is of the opposite party, there is little reason to expect that the Congress will use its authority under the CRA to repeal midnight regulations. Conversely, if the president is of the same party as his predecessor, and the Congress is of the opposite party, it is likely that the new president will veto a congressional attempt to overturn his predecessor's last-minute rules.

It should therefore not be surprising that the CRA has only been used to successfully repeal a regulation once. The target was a controversial OSHA ergonomics regulation promulgated in the last few months of the Clinton administration.[101] It was disapproved by joint resolution of a Republican-controlled Congress and signed by President Bush.[102]

Despite its practical constraints, congressional action to check midnight regulatory activity may yet be a useful tool. First, it should be noted that Congress has the inherent power to repeal federal regulations at any time and the CRA exists only to facilitate and expedite the process of congressional regulatory review and disapproval.[103] With this in mind, independent of the CRA approach, one approach a new president could take is to conduct a review of rules promulgated during his predecessor's midnight period, identify any rules that are worthy candidates for repeal, and submit them to Congress as a package.[104] The package approach can make it easier for Congress to take action on midnight regulations by focusing its attention on just one resolution. A package might also help overcome the influence that special interests opposed to repeal would otherwise exert if the regulations were considered individually.[105]

Although the CRA would not control the package approach, it nevertheless would help facilitate it. Under the CRA, rules submitted to Congress less than 60 days (60 legislative days in the House and 60 session days in the Senate) before a Congress adjourns are treated as if submitted on the 15th legislative day of the next Congress.[106] This means that all rules submitted to Congress during an outgoing administration's midnight period would be treated as if submitted in January.[107] More interestingly,

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[101] Ibid., 193–94.
[102] Ibid., 197–99.
[103] Cohen and Strauss, "Congressional Review of Agency Regulations," 99.
[104] This is theoretically a solution that couldn't be put in place under the current rules. However, it is useful to think about. As it is now, packaging or bundling of rules is not allowed under the CRA.
[105] Morriss et al., "Between a Hard Rock and a Hard Place," 594–95. "[W]hen a rule's impacts are concentrated in a particular region or on a particular industry, there may not be sufficient political support to change the rule." A package approach would be similar to strategies employed by Congress to shut down military bases. While Congress can recognize a glut of bases, and the need to close some, individual state delegations will oppose closing the military base in their area. To address this collective-action problem, Congress enacted the Base Closure and Realignment Act: Under this act, a federal advisory committee, known as the Base Closure Commission, was required to develop a recommended list of bases to be closed or realigned. This list would then be submitted as a package to Congress for review. The act required Congress to consider the Commission's list as a single package; Congress could not alter or delete specific recommendations, but could only enact a joint resolution disapproving the Commission's entire list within forty-five days. If Congress failed to disapprove the entire list, the Secretary had to implement the recommended closures and realignments within six years.
Benjamin L. Ginsberg et al., "Waging Peace: A Practical Guide to Base Closures," *Public Contract Law Journal* 23 (1994): 169, 172.
[106] *U.S. Code* 5 § 801(d); Cohen and Strauss, "Congressional Review of Agency Regulations," 101.
[107] The midnight period begins on November 8, the day after the presidential election. The earliest day a new Congress may adjourn is January 3. U.S. Const. amend. XX, §2. Even if a Congress does not adjourn until the day before the new one is to begin (January 2), any rule submitted after November 8 will be submitted less than 60 days before it adjourned. Therefore, for purposes of the CRA, it will be treated as having been submitted on the fifteenth legislative day of the new Congress. *U.S. Code* 5 § 801(d). The earliest this can be is January 18th.

because of the way days are counted, rules submitted as early as May in an election year may be rolled over to the next session, and would be considered submitted on the 15th legislative or session day—which could be February.

C. The Brito & deRugy Solution: Addressing the Oversight Problem

The most common solutions to the midnight regulations problem suggest steps that an incoming president can take to undo his predecessor's last-minute actions. Another approach would be to try to prevent the midnight regulation phenomenon, or at least mitigate its negative effects.

Professor Andrew Morriss and his coauthors have argued that the root cause of the midnight regulations problem is bad incentives: "Regulators in the lame duck period are not only freed from political fallout from their actions but have positive incentives to cause problems for the incoming administration."[108] They suggest changing those incentives by giving presidents the authority to easily repeal any regulations promulgated during the predecessor's midnight period by simply publishing a notice in the *Federal Register*.[109] (Judge Plager has even suggested a moratorium during the midnight period that would prohibit new regulations altogether.[110]) This would certainly address accountability concerns. Last-minute regulations that a president wants to ensure will not be subject to easy repeal would have to be promulgated before the midnight period, while there is still political accountability. However, to the extent regulatory activity continues to spike at the end of an administration—albeit sooner than has previously been the case—the strain placed on the regulatory review process will remain.

The Bush Administration made such an attempt to "resist the historical tendency of administrations to increase regulatory activity in their final months."[111] On May 9, 2008, White House Chief of Staff Joahua B. Bolten sent a memo to all executive agency heads instructing them to abstain from regulation in the last months of the administration except in extraordinary circumstances.[112] According to the memo, new regulations were to be proposed no later than June 1, and issued as final no later than November 1.[113] If the memo had had its intended effect, we would not have seen a spike during the midnight period. Unfortunately, the memo was not successful.

In the first seven years of the Bush Administration, the average number of significant regulations reviewed by OIRA was 7 per month.[114] Over the last three months of the term, however, that number doubled to 14.[115] Despite the Bolten Memo, OIRA reviewed 42 significant regulations in the period between Election Day and Inauguration

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[108] Morriss et al., "Between a Hard Rock and a Hard Place," 597.
[109] Ibid. At the same time, a president (on average) does not want to be seen as a person who repeals regulations that, as portrayed by the press, save lives. It seems politically more feasible to pass regulations than repeal them.
[110] Morrow, *Midnight Regulations*, 18. "[Judge Plager] suggested a more effective measure would be to have Congress pass a law prohibiting submission of final regulations during the interregnum."
[111] *See* Memorandum from Joshua B. Bolten, White House Chief of Staff, to Heads of Executive Departments and Agencies (May 9, 2008), *available at* http://www.ombwatch.org/regs/PDFs/BoltenMemo050908.pdf [hereinafter Boltem Memo].
[112] *Id.*
[113] *Id.*
[114] Monthly figures generated using OIRA's online "review counts" database. See RegInfo.gov, Review Counts, http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init (last visited Aug. 15, 2008).
[115] *Id.*

Day.[116] This is little different from the 48 significant regulations Clinton's OIRA reviewed during its midnight period.[117]

While one could argue that there might have been a greater spike but for the Bolten Memo, the data suggest the memo's June 1 deadline for agencies to wrap up their regulations merely pushed back the beginning of the midnight period. During the period of June 1 to November 1 at the end of their respective presidencies, Bill Clinton's OIRA reviewed 36 significant regulations, while George H.W. Bush's OIRA reviewed 43.[118] During the June-November 2008 period covered by the Bolten Memo, however, that number grew to 58 significant regulations reviewed.[119]

The Bolten Memo created an incentive for agencies to issue regulations before the November 4 election, while the Administration was still technically politically accountable. That is a laudable achievement. However, it seems as if the toll exerted on OIRA was just as strong during the June-November period as during the midnight period proper.

Another way of changing the incentives of regulators touched on by Morriss and his co-authors is to increase the costs to bureaucracies of regulating during the midnight period. They suggest only allowing emergency regulations to be put forth during the midnight period, or limiting the size or number of regulations allowed during the midnight period.[120] They argue, "If agencies faced a 'budget' of regulations, they would have to make choices on which subjects to 'spend' their budget."[121] This approach certainly would help to make regulators more accountable—especially if promulgating significant regulations could be banned altogether during the midnight period. However, a limit on the size or number of regulations during the midnight period does nothing to prevent spikes in regulation. As we have seen, while addressing concerns over accountability, limits on midnight activity might simply result in regulatory spikes before the midnight period.

If what we wish to accomplish is to prevent spikes in regulation that exceed OIRA's capacity to conduct proper regulatory reviews, then limits must exist at all times. By having permanent caps we could ensure that at no time—before or after the midnight period—will the pace of regulatory activity outstrip the resources available to OIRA.

Another way touched on by Morriss and his coauthors of changing regulators' incentives is to increase the costs to bureaucracies of regulating during the midnight period. They suggest only allowing emergency regulations to be put forth during the midnight period, or limiting the size or number of regulations allowed during the midnight period.[122] "If agencies faced a 'budget' of regulations," they argue, "they would have to make choices on which subjects to 'spend' their budget."[123] This approach certainly would help make regulators more accountable—especially if promulgating significant regulations could be banned altogether during the midnight period. However, a limit on the size or number of regulations *during the midnight period* does nothing to

[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
120. Morriss et al., *supra* note 26, at 597.
121. *Id.*
[122] Morriss et al., "Between a Hard Rock and a Hard Place," 597.
[123] Ibid.

prevent spikes in regulation. As we have seen, while addressing concerns over accountability, limits on midnight activity might simply result in regulatory spikes before the midnight period.

If what we wish to accomplish is to prevent spikes in regulation that exceed OIRA's capacity to conduct proper regulatory reviews, then limits must exist at all times. Having permanent caps would ensure that at no time—before or after the midnight period—will the pace of regulatory activity outstrip the resources available to OIRA. One way to cap regulations mentioned by Morris et al. is to limit the size of regulations.[124] However, simply setting a maximum cost cap for individual regulations will likely have little effect on regulatory spikes. One could still see a dramatic increase in regulations that individually fall short of the cap. Additionally, the approach is rigid. A draft regulation that exceeds the cap may nevertheless be beneficial, yet impossible to enact.

An alternative approach is to cap the total costs of regulation an agency may impose in a single year. This approach is known as a "regulatory budget," and it allows agencies to pursue their regulatory priorities, regardless of the cost of each individual regulation, so long as the agency's total activity for the year stays under the cap.[125] Senator Lloyd Bentsen, who twice introduced legislation to create a regulatory budget, has explained:

> A regulatory budget would put an annual cap on the compliance costs each agency could impose on the private sector through its rules and regulations. The process for establishing the annual regulatory budget would resemble the process currently used to set the fiscal budget—we would have a proposed budget from the president and annual budget resolutions from the budget committees. This would make it possible to coordinate the regulatory and fiscal budgets. We need a regulatory budget in order to reduce the impact of unnecessary, excessive, and conflicting government regulations.[126]

A regulatory budget is a reasonably good idea that would work to keep in check the costs imposed on society by regulation. Obviously, regulators have an incentive to underestimate the cost of a regulation, and such a requirement would only increase the pressure to do so. In addition, it would relatively easy to do considering the large degree of subjectivity attached to cost-benefit analysis. Yet, it would still be useful and better than the current situation where agencies have no obligations to try to limit the total amount of compliance costs.

Additionally, regulatory budget caps might help address the midnight regulations problem by moderating the sort of steep regulatory spikes we see at the end of presidential terms. However, a regulatory budget approach proves too much for our purposes. As noted earlier, our concern in this article is not the reduction of regulation

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[124] Ibid.
[125] See Clyde Wayne Crews Jr., *Promise and Peril: Implementing a Regulatory Budget* (Washington, DC: Competitive Enterprise Institute, 1996), http://cei.org/pdf/1549.pdf; Robert W. Hahn, "Achieving Real Regulatory Reform," *University of Chicago Legal Forum* 1997, 143, 152–53 (advocating use of a regulatory budget).
[126] Crews, *Promise and Peril*, 3 (quoting Sen. Lloyd Bentsen).

per se, but that regulations receive an adequate amount of time and attention during the regulatory review process.

In theory, an agency should be allowed to regulate as much as it needs to, as long as there is good economic analysis that justifies the need. The OIRA review process is the check that helps ensure sound economic analysis of significant regulations. Therefore, a less restrictive and more politically feasible solution to the midnight regulations problem is to cap the *number* of significant regulations an agency is allowed to submit to OIRA during a given period.

Because OIRA has up to 90 days to review significant regulations,[127] a rolling 90-day window might be an appropriate period. That is, an agency would be allowed to submit no more than *X* number of significant regulations for review in any 90-day period. The number *X* would be based on the resources—budget and staff—available to OIRA. The number should be well above the "normal" levels of regulatory activity we see during non-midnight periods; the cap should only be approached during the periods of dramatic spikes seen at the end of presidential terms.

A flexible number cap is a practical approach. Unlike a regulatory budget approach, which has been politically unfeasible so far, there would be no limit to the total cost of an agency's regulations.[128] An agency would be able to regulate as it sees fit. The only limitation is that it cannot exceed OIRA's capacity to adequately check its work. In practice, this means that an agency will not be able to promulgate an abnormally large number of significant regulations in a short period, so the agency must therefore prioritize its proposed regulations.

Capping the *number* of regulations an agency can submit in a given period rather than the *total cost* also makes sense because there are fixed costs for reviewing each rule. When a regulation is submitted to OIRA, a "desk officer" that is specialized in regulations from a particular set of agencies conducts the review.[129] A spike in the number of reviews a particular desk officer must complete would seem to affect the quality of his work more than the total cost of the regulations. Additionally, if the desk officer charged with reviewing Department of Education regulations is flooded with proposed regulations from that agency, for example, the work cannot simply be shifted to the Homeland Security desk officer. It therefore makes sense to cap the number of regulations that can be submitted to OIRA by agency rather than in total.

Finally, because the number cap would exist only to ensure quality review, not to limit the amount of regulation, it should be based on the resources available to OIRA and especially the desk officers and other regulatory review staff available.[130] What this

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[127] Executive Order 12866, § 6(b)(2)(B).
[128] Currently the United Kingdom has designed such a budget cap which is scheduled to start a trial run in 2009 and be fully operational in 2010.
[129] Copeland, *Federal Rulemaking*, 1257, 1273–74, 1277.
[130] Curtis W. Copeland explains the staff resources available to OIRA:
When OIRA was created in fiscal year 1981, the office had a "full-time equivalent" (FTE) ceiling of 90 staff members. By 1997, OIRA's FTE allocation had declined to 47 a nearly 50 percent reduction. Although Executive Order 12,866 (issued in late 1993) permitted OIRA to focus its resources on "significant" rules, this decline in OIRA staffing also occurred during a period in which regulatory agencies' staffing and budgetary levels were increasing and OIRA was given a number of new statutory responsibilities.

means is that the ceiling on the number of regulations that can be processed by OIRA in a given period can be raised by increasing the resources available to it.[131] In this way, Congress and the president can always choose to allow for regulatory spikes while preserving quality review.[132]

A cap could be implemented by presidential directive or by statute. The regulatory review process is completely a creature of executive order, the constitutionality of which has largely been recognized.[133] If the president has the authority to devise and enforce a system that checks his administration's regulatory decision making, it follows that he should be able to outline procedural rules to ensure that system's quality. Congress has also previously flirted with the idea of codifying the OIRA regulatory review process into law,[134] and if it ever did, it would be able to include our proposed safeguards.

IV. Conclusion

The midnight regulation phenomenon is a well-documented one. The reasons behind it range from the desire of the outgoing administration to extend its influence into the future as well as the opportunity to impose costs on the incoming administration. In fact, the high political costs faced by a new administration to overturn these last minute rules makes it an effective strategy for the outgoing administration to project its influence beyond its term.

Midnight regulations are problematic. In particular, if we accept that regulatory review is beneficial, then midnight regulations raise serious concerns. All things being equal, and taking into consideration the decreasing number of regulatory review staff available to OIRA, the sudden increase in regulations requiring review during the midnight period leads to a diminished review process and weakened oversight.

Until now, the most common solutions to the midnight regulations problem have suggested steps that an incoming president can take to undo his predecessor's last-minute actions. Our solution tries to mitigate the negative effects of midnight regulations by changing the incentives on the outgoing administration. We suggest placing a cap on the number of economically significant regulations OIRA can be expected to review during a

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Starting in 2001, OIRA's staffing authorization began to increase somewhat, and by 2003 it stood at 55 FTEs. Between 2001 and 2003, OIRA hired five new staff members in such fields as epidemiology, risk assessment, engineering, and health economics. OIRA representatives indicated that these new hires reflected the increasing importance of science-based regulation in federal agencies, and would enable OIRA to ask penetrating technical questions about agency proposals.
Copeland, *Federal Rulemaking*, 1257, 1293.

[131] In fact, some have argued that OIRA's resources at present are inadequate and should be increased. Robert Hahn and Robert E. Litan, "Why Congress Should Increase Funding for OMB Review of Regulation" Brookings Institution (October 2003) http://www.brookings.edu/opinions/2003/10_ombregulation_litan.aspx.

[132] According to Copeland (2004), "Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs," CRS RL32397 p. 29 "OIRA does not have a specific line item in the budget, so its funding is part of OMB's appropriation. Similarly, OIRA's staffing levels are allocated from OMB's totals." This means that either Congress could increase OIRA's budget by creating a line item, or the president could increase the budget by prioritizing the distribution of OMB's budget differently.

[133] Ibid., "Although some observers continue to hold that view."

[134] Copeland, *Federal Rulemaking*,. 1306 07.

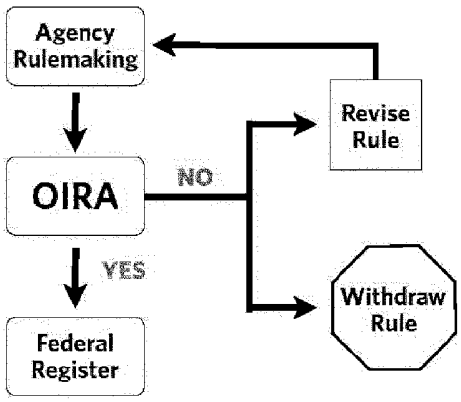
given time period.

Doing so would help prevent OIRA oversight of new regulations from being diluted. A flexible cap would afford OIRA time and resources to carefully consider new rules while preserving Congress and the President's prerogative to increase the cap by allocating more resources to OIRA. To the extent more resources are not allocated and end-of-term regulatory spikes are eliminated, a cap would also have the effect of addressing some of the other concerns raised by midnight regulations, including a lack of accountability and democratic legitimacy.

Table 1. History of executive oversight

President	Agency	Cabinet Group	Process
Nixon	OMB	None	The Quality of Life Committee is established to formulate a regulatory review process for significant regulations.
Ford	Council on Wage & Price Stability (CWPS)	Review Group on Regulatory Reform	Regulatory review is expanded to address concerns about the effect of regulation on inflation. Legislation establishing the Council on Wage and Price Stability is passed to review regulatory impact on the economy. Executive Order 11821 established procedures for Inflation Impact Statements.
Carter	OMB & CWPS	Regulatory Analysis Review Group & Regulatory Council	Regulatory Analysis Review Group is created to review major proposed rules. Executive Order 12044 required proposed rules with an effect on the economy of $100 million or more to be reviewed before they were published in the Federal Register. The Paperwork Reduction Act is passed and the Office of Information and Regulatory Affairs (OIRA) within OMB is created.
Reagan	OMB (OIRA)	Task Force on Regulatory Relief	Executive Order 12291 mandates that "Regulatory action shall not be undertaken unless the potential benefits to society from the regulation outweigh the potential costs to society." The review of regulatory impact analyses falls to OIRA. The Task Force on Regulatory Relief is created to give direction to OIRA. The Task Force often acts as a court of appeals for issues on which the OIRA and the regulatory agencies can not agree.
Bush 41	OMB (OIRA)	Council on Competitiveness	The Task Force on Regulatory Relief is replaced by the Council on Competitiveness.
Clinton	OMB (OIRA)	Reinventing Government Initiative	Executive Order 12291 is rescinded and Council on Competitiveness is abolished. Executive Order 12866 articulates a new regulatory review process; it removes OMB's authority to treat any rule it deems appropriate as if it were a "major rule." Only those proposed regulations that might "have an annual effect on the economy of $100 million or more" are now subject to OIRA review.
Bush 43	OMB (OIRA)	OMB & Council of Economic Advisors	Executive Order 13422 amended Executive Order 12866. The new order requires agencies to "identify *in writing* the specific market failure (such as externalities, market power, lack of information) or other specific problem that it intends to address (including, where applicable, the failures of public institutions)."

Abbreviated flow chart of the regulatory review process



Mr. COHEN. Thank you, Doctor. I appreciate your finishing before the red light and for your testimony.

Professor Abramowicz?

TESTIMONY OF MICHAEL ABRAMOWICZ, PROFESSOR, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. ABRAMOWICZ. Thank you, Mr. Chairman and Members of the Subcommittee.

In the first part of my remarks, I would like to focus on potentially negative and unforeseen consequences to legislative deprecation of midnight rules. I will then turn to a brief analysis of some of the problems that may arise from H.R. 34, the current proposal to allow an incoming Administration to disapprove of midnight rules, being passed.

Finally, I will turn to a broader discussion of the administrative process and how it might be strengthened to reduce idiosyncratic and unadvised executive branch decision-making, without turning a President into a 15/16ths President, prohibited from exercising the full power of the executive branch during the so-called lame duck period.

Proposals to deprecate midnight rules could make an outgoing presidential Administration less likely to pass rules simply designed to slow down the incoming Administration, but it is doubtful that enactment of such proposals would help a new Administration overall.

It takes some time for an agency to become fully staffed and then to assess its priorities.

Midnight rulemaking on relatively routine matters may be helpful to the new Administration, allowing smaller issues to be resolved, thus permitting focus on future challenges.

Once deprived of their ability to have the final say on whether regulations are issued, administrative officials, near the end of a term, may feel that they will not receive credit for any rulemaking initiatives that would come into effect only should the next Administration permit them.

Moreover, they might worry that disapproval could be embarrassing. As a result, they are likely to hold off even on many regulations that the new Administration would not disapprove.

This will lead to a buildup of many low profile regulatory initiatives, slowing the startup time for the new Administration.

The passage of legislation deprecating midnight rules might not even be effective in suppressing the issuance of controversial regulations. It might simply push the enactment of such regulations 90 days earlier to just before the presidential election. This has hazards on its own.

Decisions on whether to complete high profile regulatory initiatives that have been under review would likely depend increasingly on partisan political concerns.

Of course, the vast majority of regulations would fly under the radar of presidential politics. This, however, merely emphasizes the futility of any effort to eliminate the incentive that Administrations have to complete rulemaking initiatives that they have begun.

H.R. 34 leaves many unanswered questions. Some problems with specific language of H.R. 34 should be easily fixable.

For example, the current definition of a midnight rule applies to "a rule adopted by an agency within the final 90 days a President serves in office." Read literally, this would appear to apply regardless of the reason that President leaves office, including if he or she dies or resigns.

Other problems might not be fixed so easily. The bill does not make clear whether a President's decision to make an exception to the midnight rulemaking ban or a subsequent agency's decision whether to disapprove of a regulation is subject to judicial review.

A cornerstone of our administrative process is the requirement of reasoned decision-making and leaving these decisions entirely unchecked would be inconsistent with this requirement. Excessively intrusive judicial review, on the other hand, could undermine the effectiveness of its reform.

Midnight rulemaking can be seen as problematic not so much in and of itself, but it is problematic in what it signals more generally. Because midnight regulations occur so near the transition may highlight the fact that different Administrations are likely to pursue different objectives.

Our administrative process can be seen, in part, as a set of tools that ensures that much of the regulatory state's functioning will operate with some consistency, regardless of the occupants of the Oval Office.

Because agency regulations must go through notice and comment, agency officials must prioritize reforms. We do not end up with one version of the Code of Federal Regulations for Democratic administrations and another version for Republican administrations.

Even if one believes that administrative agencies have too much leeway to move policies over to their ideological priorities, disallowing midnight regulations is a crude response. It is akin to proposals to enact a moratorium on all rulemaking.

Other regulatory tools can help achieve the beneficial ends of regulatory continuity without artificially freezing the administrative process. For example, the continued use and improvement of cost-benefit analysis and other forms of regulatory review can reduce the risk that regulations will depend on ideology or caprice, not only during the midnight period, but during the entirety of a presidential Administration.

Thank you again.

[The prepared statement of Mr. Abramowicz follows:]

PREPARED STATEMENT OF MICHAEL ABRAMOWICZ

Thank you, Mr. Chairman and Ranking Member Franks. I appreciate this opportunity to testify before the Subcommittee on Commercial and Administrative Law on the topic "Midnight Rulemaking: Shedding Some Light." I am pleased that the Subcommittee has chosen this important topic for its first hearing of the 111th Congress, and more generally by the interest of the Subcommittee in administrative law and regulatory practice.

In the first part of my remarks, I would like to focus on potentially negative and unforeseen consequences to legislative deprecation of midnight rules. I will then turn to an analysis of some of the problems that may arise should H.R. 34, a current proposal to allow an incoming administration to disapprove of midnight rules, be passed. Finally, I will turn to a broader discussion of the administrative process and how it might be strengthened to reduce idiosyncratic and unadvised executive branch decisionmaking without aggravating the "lame duck" status of an outgoing President.

1. Proposals to deprecate midnight rules in general

Under our existing administrative system, midnight regulations passed by one administration become law absent congressional action under the same terms as regulations passed at any other time in a Presidential term. There are a number of ways that this might be changed. One could imagine a statute that simply disabled a President from engaging in rulemaking in the final period before a regularly scheduled inauguration of a new President. Alternatively, a statute might provide for increased judicial scrutiny of midnight rules, for example by requiring an increased burden of persuasion on an outgoing administration in the process of judicial review.

Such proposals might have certain benefits. For example, they might make an outgoing Presidential administration less likely to pass rules simply designed to slow down the incoming administration, or to bog the incoming administration down in resource-consuming litigation. Nonetheless, there are significant drawbacks to any legislative efforts that would convert a President into, for administrative law purposes, a 15/16ths President, an individual authorized to exercise the customary powers of the executive branch except during the last three months of the Presidency. Moreover, it is difficult to justify the creation of a 15/16ths Presidency based on general concerns about the orderly process of the administrative state.

Even the claim that reform would deter an outgoing administration from hamstringing an incoming administration is questionable. Anne Joseph O'Connell has shown that "Presidents usually have started fewer, not more, rules through notice-and-comment rulemaking in the first year of their terms than in later years." While it is possible that some of this startup time is attributable to agencies' digging out from midnight rulemaking of the prior administration, this is likely to account for only a small percentage of the increase. Rather, it takes some time for an agency to become fully staffed and then to assess its priorities. Given that there is some startup time for a new Presidential administration to plan its most important objectives, midnight rulemaking on relatively routine matters may be helpful to the new administration, allowing smaller issues to be resolved, thus permitting focus on future challenges.

It is true that even with reforms deprecating midnight rules, administrative agencies would still be permitted to issue regulations, for example with delayed effective dates, or at least to write draft regulations that the next administration could consider. But once deprived of their ability to have the final say on whether regulations are issued, administrative officials may feel that they will not receive credit for any rulemaking initiatives with delayed effectiveness, and moreover they might worry that disapproval could be embarrassing. As a result, they are likely to hold off even on many regulations that the new administration would not disapprove. This will lead to a buildup of many low-profile regulatory initiatives that must be shepherded through the publication process, slowing the startup time for the new administration.

There is, moreover, good reason to think that the vast majority of regulations issued in the midnight period are relatively routine. In the last three months of the Clinton Administration, a record 27,000 pages were published in the Federal Register, but in similar periods during the administration, 17,000 pages were published. This is obviously a notable increase, but many of the 17,000 pages that ordinarily would be published during that period presumably contained relatively routine rules. Even on the 10,000 additional pages of rulemaking, only a relatively small number of regulations (such as the ergonomics and arsenic regulations) were especially politically controversial. Much of the 10,000 pages is probably attributable simply to procrastination, or to a desire by agency officials to finish work that they have begun. If some portion of the 27,000 pages were simply not issued in the first place, there would have been a great deal new work for the incoming administration.

One concern about midnight rulemaking is that outgoing agency officials may issue regulations specifically because they want to force the new administration to spend time undoing these regulations. But there are other ways that an outgoing administration could undermine a new administration. If new laws deprecate midnight rules, an outgoing administration might take an opposite approach, essentially ceasing work on regulations, including ones that are relatively pressing because, for example, of deadlines imposed by Congress or by the courts. These agencies might even use the legislation restricting midnight regulations as an excuse. Rather than simply giving a new administration a menu of regulations to either allow or disapprove, the outgoing administration might decide to let the new administration do the work of bringing regulations through the regulatory process. Again, this could create a backlog that could hamper a new administration as much as or even more than the issuance of midnight regulations, only a relatively small number of which

a new administration is likely to invest resources in undoing. Another strategy by an outgoing administration would be to focus its resources on initiating politically controversial adjudications. Because an agency is free to develop policy in both adjudication and rulemaking, this can sometimes be an effective means of moving policy, and certainly can tie up agency resources in the next Administration.

The passage of legislation deprecating midnight rules might not even be effective in suppressing the issuance of politically controversial regulations. It might simply push the enactment of such regulations 90 days earlier, to just before the Presidential election. This has hazards of its own. Decisions on whether to complete high-profile regulatory initiatives that have been under review would likely depend increasingly on partisan political concerns. Meanwhile, although it is useful for the electorate to focus to some extent on administrative issues, a quadrennial period of intense October rulemaking might prove to be an undue distraction from the broader themes of presidential campaigns.

Of course, the vast majority of regulations would fly under the radar of Presidential politics, without affecting campaigns one way or the other. This, however, merely emphasizes the futility of any efforts to deprecate midnight rulemaking. There is likely still to be a bump in administrative activity, just a few months earlier. To be sure, the total volume of rulemaking in an administration might be slightly lower, for there will only be a guarantee of 15/16ths the time to engage in rulemaking. But past moratoria on regulation have proven excessively crude. Perhaps the bump will be a little bit less, with a couple of controversial and high-profile initiatives abandoned every four years. But even if we assume this to be a benefit, it is a small part of the broader regulatory picture.

Some may argue that an early deadline just before the election would in fact have a broader effect on rulemaking, and that there will not be a considerable increase in rulemaking activity just before an election. One argument for this is that many midnight rules may be enacted only because of the relative lack of accountability of the executive during the midnight period. We should be skeptical, however, that the relative difference in degrees of accountability across time period makes a difference on the vast majority of rulemaking issues. Moreover, scrutinizing different variations of the claim that midnight rulemaking should be deprecated because of accountability concerns helps reveal weaknesses with this claim.

One variation defines accountability as electoral accountability. There is a vein of administrative law scholarship, particularly the breakthrough work of Jerry Mashaw, that concludes that the executive branch is the most politically accountable branch, in part because the electorate is relatively more aware of actions of the President than actions of individual members of Congress. One might accept this account and then argue that accountability varies across time. The longer the period to an election, the smaller the degree of accountability. Nonetheless, it is hazardous to try to change administrative law based on changing degrees of accountability.

Suppose, for example, that we consider regulations finalized not in January 2009, but in January 2005. In both periods, George W. Bush would never face re-election again, there would be two years for the public to forget about rules enacted in that period before a House electoral cycle, and there would be four years before another Presidential election. If deprecation of regulations is to be justified by electoral accountability, then perhaps we should extend it to a period just after a President has been re-elected. To be on the safe side, perhaps we should disable regulation in the entire second term of a Presidency. Alternatively, if the argument is that the President's power should be weakened after a public repudiation of his or her policies, perhaps we should have a system that diminishes presidential power if the President's party fares poorly in midterm congressional elections. These are, of course, facetious suggestions, but they are enough to show that the fact that a particular President will not again face the electorate cannot be a sufficient basis for making regulations disapprovable.

Another variation of this argument focuses on accountability to Congress and more broadly on the separation of powers. One might argue, for example, that when the administration is not near its end, the President will face retaliation from acting in a way that Congress would not approve, for example in the form of increased congressional oversight of administrative agencies. Game theorists might say that the President and Congress are engaged in a multi-period cooperation game, but the midnight time frame presents a "final period" problem. There is an incentive to defect from a regime of cooperation in the last period. And so, the President may care less about accommodating congressional concerns in this final period.

This dynamic may occur to some extent, but it is difficult to determine whether reduced congressional accountability for a brief period of time is necessarily bad. For example, as Jack Beerman has pointed out, midnight regulations sometimes may consist of initiatives that otherwise would be blocked by special interests. Similarly,

such regulations may consist of moderately politically unpopular changes that are nonetheless beneficial. Admittedly, sometimes regulations are unpopular for good reason. It is difficult in the abstract to determine what is the optimal degree of special interest influence on legislation and ideally how much the President and administrators should pursue what they believe is best rather than what the less informed public will support. But it certainly is not clear that having a few months in which the President has a freer hand will generally lead to worse decisions rather than better ones, let alone that essentially disabling the President for a period of time will improve decisionmaking.

A counterargument is that our government is a system of checks and balances, and that the President ought to be most restrained when such checks and balances are relatively impotent. But pursuing the goal of adjusting presidential power based on the strength of checks and balances would seem to suggest a range of radical policy changes. For example, one might imagine a regulatory regime that made it harder for the President to act when Congress is of the same party as the President. The judiciary might apply a lower standard of review to administrative action when government is divided, on the theory that congressional review will be more active and may thus serve as a substitute for judicial review. The "midnight" period cannot be singled out as the only period in which checks and balances are unlikely to be effective in limiting presidential authority.

2. Problems with H.R. 34

A current bill to address the alleged dangers of midnight rulemaking is H.R. 34. Under the bill, "a midnight rule shall not take effect until 90 days after the agency head is appointed by the new President." One danger of deprecating midnight rules through legislative action is that the legislation may present unanticipated interpretive challenges. All legislation presents this danger to some extent, but the costs of ambiguity are particularly high here, because there may be uncertainty concerning the validity of large numbers of regulations, and private parties may face sanctions for failing to comply both with the old regime and with the new one.

Some problems with the language of H.R. 34 should be easily fixable. For example, the current definition of a "midnight rule" applies to "a rule adopted by an agency within the final 90 days a President serves in office." This would appear to apply regardless of the reason that a President leaves office, including if he or she dies or resigns. Another provision, governing exceptions to the statute, refers to a "President serving his final term." This definition is only a little better, as it does not make unmistakable whether a President who has been voted out of office after one term, but could run for another term later, should be counted as "serving his final term." A better definition would make clear that the legislation applies to every President who either has not run for re-election or has been voted out of office, in the 90-day period preceding the regularly scheduled inauguration of the next President. The statute also ideally would make clear that it would apply only once some official determination is made of who has won the Presidential election.

An additional interpretive problem arises from the exceptions provision, what would become § 555a(b)(2). The President is permitted to order that a midnight rule should take effect under several identified conditions. This raises interesting questions. Is this order subject to judicial review? Under what standard? If the President does certify a midnight rule so that it does take effect, can it still be disapproved by the new agency head?

The disapproval process itself presents interpretive questions. Can an agency head in a multimember agency act alone to disapprove of a regulation, even when the various members of the agency ordinarily would need to vote to take agency action? What standard of judicial review, if any, applies to an action of disapproval? Is disapproval a form of administrative action that requires no justification whatsoever? The Administrative Procedure Act, at least in theory, allows challenges to be brought based on both agency action and inaction, so even if we count an agency's issuance of a regulation and then disapproval thereof collectively as inaction, it would appear that there might be some ground for judicial review. This is especially true when an agency is issuing regulations expressly required by Congress or the courts by a particular date. Even if a failure to issue regulations in the first place were effectively unenforceable, a decision to disapprove mandated regulations might be legally questionable.

Finally, the retroactivity provision itself presents interesting issues. For example, can liability attach to a private party that has complied with a new regulation after its effective date but not with the preexisting regulation? There would appear to be strong reasons for providing a safe harbor to a private party that has dutifully followed the new regulatory regime, even if policy should subsequently revert to the

old regulations. This is especially so where regulations have criminal consequences, given the constitutional proscription of ex post facto laws and bills of attainder. Another peculiarity of the retroactivity provision is that President Bush alone would be unable to take advantage of the exceptions provision, because the bill was not signed into law during his Presidential term. Does there thus remain in the retroactivity period any exception for regulations that may be necessary, for example because of an imminent threat to health or safety, if not so certified by the President?

These are, of course, only some interpretive issues, and doubtless others will arise. At the same time, we can expect constitutional challenges to the creation of a 15/16ths Presidency, and considerable uncertainty among private parties in diverse circumstances regarding not merely some provision of a particular regulation, but whether an entire set of regulations is valid. Even if one views the 15/16ths Presidency as beneficial, one might think it would be better to allow Congress and the agencies to use ordinary procedures to undo regulatory initiatives that they dislike than to confront the many complications that would result should this statute become law. This is especially so for regulations passed at the end of President Bush's Administration. Because the political branches today are all of the same party, there is the least need for a crude and automatic mechanism to undo the Bush Administration's last rulemakings.

3. Administrative reform with a full-term presidency

The existence of problems in any attempt to deprecate midnight rulemakings does not mean that midnight rulemakings themselves are without their problems. Midnight rulemaking, however, can be seen as problematic not so much in and of itself but as problematic in what it signals more generally. Because midnight regulations occur so near the transition, they highlight the fact that different administrations are likely to pursue different objectives. Some may be inclined to accept this as democracy in action, and surely even in a hypothetical ideally functioning democracy, policy would change from administration to administration in response to the evolution of voters' views.

But the changes in policy have historically been relatively large in comparison to any underlying changes in long-term popular views about appropriate regulatory policy. It is possible to see this not as a virtue of the democratic process, but as an unfortunate symptom of its crudeness. On this view, an ideal administrative system, while allowing each new administration some discretion, would also seek to constrain executive action so that the difference in regulatory outputs from one administration to another is minimized. And indeed, our administrative process can be seen as a tool that ensures that much of the regulatory state's administrative functioning will operate more or less the same regardless of the incumbent of the Oval Office.

The importance of this can be seen by focusing on the few areas of administrative practice in which the President has the power to act simply by issuing Executive Orders, without public participation or notice-and-comment of any kind. In some of these areas, policy lurches from one ideological position to another as soon as the new President is sworn into office. One day, we have a restriction on abortion funding, and the next we do not, until the White House switches back to the other party. Yet it is remarkable how few areas of policy operate this way. We do not switch from a market-oriented health care system to a government-operated one, or between high emissions limits and low emissions limits the moment a new President comes into power. The administrative process moves slowly and consistently. Like the judicial doctrine of stare decisis, the existing regulatory system ensures that policy moves relatively slowly. The policies in place at any given time are some compromise among the varying ideological views of administrations over the previous several decades.

Why is this? Why does an incoming administration not simply gut all of the regulations from its predecessors that it dislikes in favor of its own preferred administrative approach? Agencies cannot overturn statutory commands, but that is only a partial explanation, given the wide variety of possible approaches that statutes allow for, especially in our age of Chevron deference to administrative determinations. Rather, the answer is that changing the law is time-consuming. To issue regulations, an agency must go through the notice-and-comment process, and to pass muster under the "hard look" doctrine, it must provide at least a reasonable response to those who disagree with its approaches. This process ultimately will allow an agency to accomplish virtually anything clearly consistent with statutory requirements, but the process is sufficiently cumbersome that an agency faces real tradeoffs.

Some critics have therefore decried the administrative process as "ossified." Perhaps. But if requirements of notice-and-comment decisionmaking and the institution of hard look review were eliminated altogether, then we could expect regulation to veer from one extreme to another with a change in presidential administrations, in the same way that we seen on the small handful of issues governed by Executive Orders. In effect, there would be two copies of the Code of Federal Regulations: one for when a Democrat was in power and one for when a Republican was in power, with each President perhaps picking some regulations from the other team when taking office, in the same way that a President might pick one or more Cabinet members from the opposite political party today.

The existing system of rulemaking avoids this, encouraging incremental reform. The head of an administrative agency has a budget to allocate to different priorities. Sometimes, an administrative agency head might pursue a relatively radical course in comparison to the preexisting regime, but relatively large changes require more paperwork, because there are more plausible objections to them. And so, in a typical administration, there may be some large-scale changes and a number of smaller-scale changes in the regulatory framework, but the overall framework typically looks more or less the same at the end of the administration as at the beginning. The system of hard look review ensures that even as the President exercises the full constitutional power of his office, the administrative state will move only to some degree in the direction of his or her preferences. For more radical reform without the burdens associated with notice-and-comment decisionmaking, the President must persuade Congress to act.

A regulatory regime creating a 15/16ths Presidency would constrain the administration still further, ensuring even greater levels of administrative continuity. It is impossible to conclude in the abstract whether our administrative system allows a single administration to effect too much change or too little. But even if the answer is that administrative agencies have too much leeway to move policies over to their ideological priorities, disallowing midnight regulations is a crude response. Such an approach covers nonideological regulations along with politically salient ones, and it artificially freezes policy in favor of the status quo. It is easy to see this by imagining more drastic versions of the midnight rule, such as a rule that would invalidate rulemaking in the last year or last two years of a Presidential administration. Only those who are so distrustful of government that they are willing to void regulations sight unseen should be in favor of such crude approaches.

There are other regulatory tools that can help achieve the beneficial ends of regulatory continuity without artificially freezing the administrative process. For example, recent Supreme Court efforts to prevent agencies from skirting the notice-and-comment process are likely to help promote greater consistency in administrative policy from one administration to another, and any legislative efforts in that direction could help as well. Any reforms that would increase the weight that administrative agencies must give to scientific consensus similarly could improve regulatory consistency and outcomes. In short, there are ways to avoid the dangers of midnight rulemaking—the prospect of ideological and arbitrary decisionmaking—all day long.

I will conclude by highlighting the one area of administrative reform that is perhaps most likely to have these salutary consequences. The continued use and improvement of cost-benefit analysis and other forms of regulatory review can help ensure that administrative outcomes depend on a systematic tallying of the effects of regulations, reducing the risk that midnight regulations and others will depend on ideology or caprice. Some legal scholars have attacked President Obama's nominee to head the Office of Information and Regulatory Affairs in part because of his past support for cost-benefit analysis. Yet many of these scholars' critiques of cost-benefit analysis could equally be translated into proposed improvements to the methodology. Both Congress and the Administration could greatly advance the goals underlying the midnight rulemaking reform by strengthening both the framework of cost-benefit analysis and the institutional resources that OIRA has to review agencies' actions to ensure their consistency with the Administration's objectives and with our broader regulatory history and tradition.

Thank you again.

Mr. COHEN. Thank you, Professor Abramowicz.

And, Dr. Copeland, you are recognized.

TESTIMONY OF CURTIS W. COPELAND, Ph.D., SPECIALIST IN AMERICAN NATIONAL GOVERNMENT, GOVERNMENT AND FINANCE DIVISION, CONGRESSIONAL RESEARCH SERVICE

Mr. COPELAND. Thank you. Mr. Chairman, Members of the Subcommittee, thank you for inviting me here today to discuss midnight rulemaking.

As you mentioned in your opening statement, in May 2008, President Bush's chief of staff, Joshua Bolton, sent a memorandum to Federal agencies telling them to issue the Administration's final regulations by November 1.

He said this deadline was being established to avoid the tendency of issuing midnight rules just before a President leaves office.

Data from GAO and from OMB indicate that while the level of regulatory activity increased significantly in the final months of the Bush administration, most of those rules were published early enough so that they had taken effect by the time President Obama took office on January 20. This includes the four rules that Mr. Kennedy mentioned in his testimony, the respite rule that Mr. Watt mentioned, the H2A rule that Ms. Rhinehart mentioned.

However, other final rules of concern had been published in the Federal Register, but had not taken effect, and this includes the investment advice rule that Ms. Rhinehart mentioned and some proposed rules that were never published as final rules.

Both the Obama administration and Congress have a number of options on how to address these midnight regulations and the effectiveness of those options depends, in part, on how far those rules had progressed in the rulemaking process.

One presidential approach has already been undertaken. As has been mentioned, on the afternoon that President Obama took office, White House Chief of Staff Rahm Emanuel issued a memorandum to Federal agencies telling them to, one, not send new rules to the Federal Register; two, to withdraw any rules that had been sent, but that had not been published; and, three, consider extending for 60 days the effective dates of rules that had been published, but that had not taken effect.

This memorandum continued a long tradition of regulatory moratoria at the start of a presidency. However, the Emanuel memorandum does not address any of the controversial midnight regulations that have already taken effect.

To stop or alter those rules, or even just to change their effective dates, the Obama administration will have to go through the notice and comment rulemaking process. While that process can be shortened by the agencies for good cause, courts have indicated that legitimate reasons must accompany such actions.

On the other hand, for any rule that has been proposed, but not published as a final rule, the Obama administration can simply publish a notice of withdrawal in the Federal Register to prevent any future action on the rule.

Congress also has several options to stop midnight rules. For example, the Congressional Review Act, or CRA, was enacted in 1996 to give Congress more control over agency rulemaking by establishing a set of fast-track disapproval procedures.

However, because any President is likely to veto CRA resolutions disapproving one of his own agency's rules, the act has been used only once in the last 13 years.

In fact, Congress may only be able to use the CRA after a presidential transition in which the party in control of the White House changes and the new President is of the same party as the majority in Congress—the very conditions that currently exist.

Under the CRA's carryover provisions, any final rule that was issued by the Bush administration after May 15, 2008 can now be the subject of a resolution of disapproval.

According to GAO's database, this timeframe includes about 1,800 Bush administration rules, including about 700 significant or substantive rules.

Another congressional option is to include a provision in the appropriations act prohibiting the use of funds to make a proposed rule final, or to prohibit the implementation or enforcement of rules that have already taken effect.

Although the CRA has been used only one time, Congress has included dozens of these types of restrictions in Appropriations Acts for at least the last 10 years. However, unlike CRA resolutions of disapproval, these appropriations restrictions do not eliminate the underlying rule, are typically only in effect for the time period covered by the appropriation, and have other potential limitations.

A third hybrid approach is for Congress to give the Obama administration new authority to stop midnight rules. H.R. 34, as introduced by Representative Nadler, is an example of this approach. However, to have the desired effect, key terms like "rule," "adopted," and "agency head" will need to be carefully defined.

Also, Congress will have to consider the balance of power ramifications of giving the President or executive branch officials power that it had previously reserved only to itself.

Mr. Chairman, that completes my testimony. I would be happy to answer any questions.

[The prepared statement of Dr. Copeland follows:]

PREPARED STATEMENT OF CURTIS W. COPELAND

Statement of Curtis W. Copeland
Specialist iu Americau National Government
Congressional Research Service

Before

The Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
House of Representatives

February 4, 2009

on

"Midnight Rulemaking"

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss "midnight rulemaking." As has been well documented elsewhere, at the end of every recent presidential administration (particularly those involving a change in the party controlling the White House), the level of rulemaking activity by federal agencies tends to increase — whether measured in terms of total rules, final rules, or pages in the *Federal Register*.[1] Among those who have written about this phenomenon is Susan Dudley, who was until recently the administrator of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB). In 2001, while a senior research fellow at the Mercatus Center, she said that the sharp increase in regulatory output at the end of the Clinton Administration was "not an anomaly," and that "sudden bursts of regulatory activity at the end of a presidential

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[1] See, for example, Jerry Brito and Veronique de Rugy, "Midnight Regulations and Regulatory Review," Working Paper No. 08-34, Mercatus Center, George Mason University, available at [http://www.mercatus.org/uploadedFiles/Mercatus/Publications/Midnight%20Regulations.pdf]; and Jay Cochran, III, *The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters* (Arlington, VA: Mercatus Center, Oct. 5, 2000). See also Anne Joseph O'Connell, *Cleaning Up and Launching Ahead*, January 2009, available at [http://www.americanprogress.org/issues/2009/01/cleaning_up.html].

administration are systematic, significant, and cut across party lines."[2] Midnight rulemaking has been described by some as a normal human response to approaching deadlines, and by others as an intentional effort to hamper a subsequent presidential administration.[3] Whatever the motivation, because it is difficult to change or eliminate rules once they have gone into effect, doing so at the end of a presidency is, as one observer said, "a way for an administration to have life after death."[4]

Midnight Rules at the End of the Bush Administration

Recognizing the tendency to issue "midnight rules" at the end of a presidency, on May 9, 2008, Joshua B. Bolten, then White House Chief of Staff in the George W. Bush Administration, issued a memorandum to the heads of executive departments and agencies stating that, except for "extraordinary circumstances, regulations to be finalized in this Administration should be proposed no later than June 1, 2008, and final regulations should be issued no later than November 1, 2008." The memorandum also said the administrator of OIRA would "coordinate an effort to complete Administration priorities in this final year," and that the OIRA administrator would "report on a regular basis regarding agency compliance with this memorandum."[5]

Despite this effort, and statements from the White House notwithstanding,[6] the number of rules that federal agencies promulgated in the final months of the Bush Administration increased noticeably. One indication of this increase is the number of major final rules that were sent to the Government Accountability Office (GAO) pursuant to requirements in the Congressional Review Act (CRA, 5 U.S.C. §§ 801-808).[7] The CRA requires GAO to provide Congress with a report on each final rule that OIRA designates as a "major" rule (e.g., rules with at least a $100 million impact on the economy) within 15 calendar days of

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[2] Susan E. Dudley, "Reversing Midnight Regulations," *Regulation*, Spring 2001, p. 9.

[3] Dean Scott, "Public Policy Groups Suggest Strategies for Obama to Reverse 'Midnight' Regulations," *BNA Daily Report for Executives*, January 23, 2009, p. A-23.

[4] John M. Broder, "A Legacy Bush Can Control," *New York Times*, September 9, 2007, p. A1, quoting Phillip Clapp, president of the National Environmental Trust.

[5] Under Executive Order 12866, OIRA reviews all significant rules before they are published in the *Federal Register*, and is the President's chief representative in the rulemaking process. See CRS Report RL32397, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, by Curtis W. Copeland.

[6] See Ralph Lindeman, "White House Denies Effort to Issue Last-Minute Pro-Business Regulations, *BNA Daily Report for Executives*, November 3, 2008, p. A-15, in which deputy White House press secretary Tony Fratto denied there had been an increase in rulemaking activity. Specifically, he said "We're not doing that in this administration." His comments were made in response to a report by R. Jeffrey Smith, "A Last Push to Deregulate; White House to Ease Many Rules," *Washington Post*, October 31, 2008, p. A1.

[7] The Congressional Review Act (in 5 U.S.C. § 801(a)(1)(A)) requires all final rules to be sent to each house of Congress and GAO before they can take effect.

the rule being sent to GAO and Congress.[8] During the first six months of 2008, the agencies sent GAO a total of 32 major final rules, but in the second six months, the agencies sent GAO 53 rules — a 65% increase. The number of major rules in the second six months of 2008 was also higher than the number in the second six months of 2007 (53 major rules in 2008 compared with 41 major rules in 2007 — a 29% increase). The biggest differences between 2007 and 2008 were in the months of October and November. In 2007, federal agencies submitted 13 major rules to GAO in October and November, but in the same two months in 2008, the agencies submitted 30 major rules — a 131% increase.

The surge in rulemaking at the end of the Bush Administration is also apparent in the number of "significant" rules that OIRA reviewed pursuant to Executive Order 12866.[9] According to the Regulatory Information Service Center, from September 1, 2008, through December 31, 2008, OIRA reviewed a total of 190 significant final rules — a 102% increase when compared to the same period in 2007 (94 rules).[10]

Rules Attracting Controversy

Several Members of Congress and others have expressed concerns about some of the final rules that were published in the final months of the Bush Administration, and some have called for President Obama or Congress to reverse those rules.[11] Final rules that have been identified as problematic include:

- a Department of the Interior (DOI) rule that, in the words of the proposal, requires that surface coal mining operations "minimize the creation of excess spoil and the adverse environmental impacts of fills," but that some

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[8] 5 U.S.C. § 801(a)(2)(A).

[9] Section 3(f) of the executive order defines a "significant regulatory action" as any regulatory action that is "likely to result in a rule 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."

[10] See [http://www.reginfo.gov/public/do/eoCountsSearchInit?action=init] to access this database.

[11] For example, the Chairman of the House Select Committee on Energy Independence and Global Warming released a report on October 31, 2008, listing a number of rules that the majority staff considered problematic. To view a copy of this report and related information, see [http://globalwarming.house.gov/mediacenter/pressreleases_2008?id=0056]. The same day, the Speaker of the House issued a list of "ghoulish midnight regulations" being issued by the Bush Administration. To view a copy of this list, see [http://www.speaker.gov/blog/?p=1567]. On November 3, 2008, OMB Watch published a list of "controversial rules worth watching." To view this list, see [www.ombwatch.org/article/blogs/entry/5494]. See also Cindy Skrzycki, "Democrats Eye Bush Midnight Regulations," *Washington Post*, November 11, 2008, p. D3.

observers have said would allow deposits of waste mountaintop material within 100 feet of certain streams.[12]

- a DOI rule that would, among other things, give federal agencies greater responsibility in determining when and how their actions may affect species under the Endangered Species Act.[13] Several Members of Congress have expressed concerns about the draft rule, and congressional hearings are expected.

- a DOI rule that permits state laws to determine whether concealed firearms can be carried in national parks.[14]

- an Environmental Protection Agency (EPA) revision of the definition of "solid waste" that would exclude certain types of sludge and byproducts from regulation under the Resource Conservation and Recovery Act.[15]

- a rule issued by the Department of the Treasury and the Board of Governors of the Federal Reserve System implementing certain provisions of the Unlawful Internet Gambling Enforcement Act of 2006.[16]

All of these final rules had taken effect by the time President Bush left office on January 20, 2009. Other rules that had been described by some observers as troublesome (1) had been published in the *Federal Register* as final rules, but had not taken effect; or (2) had not been published as final rules. As discussed in detail in the remainder of this testimony, various options are available to both a new President and Congress to delay or prevent the implementation of regulations viewed as problematic, or to eliminate them entirely. Which strategy is most effective for a particular rule depends on how far that rule has progressed in the federal rulemaking process.

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[12] U.S. Department of the Interior, Office of Surface Mining Reclamation and Enforcement, "Excess Spoil, Coal Mine Waste, and Buffers for Waters of the United States," 73 *Federal Register* 75814, December 5, 2008. The rule took effect on January 12, 2009.

[13] U.S. Department of the Interior, Fish and Wildlife Service, and U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, "Interagency Cooperation Under the Endangered Species Act," 73 *Federal Register* 76272, December 16, 2008. This rule took effect on January 15, 2009. For more detailed information about this rule, see CRS Report RL34641, *Proposed Changes to Regulations Governing Consultation Under the Endangered Species Act (ESA)*, by Kristina Alexander and M. Lynne Corn.

[14] U.S. Department of the Interior, National Park Service, "General Regulations for Areas Administered by the National Park Service and the Fish and Wildlife Service," 73 *Federal Register* 74966, December 12, 2008. This rule took effect on January 9, 2009.

[15] U.S. Environmental Protection Agency, "Revisions to the Definition of Solid Waste," 73 *Federal Register* 64668, October 30, 2008. The rule took effect on December 29, 2008.

[16] U.S. Department of the Treasury and the Board of Governors of the Federal Reserve System, "Prohibition on Funding of Unlawful Internet Gambling", 73 *Federal Register* 69382, November 18, 2008. The rule took effect on January 19, 2009, but compliance was not required until December 1, 2009.

Presidential Options

One approach that recent Presidents have used to control "midnight rulemaking" at the start of their administrations has been the imposition of a moratorium on new regulations by executive departments and independent agencies, sometimes accompanied by a requirement that the departments and agencies postpone the effective dates of certain rules issued at the end of the previous President's term.[17] Also, any proposed rules that have not been published in the *Federal Register* as final rules by the time the outgoing President leaves office can be withdrawn by a new administration. However, once final rules have been published in the *Federal Register*, the only way for a new administration to eliminate or change the rules (even just changing the effective date) is by going back through the rulemaking process.

Regulatory Moratoriums and Postponements

On January 29, 1981, shortly after taking office, President Reagan issued a memorandum to the heads of the Cabinet departments and the EPA Administrator directing them to take certain actions that would give the new administration time to implement a "new regulatory oversight process," particularly for "last-minute decisions" made by the outgoing Carter Administration. Specifically, the memorandum said that agencies should, to the extent permitted by law, (1) postpone for 60 days the effective date of all final rules that were scheduled to take effect during the next 60 days, and (2) refrain from promulgating any new final rules. Executive Order 12291, issued a few weeks later, contained another moratorium on rulemaking that supplemented, but did not supplant, the January 29, 1981, memorandum.[18] Section 7 of the executive order directed agencies to "suspend or postpone the effective dates of all major rules that they have promulgated in final form as of the date of this Order, but that have not yet become effective." Excluded were major rules that could not be legally postponed or suspended, and those that ought to become effective "for good cause." Agencies were also directed to refrain from promulgating any new final rules until a final regulatory impact analysis had been conducted.

On January 22, 1993, Leon E. Panetta, the Director of OMB for the incoming Clinton Administration, sent a memorandum to the heads and acting heads of Cabinet departments and independent agencies requesting them to (1) not send proposed or final rules to the Office of the Federal Register for publication until they had been approved by an agency head appointed by President Clinton and confirmed by the Senate, and (2) withdraw from the Office of the Federal Register all regulations that had not been published in the *Federal Register* and that could be withdrawn under existing procedures. The requirements did not apply, however, to any rules that had to be issued immediately because of a statutory or judicial deadline. The OMB Director said these actions were needed because it was "important that President Clinton's appointees have an opportunity to review and approve new regulations."

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[17] All of these presidential moratoriums on rulemaking have generally exempted regulations issued by independent regulatory boards and commissions, as well as regulations issued in response to emergency situations or statutory or judicial deadlines.

[18] Executive Order 12291, "Federal Regulation," 46 *Federal Register* 13193, February 17, 1981.

On January 20, 2001, Andrew H. Card, Jr., Assistant to President George W. Bush and Chief of Staff, sent a memorandum to the heads and acting heads of all executive departments and agencies generally directing them to (1) not send proposed or final rules to the Office of the Federal Register, (2) withdraw from the Office rules that had not yet been published in the *Federal Register*, and (3) postpone for 60 days the effective date of rules that had been published but had not yet taken effect.[19] The Card memorandum instructed agencies to exclude any rules promulgated pursuant to statutory or judicial deadlines, and to notify the OMB Director of any rules that should be excluded because they "impact critical health and safety functions of the agency." The memorandum indicated that these actions were needed to "ensure that the President's appointees have the opportunity to review any new or pending regulations."

Effects of the Card Memorandum. In February 2002, GAO reported on the delay of effective dates of final rules subject to the Card memorandum.[20] GAO indicated that 371 final rules were subject to this aspect of the Card memorandum, and federal agencies delayed the effective dates of at least 90 of them. As of the one-year anniversary of the Card memorandum, most of the 90 rules had taken effect, but one had been withdrawn and not replaced by a new rule, three had been withdrawn and replaced by new rules, and nine others had been altered (e.g., with a different implementation date or different reporting requirements). While some agencies allowed the public to comment on the extensions of the effective dates, most agencies simply published final rules citing the Administrative Procedure Act's "good cause" or "procedural rule" exceptions to notice and comment rulemaking.[21] One author noted that such practices "tended to evade judicial challenge due to their short time frames, but they did occasion criticism."[22]

The Bolten Memorandum. Viewed in this context, the May 2008 memorandum by White House Chief of Staff Bolten represents both a continuation of a trend of presidential involvement in rulemaking related to transitions, and an evolution in that involvement. The Administrative Procedure Act generally prohibits final rules from taking effect for 30 days

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[19] U.S. White House Office, "Regulatory Review Plan," *Federal Register*, vol. 66, no. 16, January 24, 2001, p. 7702. To view a copy of this memorandum, see [http://www.whitehouse.gov/omb/inforeg/regreview_plan.pdf].

[20] General Accounting Office, *Regulatory Review: Delay of Effective Dates of Final Rules Subject to the Administration's Jan. 20, 2001, Memorandum*, GAO-02-370R, February 15, 2002.

[21] As discussed later in this testimony, the Administrative Procedure Act allows an agency to avoid notice and comment procedures for rules of agency organization, procedure, or practice when an agency finds, for "good cause," that those procedures are "impracticable, unnecessary, or contrary to the public interest."

[22] Jeffrey S. Lubbers, ed., *A Guide to Federal Agency Rulemaking, Fourth Edition* (Chicago: ABA Publishing, 2006), pp. 121-122. For a discussion of these criticisms, see William M. Jack, "Taking Care That Presidential Oversight of the Regulatory Process is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions Under the Bush Administration's Card Memorandum," *Administrative Law Review*, vol. 54 (Fall 2002), pp. 1479-1518. Some federal courts have considered any delay in a rule's effective date to require notice and comment rulemaking. See *Natural Resources Defense Council, Inc. v. EPA*, 683 F.2d 752, 761 (3d Cir. 1982); and *Council of the Southern Mountains v. Donovan*, 653 F.2d 573 (D.C. Cir. 1981). One such action pursuant to the Card memorandum was rejected by a court. See *Natural Resources Defense Council v. Abraham*, 355 F.3d 179, 204-05 (2d Cir. 2004).

after they are promulgated,[23] and the Congressional Review Act generally prohibits "major" rules from taking effect for 60 days after they are published or sent to Congress.[24] Therefore, because the Bolten memorandum required that all final rules be published in the *Federal Register* by November 1, 2008, full compliance with this requirement would result in all rules having taken effect before President Obama took office on January 20, 2009. Some observers have noted that this approach was quite effective, as many of the controversial final rules that were issued at the end of the Bush Administration had taken effect by the time President Obama took office.[25] In contrast, many rules that were issued at the end of the Clinton Administration had not taken effect.[26]

The Emanuel and Orszag Memoranda. On January 20, 2009, Rahm Emanuel, Assistant to President Obama and Chief of Staff, sent a memorandum to the heads of executive departments and agencies requesting that they generally (1) not send proposed or final rules to the Office of the Federal Register, (2) withdraw from the Office rules that had not yet been published in the *Federal Register*, and (3) "consider" postponing for 60 days the effective dates of rules that had been published in the *Federal Register* but had not yet taken effect.[27] The Director or Acting Director of OMB was allowed to except certain rules from these requirements for emergency or "other urgent circumstances relating to health, safety, environmental, financial, or national security matters." One of the major differences between the Emanuel memorandum and the Card memorandum is in the degree of deference shown to the rulemaking agencies. For example, whereas the Emanuel memorandum requested agencies to "consider" extending the effective dates of rules that had not taken effect, the Card memorandum simply instructed the agencies to do so. Also, the Emanuel memorandum said that when the effective dates of rules are extended, the agencies should allow interested parties to comment for 30 days "about issues of law and policy raised by those rules." The Card memorandum had no similar provision regarding public comment.

On January 21, 2009, Peter R. Orszag, Director of the Office of Management and Budget, sent a memorandum to the heads of executive departments and agencies providing guidance on implementing the third provision in the Emanuel memorandum.[28] The Orszag memorandum said that agencies' decisions on whether to extend the effective dates of rules should be based on such considerations as whether the rulemaking process was procedurally adequate, whether the rule reflected proper consideration of all relevant facts, and whether objections to the rule were adequately considered. The Orszag memorandum also said that public comments were to be sought regarding both the agencies' "contemplated extension

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[23] 5 U.S.C. 553(d).

[24] 5 U.S.C. 801(a)(3).

[25] Reece Rushing, Rick Melberth, and Matt Madia, *After Midnight: The Bush Legacy of Deregulation and What Obama Can Do*, Center for American Progress and OMB Watch, available at [http://www.americanprogress.org/issues/2009/01/after_midnight.html].

[26] For example, according to GAO, federal agencies submitted 385 rules to GAO between January 1, 2001, and January 20, 2001, including 12 major rules. In contrast, during the same period of time at the end of the George W. Bush Administration (between January 1, 2009, and January 20, 2009), federal agencies submitted only 138 rules, and only one major rule.

[27] Executive Office of the President, "Memorandum for the Heads of Executive Departments and Agencies," 74 *Federal Register*, 4435, January 26, 2009.

[28] See [http://ombwatch.org/regs/PDFs/OrszagMemo09-08.pdf] for a copy of this memorandum.

of the effective date and the rule in question." Agencies were also instructed to consult with OIRA and the Department of Justice's Office of Legal Counsel before extending the effective dates of any rules, particularly when the rules were scheduled to take effect before public comments could be solicited.

Although many of the controversial rules that were issued near the end of the Bush Administration had taken effect by January 20, 2001, the Emanuel memorandum has caused the effective dates of some rules to be delayed. For example, last week, the Forest Service published a final rule in the *Federal Register* delaying the effective date of a December 29, 2009, final rule regulating the sale of certain forest products.[29] The agency said the January 28, 2009, effective date was being delayed for 60 days in accordance with the Emanuel memorandum, and solicited public comments for 30 days on "any issues or concerns on the policy raised by the December rule." In addition, federal agencies have withdrawn a number of rules that had been sent to the Office of the Federal Register but had not been published.

Proposed Rules That Have Not Been Published as Final Rules

If a federal agency has published a proposed rule, but has not published the related final rule, the agency is under no obligation to issue a final rule unless required to do so by statute or court order. To preclude further action on a proposed rule, the agency may wish to publish a notice in the *Federal Register* announcing its withdrawal of the rule.[30] Alternatively, the agency could elect to publish the final rule, solicit additional public comments on the proposed rule, or take some other action.

Several Bush Administration proposed rules that were of concern to certain interested parties were never published as final rules. These rules include:

- a Department of Justice proposed rule that would "clarify and update" the policies governing criminal intelligence systems that receive federal funding, but that some contend would make it easier for state and local police to collect, share, and retain sensitive information about Americans, even when no underlying crime is suspected.[31]

- a Department of Labor proposed rule that would change the way that occupational health risk assessments are conducted within the department. Legislation was introduced in the 110th Congress (H.R. 6660 and S. 3566)

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[29] U.S. Department of Agriculture, Forest Service, "Sale and Disposal of National Forest System Timber; Special Forest Products and Forest Botanical Products," 74 *Federal Register* 5107, January 29, 2009.

[30] These withdrawals are recorded in the *Unified Agenda of Federal Regulatory and Deregulatory Actions*, which is published twice a year by the Regulatory Information Service Center within the General Services Administration.

[31] For the proposed rule, see U.S. Department of Justice, Office of Justice Programs, "Criminal Intelligence Systems Operating Procedures," 73 *Federal Register* 44673, July 31, 2008. For a characterization of the rule, see Spencer S. Hsu and Carrie Johnson, "U.S. May Ease Police Spy Rules," *Washington Post*, August 16, 2008, p. A1.

to prohibit the issuance or enforcement of this rule, but the legislation was not enacted.[32]

- an EPA "new source review" rule that, if made final, would alter current requirements stipulating when upgrades at older power plants would require the installation of modern anti-pollution equipment.[33] EPA said that the change would balance environmental protection with the "economic need of sources to use existing physical and operating capacity." However, environmental groups contended that the change would weaken existing protections and conflicts with a recent decision of the Supreme Court related to this issue.[34]

New Rulemaking to Eliminate or Change Final Rules

Once an outgoing administration's final rule has been published in the *Federal Register*, the only way for the incoming administration to change or eliminate the rule is by going back through the federal rulemaking process.[35] Under informal rulemaking procedures established by the Administrative Procedure Act (APA, 5 U.S.C. § 551 et seq.), agencies are generally required to publish a notice of proposed rulemaking (NPRM) in the *Federal Register*, allow "interested persons" an opportunity to comment on the proposed rule, and, after considering those comments, publish the final rule along with a general statement of its basis and

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[32] For the proposed rule, see U.S. Department of Labor, Office of the Secretary, "Requirements for DOL Agencies' Assessment of Occupational Health Risks," 73 *Federal Register* 50909, August 29, 2008. For characterizations of the rule, see Carol D. Leonnig, "U.S. Rushes to Change Workplace Toxin Rules," *Washington Post*, July 23, 2008, p. A1; and Gayle Cinquegrani, "Miller Introduces House Bill to Prohibit DOL 'Secret Rule' on Workplace Toxin Exposure," *BNA Daily Report for Executives*, August 1, 2008, p. A-7. On August 18, 2008, a *Washington Post* editorial recommended that the Department of Labor withdraw its proposed rule ("A Toxic Proposal: The Labor Department Politicizes a Regulation of Workplace Health," *Washington Post*, August 18, 2008, p. A10).

[33] For the proposed rule, see U.S. Environmental Protection Agency, "Supplemental Notice of Proposed Rulemaking for Prevention of Significant Deterioration and Nonattainment New Source Review: Emission Increases for Electric Generating Units," 72 *Federal Register* 26201, May 8, 2007.

[34] American Lung Association, EarthJustice, Environmental Defense, Natural Resources Defense Council, and Sierra Club; "Comments on EPA's Proposed 'Supplemental Notice of Proposed Rulemaking for Prevention of Significant Deterioration and Nonattainment New Source Review: Emission Increases for Electric Generating Units,'" available at [http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=0900000648 0273d62].

[35] Advocates of the "unitary executive" theory of presidential power assert that the President should be able to make the final decision regarding the substance of agency rules — even when Congress has assigned rulemaking responsibilities to agency officials. Even in those instances, however, it is the agency that must take the rulemaking action, not the President. The President cannot unilaterally eliminate or change a rule issued by an executive agency (e.g., by issuing an executive order), but advocates of the unitary executive and others assert that the President can generally direct an agency official to do so. For more on this issue, see testimony of Curtis W. Copeland, Specialist in American National Government, U.S. Congress, House Committee on the Judiciary, *Federal Rulemaking and the Unitary Executive Principle*, hearings, 110th Congress, 2nd sess., May 6, 2008 (available from the author).

purpose. The APA does not specify how long rules must be available for comment, but agencies commonly allow at least 30 days. As noted previously, the APA says that the final rule generally cannot become effective until at least 30 days after its publication.

However, there are ways that the rulemaking process can be shortened. The APA (5 U.S.C. § 553) states that full "notice and comment" procedures are not required when an agency finds, for "good cause," that those procedures are "impracticable, unnecessary, or contrary to the public interest." Agencies can also make their rules take effect in less than 30 days by invoking the "good cause" exception.[36] When agencies use the good cause exception, the APA requires that they explicitly say so and provide a rationale for the exception's use when the rule is published in the *Federal Register*. The APA also provides explicit exceptions to the NPRM requirement for certain categories of regulatory actions, such as rules dealing with military or foreign affairs; agency management or personnel; or public property, loans, grants, benefits, or contracts. Further, the APA says that the NPRM requirements do not apply to interpretative rules; general statements of policy; or rules of agency organization, procedure, or practice.

Certain procedures for expedited rulemaking were designed not to involve NPRMs. One such procedure is what is known as "interim final" rulemaking, in which an agency issues a final rule without an NPRM that is generally effective immediately, but with a post-promulgation opportunity for the public to comment. If the public comments persuade the agency that changes are needed in the interim final rule, the agency may revise the rule by publishing a final rule reflecting those changes. Interim final rulemaking can be viewed as a particular application of the good cause exception in the APA, but with the addition of a comment period after the rule has become effective.[37]

The legislative history of the APA makes it clear that Congress did not believe that the act's good cause exception to the notice and comment requirements should be an "escape clause."[38] A federal agency's invocation of the good cause exception (or other exceptions to notice and comment procedures) is subject to judicial review. After having reviewed the totality of circumstances, the courts can determine that an agency's reliance on the good cause exception was not authorized under the APA.[39] The case law has generally reinforced the view that the good cause exception should be "narrowly construed."[40] Nevertheless,

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[36] The APA also allows rules to take effect in less than 30 days if the rule grants or recognizes an exemption or relieves a restriction, or if the rule is an interpretative rule or statement of policy.

[37] For more, see Michael Asimow, "Interim Final Rules: Making Haste Slowly," *Administrative Law Review*, 51 (Summer 1999), pp. 703-755.

[38] Senate Committee on the Judiciary, *Administrative Procedure Act: Legislative History*, Senate Document 248, 79th Congress, 2nd sess. (1946).

[39] For discussions of these court cases, see Ellen R. Jordan, "The Administrative Procedure Act's 'Good Cause' Exemption," *Administrative Law Review*, 36 (Spring 1984), pp. 113-178; and Catherine J. Lanctot, "The Good Cause Exception: Danger to Notice and Comment Requirements Under the Administrative Procedure Act," *Georgetown Law Journal*, 68 (Feb. 1980), pp. 765-782.

[40] See *American Federation of Government Employees, AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981); and *Mobay Chemical Corp. v. Gorsuch*, (682 F.2d 419, 426 (3rd Cir.), cert. denied, 459 U.S. 988 (1982)). In another case (*Action on Smoking and Health v. CAB*, 713 F.2d 795, 800

(continued...)

GAO reported in 1998 that about half of the 4,658 final rules published in 1997 were not preceded by an NPRM, and that, in these cases, the agencies most commonly cited the good cause exception.[41]

Congressional Options

Congress may examine proposed and final "midnight" regulations being issued at the end of the Bush Administration and conclude that they should be allowed to go forward. Should Congress conclude otherwise, though, various options are available — even for rules that have already taken effect.

Congressional Review Act

Congress may use its general powers to overturn agency rules by regular legislation. However, for various reasons, Congress may find it difficult to do so. The Congressional Review Act (CRA), enacted in March 1996, was an attempt by Congress to reassert control over agency rulemaking by establishing a special set of expedited or "fast track" legislative procedures for this purpose, primarily in the Senate.

In essence, the act requires that all final rules (including rules issued by independent boards and commissions) to be submitted to both houses of Congress and to GAO before they can take effect. Members of Congress have 60 "days of continuous session" to introduce a joint resolution of disapproval after a rule has been submitted to Congress (hereafter referred to as the "initiation period").[42] The Senate has 60 "session days" from the date the rule is submitted to Congress (or published in the *Federal Register*, if later) to use expedited procedures to act on a resolution of disapproval (hereafter referred to as the "action period").[43] For example, once a joint resolution has reached the floor of the Senate, the CRA makes consideration of the measure privileged, prohibits various other dilatory actions, disallows amendments, and limits floor debate to 10 hours. If passed by both houses of Congress, the joint resolution is then presented to the President for signature or veto. If the President signs the resolution, the CRA specifies not only that the rule "shall not take effect" (or shall not continue if it has already taken effect), but also that the rule may not be reissued

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[40] (...continued)
(D.C. Cir. 1983)), the court said that allowing broad use of the good cause exception would "carve the heart out of the statute."

[41] U.S. General Accounting Office, *Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules*, GAO/GGD-98-126, August 31, 1998.

[42] "Days of continuous session" excludes all days when either the House of Representatives or the Senate is adjourned for more than three days.

[43] "Session days" include only calendar days on which a chamber is in session. Once introduced, resolutions of disapproval are referred to the committees of jurisdiction in each house of Congress. The House of Representatives would consider the resolution under its general procedures, very likely as prescribed by a special rule reported from the Committee on Rules. In the Senate, however, if the committee has not reported a disapproval resolution within 20 calendar days after the regulation has been submitted and published, then the committee may be discharged of its responsibilities and the resolution placed on the Senate calendar if 30 Senators submit a petition to do so.

in "substantially the same form" without subsequent statutory authorization.[44] If, on the other hand, the President vetoes the joint resolution, then (as is the case with any other piece of legislation) Congress can override the President's veto by a two-thirds vote in both houses of Congress.

Under most circumstances, it is likely that the President would veto such a resolution in order to protect rules developed under his own administration, and it may also be difficult for Congress to muster the two-thirds vote in both houses needed to overturn the veto. Of the nearly 50,000 final rules that have been submitted to Congress since the legislation was enacted in March 1996, the CRA has been used to disapprove only one rule — the Occupational Safety and Health Administration's November 2000 final rule on ergonomics.[45]

The March 2001 rejection of the ergonomics rule was the result of a specific set of circumstances created by a transition in party control of the presidency. The majority party in both houses of Congress was the same as the party of the incoming President (George W. Bush). When the new Congress convened in 2001 and adopted a resolution disapproving the rule published under the outgoing President (William J. Clinton), the incoming President did not veto the resolution. Congress may be most able to use the CRA to disapprove rules in similar, transition-related circumstances.[46]

CRA "Carryover" Provisions. The ergonomics disapproval was also an example of the "carryover" provisions in the CRA. Section 801(d) of the CRA provides that, if Congress adjourns its annual session *sine die* less than 60 *legislative days* in the House of Representatives or 60 *session days* in the Senate after a rule is submitted to it, then the rule is subject, during the following session of Congress, to (1) a new initiation period in *both* chambers and (2) a new action period in the Senate.[47] The purpose of this provision is to ensure that *both* houses of Congress have sufficient time to consider disapproving rules submitted during this end-of-session "carryover period." In any given year, the carryover period begins after the 60th legislative day in the House or session day in the Senate before

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[44] For a more detailed discussion of these procedures, see CRS Report RL34633, *Congressional Review Act: Disapproval of Rules in a Subsequent Session of Congress*, by Curtis W. Copeland and Richard S. Beth. For a discussion of the act's implementation, see CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After a Decade*, by Morton Rosenberg.

[45] U.S. Department of Labor, Occupational Safety and Health Administration, "Ergonomics Program," 65 *Federal Register* 68261, November 14, 2000. Although the CRA has been used to disapprove only one rule, it may have other, less direct or discernable effects (e.g., keeping Congress informed about agency rulemaking and preventing the publication of rules that may be disapproved).

[46] See, for example, Susan E. Dudley, "Reversing Midnight Regulations," *Regulation*, vol. 24 (Spring 2001), p. 9, who noted that the "veto threat is diminished [after a transition], since the president whose administration issued the regulations is no longer in office." See also testimony of Curtis W. Copeland, in U.S. Congress, House Committee on Government Reform, Subcommittee on Regulatory Affairs, *The Effectiveness of Federal Regulatory Reform Initiatives*, 109th Cong., 1st sess., July 27, 2005, p. 13. See CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After a Decade*, by Morton Rosenberg, for a description of this and several other possible factors affecting the law's use.

[47] "Legislative days" end each time a chamber adjourns for the day, and begin each time it convenes after such an adjournment.

the *sine die* adjournment, whichever date is *earlier*. The renewal of the CRA process in the following session occurs even if no resolution to disapprove the rule had been introduced during the session when the rule was submitted.

For purposes of this new initiation period and Senate action period, a rule originally submitted during the carryover period of the previous session is treated as if it had been published in the *Federal Register* on the 15th legislative day (House) or session day (Senate) after Congress reconvenes for the next session. Resolutions of disapproval may be introduced in each chamber at any point in the 60 days of continuous session of Congress that follow the respective date, and the Senate may use expedited procedures to act on the resolution during the 60 days of session that follow the same applicable date.

Implications for Rules Issued in the Second Session of the 110th Congress. Examination of the House and Senate calendars from the second session of the 110th Congress indicates that the cutoff date for the CRA's carryover provisions was May 15, 2008. Any final rule that was sent to Congress after May 15, 2008, would not have had 60 legislative days in the House for congressional disapproval before *sine die* adjournment. According to GAO's CRA database, about 1,800 Bush Administration final rules, including about 700 "significant" or "substantive" rules, were submitted to Congress between May 15, 2008, and *sine die* adjournment of the second session of the 110th Congress.

The Senate reached the 15th session day of the 111th Congress on January 27, 2009, and the House reached the 15th legislative day on January 28, 2009. As a result, resolutions of disapproval can now be submitted regarding rules that were issued during the second session of the 110th Congress. Starting on the 15th legislative or session day of the 111th Congress, such resolutions are in order for 60 "days of continuous session" (i.e., all calendar days except those when either the House of Representatives or the Senate is adjourned for more than three days).

Consolidation of Disapproval Resolutions. In order to qualify for the expedited Senate procedures that the CRA provides, a resolution of disapproval must (among other things) use the language provided for such resolutions in the CRA: "'That Congress disapproves the rule submitted by the XX relating to XX, and such rule shall have no force or effect.' (The blank spaces being appropriately filled in)." This language indicates that a resolution of disapproval can be used to disapprove only one rule at a time. However, a recently issued CRS report suggests ways in which Congress might make use of measures consolidating multiple disapprovals and considered under regular legislative procedures, either in place of or in conjunction with the CRA disapproval process.[48]

Appropriations Provisions

Although the CRA has been used only once to overturn an agency rule, Congress has frequently used provisions added to agency appropriations bills to affect rulemaking and regulations. A CRS analysis of the Consolidated Appropriations Act for 2008 revealed nearly two dozen such provisions in the act, which generally fell into four categories: (1) prohibitions on the finalization of particular proposed rules, (2) prohibitions on the

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[48] CRS Report R40163, *The Congressional Review Act and Possible Consolidation into a Single Measure of Resolutions Disapproving Regulations*, by Richard S. Beth.

development of regulations with regard to particular statutes or issues, (3) restrictions on implementation or enforcement, and (4) conditional restrictions on the development or implementation of particular rules.[49] A review of appropriations legislation that was enacted from FY1999 through FY2007 indicated that many of the regulatory restrictions in the Consolidated Appropriations Act for 2008 had appeared in one or more appropriations statutes in previous years. Some were in relevant appropriations bills in all 10 years, some had been in multiple years (but not all 10), and some were present in only one year. In some cases, the provisions appear to have been designed to slow down or prevent the issuance of "midnight" rules issued near the end of a presidential administration, or to ensure the implementation of rules issued during that period.

These restrictions in appropriations bills illustrate that Congress can have a substantial effect on agency rulemaking and regulatory activity beyond the introduction of joint resolutions of disapproval pursuant to the CRA. However, unlike CRA joint resolutions of disapproval, these appropriations provisions cannot nullify an existing regulation (i.e., remove it from the *Code of Federal Regulations*) or permanently prevent the agency from issuing the same or similar regulations. Therefore, any final rule that has taken effect and been codified in the *Code of Federal Regulations* will continue to be binding law — even if language in the relevant regulatory agency's appropriations act prohibits the use of funds to enforce the rule. Regulated entities are still required to adhere to applicable requirements (e.g., installation of pollution control devices, submission of relevant paperwork), even if violations are unlikely to be detected and enforcement actions cannot be taken by federal agencies.

Also, unless otherwise indicated, regulatory restrictions in appropriations acts are binding only for the period of time covered by the legislation (i.e., a fiscal year or a portion of a fiscal year), and only with respect to the funds appropriated in the act containing the restriction.[50] Therefore, any restriction that is not repeated in the next relevant appropriations act or enacted in other legislation is no longer binding on the relevant agency or agencies. However, some appropriations provisions are worded in such a way that they have essentially become permanent or multi-year requirements.

Most of the regulatory restrictions are in appropriations bills providing funds for particular agencies or groups of agencies. Therefore, the prohibitions are generally applicable only to the agencies funded by that appropriations measure. However, some of the regulatory prohibitions are in the "General Provisions — Government-wide" section of one of the appropriations measures (for FY2008, Title VII of the Financial Services and General Government Appropriations Act), and are, therefore, applicable to virtually all federal agencies. Other provisions are worded in such a way that their effects are broader

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[49] CRS Report RL34354, *Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions*, by Curtis W. Copeland.

[50] See U.S. General Accounting Office, *Principles of Appropriations Law, Third Edition, Volume I*, GAO-04-261SP, (January 2004), p. 2-34, which states that, "Since an appropriation act is made for a particular fiscal year, the starting presumption is that everything contained in the act is effective only for the fiscal year covered. Thus, the rule is: A provision contained in an annual appropriation act is not to be construed to be permanent legislation unless the language used therein or the nature of the provision makes it clear that Congress intended it to be permanent."

than the agencies funded by those particular appropriations bills (e.g., those that prohibit the use of funds in "this or any other Act" to publish or implement regulations).[51]

On the other hand, some of the appropriations provisions limiting regulatory actions may not be as restrictive as they initially appear. Some federal regulatory agencies derive a substantial amount of their operating funds from sources other than congressional appropriations (e.g., user fees), and the use of those funds to develop, implement, or enforce rules may not be legally constrained by language preventing the use of appropriated funds.[52] Also, some federal regulations (e.g., many of those issued by the Environmental Protection Agency and the Occupational Safety and Health Administration) are primarily implemented or enforced by state or local governments, and those governments may have sources of funding that are independent of the federal funds that are restricted by the appropriations provisions. Some state or local governments may also have their own statutory and regulatory requirements that are the same as or similar to the federal rules at issue, or may even go beyond federal standards.[53] If state or local funds or legal authorities are used to develop, implement, or enforce regulations, those actions would not appear to be constrained by statutory provisions limiting the use of *federal* funds to restrict action on particular *federal* laws and regulations.[54]

Agencies may also find ways around provisions prohibiting the use of appropriated funds for rulemaking or other regulatory actions. For example, if an agency is not permitted to use its appropriation to issue a formal rule on a particular issue, it might attempt to achieve the end result through other means (e.g., a guidance document that, while technically having no binding effect, may be granted great deference by affected parties).[55] More generally, if Congress restricts one agency or group of agencies from issuing a rule on a particular topic, another agency with similar or overlapping statutory authority may be assigned that responsibility.

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[51] See U.S. General Accounting Office, *Principles of Appropriations Law*, p. 2-33, which says that a general provision "may apply solely to the act in which it is contained ('No part of any appropriation contained in this Act shall be used ...'), or it may have general applicability ('No part of any appropriation contained in this or any other Act shall be used ...')."

[52] Others, however, take the view that even these non-appropriated funds must be at least figuratively deposited into the Treasury, and that "all spending in the name of the United States must be pursuant to legislative appropriation." Kate Stith, "Congress' Power of the Purse," *The Yale Law Journal*, vol. 97 (1988), p. 1345.

[53] For example, under the Occupational Safety and Health Act, states may set standards for hazards such as ergonomic injury for which no federal standard has been established. See U.S. General Accounting Office, *Regulatory Programs: Balancing Federal and State Responsibilities for Standard Setting and Implementation*, GAO-02-495, March 2002.

[54] See U.S. Government Accountability Office, *Principles of Federal Appropriations Law, Third Edition, Volume II*, GAO-06-382, February 2006, which says that, unless stated otherwise, expenditures by recipients of federal grants "are not subject to all the same restrictions and limitations imposed on direct expenditures by the federal government. For this reason, grant funds in the hands of a grantee have been said to largely lose their character and identity as federal funds."

[55] See Office of Management and Budget, "Final Bulletin for Agency Good Guidance Practices," 72 *Federal Register* 3432, January 25, 2007. OMB issued the bulletin, in part, because of concerns that agencies were treating guidance documents as binding rules. Nevertheless, as OMB points out, guidance documents can have significant effects on regulated entities.

Legislative Authorization of Executive Branch Authority

The previous sections of this testimony have described options that either Congress or the President could take to address midnight rulemaking. A third, hybrid approach is for Congress to provide new authority to the incoming administration (i.e., either the President or the rulemaking agencies) to stop or change rules issued at the end of a presidency. For example, in the 111th Congress, H.R. 34, introduced by Representative Jerrold Nadler, would delay the effective date of any midnight rule (defined as those adopted in a President's final 90 days in office) until 90 days after the new President appoints the agency head. However, the bill would allow the outgoing President to exempt certain types of rules from such delays by submitting a written notice to Congress. Another provision in H.R. 34 would allow agency heads to disapprove any midnight rules within 90 days of being appointed by the new President by publishing a disapproval statement in the *Federal Register* and sending a notice of disapproval to the congressional committees of jurisdiction.

Legislation such as H.R. 34 could permit expeditious action to address midnight rules issued late in a President's term of office. However, to have the desired effect, key terms in this or other legislation will need to be defined. For example, H.R. 34 is not clear when a rule is considered "adopted" (e.g., publication date versus effective date); what constitutes an "agency head" (e.g., Secretary of Labor versus the Administrator of the Occupational Safety and Health Administration); when an agency head is considered "appointed" (e.g., nomination date versus the date the oath of office is taken); or even what a covered "rule" is (e.g., all rules as defined in Section 551 of the Administrative Procedure Act, or only "notice and comment" rules in Section 553 of the act). Also, Congress will have to consider the balance of power ramifications of giving the President or executive branch officials powers that it had previously reserved for itself.

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Mr. Chairman, that concludes my prepared statement. I would be happy to answer any questions that you or other Members of the Subcommittee might have.

Mr. COHEN. Thank you, Dr. Copeland. And I appreciate each of the members of the panel for their attendance and their remarks.

We now will have an opportunity for questioning, and I will recognize myself for questioning.

The first is for Dr. Bass. The list of 25 troublesome midnight regulations listed in your testimony, which do you believe are the most egregious and should be addressed by Congress and/or the new Administration?

Mr. BASS. Of the 25, all 25. That is why we listed them. This is an example of the problem that we are starting to see more of, which is everyone wants the top one or two.

What was so surprising about the Bush activity at the end of the Administration was the wealth of these rules. You heard Dr. Copeland talk about the numbers. It was quite a large number that you had mentioned that are out there.

These 25, most all of these are now effective, minus two of them. It seems to me there is no one-size-fits-all solution for all of these.

At this stage, we are going to have to make sure that Congress and the Obama administration work in a coordinated fashion to resolve rule-by-rule how to deal with these.

Mr. COHEN. And when you say those 25 are troublesome, are you talking about procedure, as well as substance?

Mr. BASS. A mixture of both. There were some—Mr. Kennedy described some rushed examples, like on the endangered species. I think there are others.

For example, we may all disagree on the HHS health care provider conscience rule. We may have very different values about it. But what was striking about the process is the OMB review of the rule, which is usually measured in weeks or months, was done in hours.

And what that meant is that agencies like the EEOC that normally would comment on a rule didn't get a chance to even comment on the rule itself. That means that it isn't a violation of law, it is a violation of process of good rulemaking.

That is what causes the problem with many of these.

Mr. COHEN. You mentioned that many of the Bush midnight regulations were favors to special interests.

Mr. BASS. Yes.

Mr. COHEN. Which regulations were you referring to and which special interests were the primary beneficiaries of Bush midnight rules?

For example, Mr. William Wichterman, a former lobbyist for the NFL, worked in this capacity at the White House Office of Public Liaison on a controversial midnight regulation dealing with the implementation of the Internet gambling law.

Is that one of the issues that you raised in your remarks that troubled you?

Mr. BASS. We did not specifically raise that, but that would be an example of the kind of thing we are talking about.

There are really three types of issues. One is the influence of money and politics, as you are suggesting. There is uncertainty when there is opacity with many of these rules about who is getting the best deal out of this.

The second is industry-wide. Mr. Kennedy talked about the mountaintop mining as a result that services a particular industry. That is another type of concern.

And then I think the third kind of issue that is at play here is simply the notion of a broader antiregulatory/deregulatory agenda. And there is some irony that the Bush administration—we all know the Bush administration was never friendly to regulation, and yet they chose to use the regulatory process as the vehicle for achieving much of the policy and priorities, which was deregulatory in the last stages of its Administration.

Mr. COHEN. Professor Abramowicz, let me ask you a question. You had mentioned a 15/16th President. I presume you are assuming two terms and breaking it into half years or is that just kind of a——

Mr. ABRAMOWICZ. I was assuming, if I am not wrong, but I was assuming if we had a 3-month period, 3 months is a fourth of a year. That is where the 3-month period would be 1/16th of a presidential term. So I was actually assuming a 4-year term.

Of course, I recognize that the President will continue to exercise the powers of the office even in that last 1/16th beyond the executive branch. The concern is diminishing the powers or potentially even essentially eliminating them within that sphere of influence.

Mr. COHEN. You said that you were afraid that maybe some folks would be embarrassed to publish last-minute regulations for fear they would be overturned.

Can you cite me an example of a politician who has been embarrassed by something they wanted to do?

Mr. ABRAMOWICZ. That is a good point, Mr. Chairman. I think that it is still possible. On many things that fly below the radar, officials in these agencies, who are not necessarily people who are running for elective office, might be concerned and might hold back on progressing out of concern that they might look bad if the regulations were disapproved.

Mr. COHEN. And from your testimony, you see this as a bipartisan problem that you have seen in——

Mr. ABRAMOWICZ. Yes. Midnight regulations have occurred in Republican and Democratic administrations alike.

Mr. COHEN. Some people wonder why the interest organizations are not challenging each individual rule under the Administrative Procedure Act.

Are these midnight regulations difficult to challenge under the Administrative Procedure Act and, therefore, congressional action might be warranted to give a more efficient process for challenge?

Mr. ABRAMOWICZ. I don't think so, Mr. Chairman. I think we do have an ordinary litigation process in which one can raise procedural and substantive objections to regulations.

And indeed, if, in fact, a regulation has not gone through the customary review processes, if, in fact, there had been completes that had been completely ignored, as, for example, Mr. Kennedy suggested has happened, that should considerably weaken the case of the agency if it subsequently attempts to defend the rule in court.

If there is litigation against the agency challenging a particular rule, if the agency simply hasn't dotted its Is and crossed its Ts by responding to comments, then under the general hard look doctrine

that the courts apply in these circumstances, the rule probably would be struck down by the courts in any event.

So it is true certainly that Administrations may have a temptation to take shortcuts at the end of an Administration, but in doing so, they take the risk that the regulations will not be durable, in any event, because they will not survive judicial review.

Mr. COHEN. Thank you, Professor. My time has expired.

Mr. Franks?

Mr. FRANKS. Mr. Chairman, I will be incredibly brief, and perhaps I could ask Professor Abramowicz for a concise answer.

I agree with your testimony. Can you give us what you would consider the key constitutional and prudential prudent limits on the degree to which Congress could proscribe a President from engaging in end-of-term rulemaking and what could be done, in your mind, that would be within the constitutional constraints?

Mr. ABRAMOWICZ. That is an excellent question. Certainly, some of the suggestions that Dr. de Rugy suggested, such as increasing funding of OIRA, clearly, within congressional prerogative, potentially even within administrative executive prerogative at the end of administration. That would certainly be a prudent thing to do.

Your question, while requesting a brief response, brings up broad issues of a unitary executive, a very controversial area of constitutional law. Those who believe in a unitary executive might argue that some curtailment of the midnight regulation power could be constitutionally problematic.

Mr. FRANKS. Thank you, Mr. Chairman. And I would just say you done good here for your first shot at the thing.

Mr. COHEN. Thank you, sir. I appreciate the compliment, and I look forward to working with you and on this issue in a bipartisan manner, because it is the Chair's opinion, as we said in the opening statement, that this affects all Administrations.

It is systemic, that folks want to get done what they can get done and sometimes Parkinson's law is in effect and the time and work and all those things come together.

I would like to thank all our witnesses for their testimony today.

Without objection, Members will have 5 legislative days to submit any additional written questions, which we will forward to the witnesses and ask that you answer promptly as you can, and they will be made a part of the record.

Without objection, the record will remain open for 5 legislative days for the submission of any other additional material.

Again, I thank everyone for their time and patience, particularly our Ranking Member.

This hearing of the Subcommittee on Commercial and Administrative Law is adjourned.

[Whereupon, at 12:49 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

PREPARED STATEMENT OF DAVID M. MASON, VISITING SENIOR FELLOW, THE HERITAGE FOUNDATION, SUBMITTED BY THE HONORABLE TRENT FRANKS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA, AND RANKING MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

What's Different About Midnight? Regulatory Dangers at Any Hour

Midnight Rulemaking: Shedding Some Light
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
February 4, 2009

Statement for the Record

David M. Mason, Visiting Senior Fellow, The Heritage Foundation

The Subcommittee is to be commended for holding a hearing on "midnight regulations." Regulation, its purposes, benefits, and costs, and the administrative process through which regulations are promulgated and reviewed could use more rather than less Congressional attention. Reviewing controversies over regulations issued during the transition between administrations should focus on appropriate constitutional and institutional roles and procedures, rather the temporary advantage of a particular political party controlling either or both branches of government at a given time.

The obvious, but under-examined question about "midnight" regulations is: what is the problem with issuing regulating at midnight? There appear to be two possible answers. First, regulations issued at the end of a Presidential Administration may be inadequately considered or reviewed in the rush to completion (the consideration problem). Second, opponents of an outgoing administration's regulatory choices may feel it is somehow illegitimate for the outgoing administration to establish policies that bind its successor (the permanence problem). In either case, appropriate solutions lie in alterations to the regulatory development and review process, not to solutions narrowly focused on transition periods.

Adequate Consideration and Review

To the extent that Congress is concerned that regulations may have been inadequately vetted and considered, the solution is requiring adequate consideration and careful review of regulations. While the rush to regulate (or deregulate) may be intensified at the end of a President's tenure, the concern about adequate consideration should extend throughout the regulatory process. If it is wrong to rush a regulation in the fall of an even-number year, it is wrong to rush it in the spring of an odd-numbered year, and the same requirements should apply.

If administrators deserve a second chance to review regulations that may have been too-hastily issued, as proposed by the "Midnight Rule Act,"[1] why not provide that opportunity at any time an agency head believes post-promulgation review is appropriate? If Congress itself needs more flexibility and less cumbersome procedures to

[1] H.R. 34, Midnight Rule Act http://www.thomas.gov/cgi-bin/query/z?c111:H.R.34.IH:

review recently-issued regulations, adjustments to the Congressional Review Act may be appropriate. But again, there is no reason that Congress' institutional or constitutional interests differ in the immediate wake of an election than at other times. Adjustments to the Congressional review process should be made to apply at all times, not merely in a quadrennial window.

Congress should also improve its own institutional capability to determine whether regulations have, in fact, been fully and appropriately considered. Stakeholders dissatisfied with regulatory outcomes often appeal to the courts and to Congress. Congress reviews and controls regulatory actions in oversight hearings, through the CRA, in appropriations riders (for instance, prohibiting the use of funds to enforce a disfavored regulation) and in other legislation (for instance, legislatively repealing specified regulations as part of a reauthorization or other substantive legislation). There debates are normally conducted in the context of specific regulations. But Congress currently lacks a strong institutional ability to assess claims that regulations were inadequately considered or justified. A Congressional Office of Regulatory Analysis (CORA) would give Congress improved ability to assess such claims, both generally and in the context of specific regulatory controversies.

Regulatory Permanence

The problem of one administration binding its successor has generated controversy at least since *Marbury v. Madison*. Yet the fundamental rule is undisputed. A President holds power until his term ends. Any procedurally appropriate action by an incumbent President has continuing authority to the extent that the statute or other authority for the action provides. There is no constitutional basis on which to distinguish an action taken on January 19 of the year following a presidential election from an action taken two days later. Nor is there any basis in existing administrative law to make such a distinction.

Furthermore, the problems of the actions of one administration binding a successor, or the public, beyond its term exists because of the permanent nature of regulations, not because of the election cycle. If there is something objectionable about an administration issuing rules that are binding (on a successor or the public) beyond its own tenure, the solution is to make those rules impermanent, for instance through sunset provisions.

H.R. 34[2] would provide new agency heads the opportunity to repeal regulations issued in the last 90 days of a Presidential term. If this provision is intended to allow a new administration to establish its own policies, what is the principled basis for a three month window? Is a bad regulation (however that assessment is arrived at) any less bad because it was issued in October rather than December, or because it has been effective for three months rather than four?

[2] H.R. 34, Midnight Rule Act http://www.thomas.gov/cgi-bin/query/z?c111:H.R.34.IH:

If Congress is concerned about the politically dead hand of one administration binding the next, why not sunset all regulations issued by any administration at the end of the first year of a successor's term? This would allow an incoming administration to review the choices of predecessor comprehensively, not merely based on accidents of the calendar. If a complete review of the Code of Federal Regulations might prove too daunting for an incoming administration, then a comprehensive sunset provision (for instance, on a four year cycle) might be preferable.

Whatever remedies Congress chooses, it should act with an eye toward sound constitutional and administrative principles. Supporters of a review power for incoming administrations should consider whether they support granting the same review authority to whoever succeeds President Obama. Would Congress wish to grant the powers proposed to Obama's agency heads to their successors appointed by a President Palin? Our government of separated and limited powers is designed to limit abuses of power and abrupt swings of policy. A party temporarily enjoying strong positions in two branches would be ill-advised to grant too extensive powers or sweep aside institutional checks and balances in a predecessor's policies with its own.

Additional problems with H.R. 34

Even if Congress believes there is a problem with "midnight" regulation deserving a specific remedy, H.R. 34 has several flaws that require attention.

First H.R. 34 is unclear about the status of a predecessor regulation when a "midnight" regulation is revoked by a new agency head. Regulations are rarely entirely new. Many regulations replace existing regulations. Occasionally regulations are simply repealed. If a new agency head revokes a regulation issued by their predecessor, is the previous regulation revived? What about a regulation that is simply repealed? If an altered or repealed regulation is revived, isn't some notice to regulated entities required? If Congress adopts H.R. 34, some provision for determining the effect of an agency head's revocation on a regulation that was repealed or amended by the previous administration is necessary. Further, some provision for adequate notice and establishing an effective date will be required.

Second, H.R. 34 appears to dispense with the Administrative Procedures Act's requirements for notice and comment on rulemakings entirely. There is no requirement that an incoming agency head give notice to affected parties that the agency is contemplating repeal of the regulation. There is no opportunity for public comment on that decision. If a primary purpose of "midnight" regulation reform is to ensure adequate notice and consideration, allowing regulatory action without either notice or comment is an odd cure. This is especially the case if the intent of H.R. 34 is to allow an incoming agency head to terminate a rulemaking proceeding entirely. As a general rule, once an agency commences a rulemaking proceeding, a reasoned explanation for terminating the proceeding without action is required. The legislation should address what sort of explanation (if any) for an agency head's dedision is required.

Third, H.R. 34 could be read to make the decision of a new agency head wholly un-reviewable by the courts. The termination of a rulemaking proceeding normally is reviewable in court under standards similar to a decision to issue a new regulation. If an agency head can revoke a regulation and terminate a rulemaking proceeding without notice, comment, or explanation, there appears to be no basis or record which a court could review. Lack of judicial review would allow incoming agency heads to act in a wholly arbitrary and capricious manner: again an odd remedy for legislation intended to promote adequate consideration and review of regulations.

A narrower focus?

A narrower critique of regulatory actions of an outgoing administration might focus on actions between election day and inauguration day. When party in power is changing there is a sense in which the negative verdict of the voters can be seen as delegitimizing the policy choices of the outgoing administration. In addition, there is a danger that an administration in that position might make politically unpopular which it was reluctant to make before the election. Decisions are made in order to avoid political accountability or public scrutiny and judgment, are clearly undesirable, even if they are administratively proper.

During the just-past transition, however, little such unaccountable rulemaking occurred. In May of 2008, then White House Chief of Staff Joshua Bolten issued a memorandum directing agency heads to complete actions they intended to take during the Bush Administration by November1. The memo included some exceptions, such as for public health and safety and judicial or legislative deadlines that should be unobjectionable in principle. As a result, major regulatory decisions of the Bush administration were made and known well before the election. Indeed, some of those decisions were discussed in the campaign. The competitors for the Presidency had the opportunity to proclaim their support for or opposition to those policies, and voters were able to incorporate those decisions into their voting choices.

Indeed, most of the criticism at the Subcommittee's hearing is alleged violations of the Bush Administration of its own policies as enunciated in the Bolten Memo. If Congress wishes to avoid potential post-election mischief, it could take the principles embodied in the Bolten memorandum and incorporate those into statute. It may be preferable simply to prohibit an outgoing administration from issuing final regulations following the election of a successor than to have regulations issued, and then later withdrawn. A prohibition on final regulations would allow an incoming administration to review pending rulemakings, issue additional notices where desirable, and take final action according to normal APA requirements and judicial review.

The post-successor approach may not be as simple as it first appears. Congress would likely agree with certain of the exceptions in the Bolten Memo, such as those relating to public health and safety, and quite possibly extending to those covering statutory or judicial deadlines.

Further, the result of a post-election rulemaking ban will be the narrowing of the effective window in which any administration can exercise its full powers. While skeptics of regulation might cheer this restriction, if the regulatory authority granted the executive branch is legitimate, there is not legitimate reason to restrict that exercise to 15/16ths of the administration's tenure.[3] As suggested above, a preferable solution would be to make all regulations subject to greater review or easier repeal. Having one set of rules of three years and another set every fourth makes little sense.

Resolving Policy Disputes

Criticisms of Bush "midnight" regulations are not principally based on concerns about inadequate consideration, permanent application, or post-election evasions. Critics have significant policy differences with Bush Administration decisions. There is nothing wrong with stating those policy differences and attempting to reverse the Bush decisions. However, we should not be confused into thinking there was anything administratively improper about the scores of regulations issued during May (or earlier) through October or even later last year. Critics of those policies are in a strong position to revisit or reverse them. New administrators can open new rulemakings. Congress can exercise its authority under the Congressional Review Act, Congress could amend specific statutes to negate or replace existing regulations. Bush's critics may be impatient with the Constitutional and administrative processes required to take such steps. Yet those processes exist for important reasons, such as insuring adequate debate, consideration, and review of regulatory decisions. Taking constitutional and regulatory shortcuts in the haste to change particular policies is improper and foolish.

Summary

If Congress wishes to improve the quality of rulemaking and in insure public accountability, it should pursue regulatory reforms that ensure quality and accountability throughout a presidential administration. Congress should especially avoid approaches that grant an incoming administration extraordinary and un-reviewable power to repeal valid regulations. Congress should not grant administrative officials the power to take significant regulatory actions without adequate notice, comment, and judicial review.

Rather than adopting the inter-administration patch of H.R. 34, Congress should:

- Adopt comprehensive sunset legislation to enable successive administrations to review regulations and establish their own policies on an orderly basis.
- Establish a Congressional Office of Regulatory Analysis to improve its internal capability to review and assess regulatory choices by the executive branch.
- Make the Congressional Review Act easier to trigger and more flexible to use.

[3] Statement of Michael Abramowicz, http://judiciary.house.gov/hearings/pdf/Abramowicz090204.pdf .

ARTICLE FROM *CONSUMER FREEDOM*, SUBMITTED BY THE HONORABLE STEVE KING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IOWA, AND MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Kennedy's Pork Police Hit Iowa

April 2, 2002

Farmers be warned: Anti-pork activists from across the nation (including "labor leaders," "attorneys," and "animal welfare and community activists") will descend on Clear Lake, Iowa, on Friday, April 5 for the Second Annual Hog Summit, where they will "discuss strategies for battling the factory meat industry and for promoting sustainable hog farming."

Leading the way is Robert F. Kennedy, Jr., head of the Water Keeper Alliance, an anti-consumer outfit funded by the Moore Charitable Foundation, the Turner Foundation, and many others. [For more on where Water Keeper gets its money, visit ActivistCash.com.]

Robert Boyle, founder of environmental group Riverkeeper (the predecessor to Water Keeper), has said Kennedy is "very reckless," and has "assumed an arrogance above his intellectual stature," and attorney George Rodenhausen, who has worked with Kennedy, says he "separates himself from good science at times in order to aggressively pursue an issue and win."

Kennedy is turning that aggression against pork producers. Using racketeering laws meant to nab mobsters, he says his group "can put an end to this industry" -- and coincidentally put farmers out of work. He will not stop there. Referring to the poultry and beef industries, Kennedy last year: "We're starting with hogs. After the hogs, then we are going after the other ones."

How did a Kennedy get so interested pork? In 1984, Kennedy was arrested for criminal possession of heroin and sentenced to 800 hours of community service. He served it out by volunteering with the Hudson River Foundation (which later became Water Keeper) and after fulfilling his sentence stayed on as an attorney for the organization.

After his hiring of a convicted environmental criminal led eight members of the group's board to resign, Kennedy has seized control as the undisputed force behind Water Keeper. Kennedy has assembled a team of big-name attorneys to sue pork producers with the same tactics used against tobacco. He estimates potential "damages" of up to $13 billion. "We have attorneys now who have money and they know what they're doing," he has bragged.

The "sustainable" pork Kennedy and the other anti-consumer activists gathering in Clear Lake support costs considerably more than conventionally produced pork -- a system similar to the one Kennedy promotes is practiced in Sweden, where pork prices have risen as high as $12 per pound. Kennedys can afford that; average Americans cannot. But Kennedy believes multi-billion-dollar victories are in sight -- even if along the way he drives companies out of business, forces thousands of workers out of their jobs, and drives up the price of pork for consumers.

"We have lawyers with the deepest pockets, and they've agreed to fight the industry to the end," says Kennedy. "We're going to go after all of them."

URL: http://www.consumerfreedom.com/news_detail.cfm/headline/1371

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RESPONSE TO POST-HEARING QUESTIONS FROM ROBERT F. KENNEDY, JR., CHAIRMAN, WATERKEEPER ALLIANCE

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on "Midnight Regulations: Shining Some Light"
Wednesday, February 4, 2009

Robert F. Kennedy, Jr., Waterkeeper Alliance

Questions from the Honorable Steve Cohen, Chairman:

1. **Which, if any, of the Bush Administration's midnight rules dealing with environmental matters were promulgated in haste, without affording the public an adequate opportunity to submit comments or the agency an adequate opportunity to review public comments, or otherwise in contravention of good regulatory practices? What is the basis of your conclusion?**

While many of the rules published in the waning days of the Bush administration were objectionable for their weakening of environmental and public health protections; and frequently based on shoddy legal reasoning and issued despite overwhelming public opposition; a subset were also completed in a rushed timeframe that did not allow an adequate opportunity for public notice and comment, or provide sufficient time for agency staff to fully review, consider and respond to the comments the agency did receive. Examples of such rules and other actions are described below.

Land Use Planning and Drilling on Wilderness Lands
The Bush administration in the autumn of 2008 initiated a process to amend resource management plans (RMPs) on Bureau of Land Management (BLM) lands that would determine the management of tens of millions of acres of the nation's public lands. The RMPs were issued through an unusual administrative procedure that precluded the public's full involvement while limiting or eliminating the right to appeal – contrary to the agency's organic act. The most controversial of these amended land use plans occurred in Utah – where six plans governing 11 million acres were issued in a flurry of activity. Nearly one plan almost every week from August 1 to September 5, 2008 was finalized. While the public was given thirty days to protest each plan, with only seven days separating the release dates, the public effectively had only one week between each protest deadline to review and digest each 1,000-page plan, and submit protest letters to the BLM detailing concerns and inadequacies of plans which determined all aspects of management of Utah's renowned canyon country for the next 15-20 years. In essence, the plans were amended solely to fast track oil and gas drilling in places that were previously off limits.

After releasing the RMPs, on November 11, 2008, Election Day, the BLM announced the auction of 360,000 acres in a December 19th lease sale, including parcels near or adjacent to national treasures such as Arches National Park, Dinosaur National Monument, and Canyonlands National Park. The sale also included numerous parcels part of America's Redrock Wilderness Act now pending before Congress, as well as lands that the BLM had acknowledged as having

wilderness characteristics. This announcement was made without consulting with, or even advising, the National Park Service, an atypical move for a lease sale of parcels so close to National Park System protected areas. The Park Service formally requested that the BLM remove 93 parcels based on concerns about air and water quality, wildlife and serenity in the parks if drilling were to occur near their borders. However, BLM agreed to remove only 24 of those 93 parcels. Eventually, the BLM reduced the sale to over 170,000 acres, but left many of the most controversial parcels on the auctioning block for the December 19th sale.

While the results of the Utah auction were ultimately nullified by Secretary Salazar, the faulty RMPs remain in effect. Inappropriate oil and gas drilling could still occur in the states of Utah, Wyoming, and Montana until these RMPs are rescinded.

Oil Shale

On September 4, 2008, the Bureau of Land Management (BLM) released a Final Programmatic Environmental Impact Statement (PEIS) that modified the land-use plans of 1.9 million acres of public land in Colorado, Utah, and Wyoming to prioritize commercial oil shale development in this area. Although the PEIS conceded that the BLM lacked sufficient information about the likely impacts of development to justify issuing commercial leases, its release moved the leasing and subsequent development of these lands a step closer. In advancement of these goals, the Bureau of Land Management (BLM) issued regulations governing the commercial leasing of oil shale on November 18, 2008. Incredibly, these rules were promulgated despite BLM's own assessment that the agency had no practical means to assess the impacts of a future oil shale industry.[1]

Following the promulgation of the BLM commercial oil shale rules, the Bush administration issued three more "midnight" actions that sent the nation further along the oil shale path. First, the administration proposed new rules on December 24, 2008, that would exempt toxic wastes produced as a by product of oil shale extraction from being managed as hazardous waste by the Environmental Protection Agency. On January 8, 2009, the Bush administration issued an order revoking a President Hoover Executive Order from 1930 that protected 7.6 million acres of federal lands from further oil shale leasing. The decision was issued under a 'categorical exclusion,' exempting the agency from public comment and without going through the typical administrative channels. And on January 14, 2009, the BLM announced that the agency would accept new nominations for a second round of research, development, and demonstration (RD&D) leases. This new RD&D phase would allow companies to conduct commercial oil shale operations on 640-acre plots without proper environmental analysis for as long as 35 years.

Endangered Species Act

On August 15, 2008, the Bush administration issued proposed changes to the Endangered Species Act that significantly alter key provisions of the law and weaken protections for threaten and endangered organisms. For example, the regulations allow federal agencies to bypass consultation with scientists about whether new projects, such as the filling of wetlands and the

[1] BLM's Record of Decision definitively affirms the level of uncertainty within the agency, "Because there is no commercial oil shale industry in the United States, there is no data available on what, if any, extraction process will be commercially viable, and thus there is uncertainty about the precise impacts from commercial oil shale development." 73 Fed. Reg. 69453

construction of roads, will harm threatened wildlife. The original announcement of the changes only allowed for 30 days of public comment. It wasn't until after public outrage and requests from Congress that the administration extended the deadline for public comment another 30 days for a total of 60 days. However, the standard public comment period for a major rule change like the one proposed should have been no less than 90 days. On top of this, the Bush administration received approximately 300,000 comments from the public. They determined that 100,000 of these were form letters leaving 200,000 substantive comments for review. In October of 2008, a leaked, internal memo indicated that the administration would complete the review of these 200,000 comments in just 32 hours meaning that each comment would need to be reviewed in approximately 9 seconds. Despite strong public opposition to the proposed changes, the Bush administration finalized the rule on December 16th setting the effective date for the changes to begin on January 15th, 2009 – just days before leaving office. These regulations are a clear example of a rushed job that was designed to circumvent the public comment process in the administration's midnight hours.

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on "Midnight Regulations: Shining Some Light"
Wednesday, February 4, 2009

Robert F. Kennedy, Jr., Waterkeeper Alliance

Questions from the Honorable Trent Franks, Ranking Member:

1. **You have a number of policy concerns with the George W. Bush Administration's end-of-term regulations. Can you, however, identify for us the key administrative process concerns that you have about the way in which all presidential administrations go about promulgating midnight rules?**

Every administration has the authority to issue rules, guidance and other policy decisions up through the final day of a President's term. The term "midnight rule" connotes two different, and in some instances overlapping, features of rulemaking and other agency actions at the end of a President's term in office. First, it connotes rushing forward with a rule without having provided adequate time for public notice and comment (where required) or sufficient time for agency staff to adequately review, consider and respond to comments received. This might be called the "racing to meet the deadline at midnight" approach. Second, it connotes issuing final decisions at the very end of a term, even if they have been open for public comment for a considerable period, (and otherwise been more in keeping with both the letter and spirit of the requirements of the Administrative Procedure Act) because they are overwhelmingly unpopular and/or poorly reasoned and supported on legal and policy grounds. This second approach might be dubbed the "issuing the lousy decision under the cover of darkness at 'midnight'" approach. Unfortunately, there are numerous examples of the Bush administration having adopted both approaches to issuing rules in its waning days. That was the subject of my testimony.

2. **Do you admit that conservative critics had similarly strenuous policy criticisms to level against the Clinton Administration's midnight regulations?**

I am not aware of the details or nature of the objections that conservative critics may have had toward environmental decisions made in the waning days of the Clinton Administration.

RESPONSE TO POST-HEARING QUESTIONS FROM GARY D. BASS, PH.D.,
XECUTIVE DIRECTOR, OMB WATCH

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on "Midnight Regulations: Shining Some Light"
Wednesday, February 4, 2009

Dr. Gary Bass, PhD., OMB Watch

Questions from the Honorable Steve Cohen, Chairman:

1. **In your written statement, you contend that the true purpose of the so-called "Bolten memo" (Memorandum from Joshua B. Bolten, White House Chief of Staff, to Heads of Executive Departments and Agencies (May 9, 2008)) was to change when the clock reached midnight in order to insulate potentially controversial rules from disapproval by a new administration. If Congress enacted legislation like H.R. 34, do you think that an outgoing administration would simply move up its midnight regulatory period so as to avoid the possibility that the new administration would revise or revoke its rules?**

Yes.

Recent administrations have trended toward the use of greater and greater forethought in an attempt to secure their regulatory legacy. Although the virtue of the Bush administration's campaign is questionable, President Bush set a new standard by ensuring his batch of midnight rules were not only finalized but in effect by the time he left office.

In my opinion, future presidents are likely to follow the Bush precedent. If Congress legislates "a new midnight," as H.R. 34 would, future administrations are likely to adjust their regulatory planning accordingly. Additionally, Congress may want to tread carefully when it comes to restricting any administration's authority to implement statutes through its regulatory powers. Congress should respect the separation of powers doctrine that grants the executive branch power to implement the laws of the land. Slowing down or impeding that process could have substantial negative impact.

2. **You note in your written statement that some Bush Administration midnight rules favored special interests. Which ones? What is the basis of your conclusion?**

Of those listed in the Appendix of my written testimony, I believe every rule finalized by the Environmental Protection Agency, Department of Labor, Department of the Interior, and Department of Transportation will benefit special interests or holds the potential to benefit special interests. Allow me to elaborate.

Many of the Bush administration's midnight regulations are really more like *deregulations*. In other words, many of the rules eliminated requirements that had previously been imposed on what is referred to broadly as the regulated community. To the extent that the regulated community curries favor in Washington, mostly by employing lobbyists who push for these changes, I believe it is appropriate to deem them special interests – they advance their own agendas, regardless of whether it will benefit the public at large.

The mountaintop mining rule is an example of a deregulatory action that will surely benefit special interests, in this case, the mining industry. The rule will allow surface mining operations to dump excess waste into rivers and streams, a practice previously prohibited. The change will allow mining operations to cut their disposal costs but will exacerbate the environmental degradation associated with mountaintop mining and contaminate the water supply for rural communities, especially those in Appalachia.

In some cases, we can observe a direct link between special interest access and regulatory outcomes. Before finalizing a rule that exempts factory farms from reporting the air emissions generated by animal waste, officials from the White House and the U.S. Environmental Protection Agency met with representatives from the poultry, pork, and turkey farm lobbies.[1] While we cannot be certain what was discussed at the meeting because these meetings are not fully transparent, I believe it is safe to assume the lobbyists were pushing for the reporting exemption on behalf of their constituents. Many emergency responders at the state and local level, whose interests align more closely with the public, opposed the regulation.

We can also observe evidence of special interest influence in the rule that altered enforcement of the Family and Medical Leave Act. In one of the rule's most controversial provisions, the Department of Labor granted employers the right to speak directly to an employee's health care provider. Previously, employers were required to use an intermediary. In 2007, the National Association of Manufacturers, an industry lobbying group, said the provision requiring an intermediary "should be deleted."[2]

3. **You noted in your testimony that "William Wichterman, a former lobbyist for the NFL, worked in the White House Office of Public Liaison on a controversial midnight regulation dealing with the implementation of the Internet gambling law." Was Mr. Wichterman operating under a conflict of interest? Did Mr. Wichterman's work on the regulation adversely affect the regulatory process? Please explain the bases of your answers.**

To the best of my knowledge, neither my written testimony nor my oral remarks mention Mr. Wichterman or the Internet gambling rulemaking. I am not familiar enough with the rulemaking to answer your questions.

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[1] A list of meeting participants is available at http://www.whitehouse.gov/omb/oira/2050/meetings/811.html, "Meeting Record Regarding: CERCLA/EPCRA Notification Requirements and the Agricultural Sector, Date: 10/28/2008."

[2] The National Association of Manufacturers' comments are available at http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=0900006480279595.

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on "Midnight Regulations: Shining Some Light"
Wednesday, February 4, 2009

Dr. Gary Bass, PhD., OMB Watch

Questions from the Honorable Trent Franks, Ranking Member:

1. **Do you believe that there are ways in which we could strengthen the Office of Management and Budget's Office of Information and Regulatory Affairs' authorities and procedures that would help to mitigate problems you have observed in midnight rulemaking?**

I do not believe OIRA's role should be strengthened, but I do believe an alteration of its role would help to curb in the future some of the procedural abuses we observed during the Bush administration's midnight rulemaking campaign.

Table II in my written testimony details seven examples of rules that the Bush administration rushed through the usual process. To ensure rules were in effect by Jan. 20, 2009, the Bush administration at times sacrificed public participation and interagency review.

For those who believe OIRA plays a salutary role, the rush should be viewed negatively. In one instance, OIRA reviewed a Department of Health and Human Service proposed rule in only hours. The Equal Employment Opportunity Commission, which had an interest in the rulemaking, was not given an opportunity to comment thereby undercutting the stated purpose of OIRA's interagency review.

I believe OIRA's role has historically been detrimental. Regardless of the length of an OIRA review of any individual midnight rule, I do not believe it attempted – or, given more time, it would have attempted – to cure any of the procedural ills that plagued the rules I identified in Table II.

However, a substantial reorientation at OIRA would afford it the opportunity in the future to increase accountability in the rulemaking process near the end of a president's term. President Obama, or Congress, should begin this reorientation by removing from OIRA the responsibility of reviewing individual rules.

Instead, OIRA should assist agencies in developing regulatory plans, and then attempt to hold them accountable to those plans. Too often, regulations take several years to complete. Meanwhile, new problems arise. OIRA should play a planning role by asking agencies to think strategically about timelines for completing rules and to identify new problems for which regulation may be a solution. Then, the agencies should work efficiently to complete those rules,

without having to concern themselves with the formal OIRA review of individual rules. This entire process should occur transparently, so all interested parties know what to expect and the public can become aware of the process and outcome.

Had such a process been in place, the public, the regulated community, and Congress would have been able to hold the Bush administration accountable for its process failures. The Bush administration consistently maintained that it was not engaged in a midnight rulemaking campaign and that the level of regulatory activity in its final months was similar to that of other periods in the administration.[3]

Both qualitative and quantitative information rebut the administration's argument, as my written testimony indicates. But had the administration been forced to plan its actions, we all would have known whether the administration was truly planning to complete certain regulations in just a few months, or if the speed with which it finalized those regulations was borne of more mischievous motives.

2. Do you believe that if those reforms were adopted for rulemaking in general, we could substantially improve the entire rulemaking process?

Yes, I believe the review of each and every significant agency proposal is an inappropriate responsibility for OIRA to maintain, and that new responsibilities would improve rulemaking.

A process in which OIRA focuses on assisting agency's in planning their regulatory actions and holding them accountable for delay would improve federal rulemaking. When rulemakings lag or when agencies fail to address emerging hazards, the public remains at risk and taxpayer resources are used inefficiently.

Conducting a planning process transparently would aid both the public and the regulated community, as more advance notice would allow all interested parties to better plan their comments and better prepare for policy changes.

Ending the OIRA review of individual regulations would also benefit agency regulators by allowing them to operate in a less politically saturated environment. In the past, agency employees have complained that OIRA pressures them into making certain decisions or focusing on certain research.[4]

For example, OIRA has also been known to change for political reasons the substance of regulations. During the Environmental Protection Agency's most recent review of the national ambient air quality standard for ozone, OIRA changed during review the content of the rule.

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[3] For example, during an Oct. 31, 2008 press briefing, then-White House spokesman Tony Fratto said, "There's no great increase in the number of regulations that we're reviewing right now."

[4] For example, see the Union of Concerned Scientists report, "Interference at the EPA" which quotes dozens of EPA scientists complaining of OMB interference in their work. Available at http://www.ucsusa.org/assets/documents/scientific_integrity/interference-at-the-epa.pdf.

OIRA exercised this power despite lacking both the expertise and the legal responsibility under the enabling legislation to make final determinations on the substance of the regulation.[5]

3. You highlight several George W. Bush Administration rules that were proposed but not finalized as evidence of miduight regulations. Why do you not, however, consider those rules as evidence of regulatory restraint? Under your analysis, an outgoing President would seem to be damned if he finalized a rule and damned if he didn't finalize it, wouldn't he?

My written testimony mentions three Bush administration rules that were proposed but not finalized including a Labor Department rule proposed in August 2008 that would change the way occupational health risks are calculated, a Justice Department rule proposed in July 2008 that would expand the powers of state and local law enforcement officials, and a Mine Safety and Health Administration rule proposed in September 2008 that would require drug and alcohol testing for certain miners.

I do not believe my testimony uses these rules to illustrate the Bush administration's midnight rulemaking campaign. Indeed, these rules should not be considered midnight rules, since they were not finalized. Please allow me to clarify.

I used these rules as examples of regulations that are covered by section 1 of the Rahm Emanuel memo of Jan. 20, 2009. The intent of the memo was to set the Obama administration's policies for dealing with those regulations left by the Bush administration that did not yet carry the full force and effect of law.

The intent of section 1 was to put a halt, at least temporarily, on all rules, in any stage, that had not yet been submitted to the Office of the Federal Register for publication. The three rules I identified in my testimony were chosen because they represent rules of concern that I feared may have been on their way toward finalization. They were initiated late in the administration's term and were being rushed through a process that generally takes years. Such speed indicates that the outcome could be questionable.

Rules close to finalization are the most relevant to section 1 of the Emanuel memo since, absent section 1's requirements, rules largely formulated during the Bush administration could have been published during the Obama administration. Section 1's primary aim was to prevent any inter-administration conflict that might arise from such a situation.

4. Several of the rules on your list are not "significant" under Executive Order 12866. How should the President exercise control over those, since they aren't subject to oversight by the Office of Information and Regulatory Affairs?

I believe "nonsignificant" rules *are* subject to OIRA oversight. Although the current regulatory review executive order, E.O. 12866, only requires OIRA to review significant and economically

[5] A synopsis is available at http://www.ombwatch.org/node/3635.

significant rules, it does not prohibit agencies from submitting to OIRA those rules that have not been deemed significant.

More importantly, E.O. 12866 gives OIRA, not the agencies, the final say on the significance determination. Since significance is a wholly subjective term, agencies maintain little power. E.O. 12866 also requires OIRA review a list of *all* planned regulatory actions, thereby allowing OIRA to see each action at an early stage. Taken together, these provisions give OIRA the power to deem significant any rule, especially if it anticipates it will desire a more formal review of the rule.

Allow me to state for the record my displeasure with the procedures I have just described. E.O. 12866 vests in OIRA all relevant power – not just to make determinations about significance but to control the rulemaking process writ large. OIRA historically has served as a gatekeeper. It applies a political litmus test to rules submitted to it. For those that do not pass, OIRA concocts rationale for disapproval. OIRA's most popular methods include the application of cost-benefit balancing, questioning scientific studies and conclusions, and nearly interminable delay.

The President should exercise control over any regulation of his choosing, so long as that control falls within the boundaries of law. However, OIRA is not integral to his ability to exercise this control. (A more appropriate role for OIRA is detailed in the answer to questions 1 and 2.) The president should exercise control over rules by communicating his priorities and preferences to the cabinet officials and agency heads he appoints and the Senate confirms – the officials empowered to write and enforce regulations under statute.

5. In light of his constitutional obligation to "take Care that the Laws be faithfully executed," what should an outgoing President do about rules such as those on your list that were subject to deadlines set by Congress?

Although I am critical of the Bush administration's midnight regulations campaign, let me be clear that I support the continuation of regulatory functions and rulemaking through the end of a president's term. In the case of the Bush administration, I object to their decisions to sacrifice due process and their clear push to advance special interests instead of the public interest. I would have objected to these rules if they had been done at the beginning, middle or end of the administration. It is not midnight regulations, per se, that I object to; it is poorly crafted or misguided regulation that is offensive. When the spirit of public participation is vitiated so too is the rulemaking itself.

When Congress sets a deadline for a rulemaking, the president and agency heads should ensure the deadline is met, regardless of when that deadline occurs. If a statutory deadline falls near the end of a president's term, he should work to meet it. If a statutory deadline falls near the beginning of an incoming president's term, the outgoing president should work to lay the groundwork for the regulation and ensure a smooth transition.

It is inevitable that outgoing administrations will look inward at its legacy and think about completing work it has not fully addressed. Hence, we should always expect that rulemaking will pick up steam at the end of administrations.

RESPONSE TO POST-HEARING QUESTIONS FROM LYNN RHINEHART, ASSOCIATE GENERAL COUNSEL, AFL-CIO

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on "Midnight Regulations: Shining Some Light"
Wednesday, February 4, 2009

Lynn Rhinehart, AFL-CIO

Questions from the Honorable Steve Cohen, Chairman:

1. **How does the Bush Administration's record on midnight rules in the labor and employment area compare to that of its predecessors – Democratic and Republican – in terms of both process and substance?**

   As many observers have noted[1], it is typical for outgoing administrations – both Democratic and Republican – to increase their regulatory output at the end of their terms. The Bush Administration's record differs from prior administrations – and from Democratic administrations – in that the Labor Department's rulemakings at the end of the Bush Administration's term, with rare exception, were anti-worker and anti-labor. They weakened worker protections and imposed additional burdens on labor organizations. In addition, the Bush Administration rushed many of its last-minute rules through the process, allowing only a minimal amount of time for public comment. This differed from the rules issued at the end of the Clinton Administration, which had been the subject of extensive and lengthy rulemaking processes, including extensive public comment periods.

2. **You identify in your written statement various options available to Congress and the Obama Administration to address objectionable Bush Administration midnight rules. Might legal challenges by adversely affected parties be another effective way to deal with these rules? Do you anticipate legal challenges – under the Administrative Procedure Act or otherwise – to any of the labor and employment rules that you highlight in your statement? Which ones? Will the suits likely be successful? What limitations do such suits have as means of redress?**

   Lawsuits are not a particularly effective or quick way of dealing with problematic midnight rules, for two reasons. First, unless the reviewing court orders a stay of the regulations during the pendency of the litigation, or the agency voluntarily agrees to a stay, the problematic rules remain in effect during the legal challenge, which can take years. Second, it is difficult to win a legal challenge to a rule under the APA. A challenge to a rule will only succeed if the plaintiff can show that the agency violated the

[1] See, e.g., Anne Joseph O'Connell, "Cleaning Up and Launching Ahead: What President Obama Can Learn From Previous Administrations in Establishing his Regulatory Agenda", Center for American Progress (January 2009); Jerry Brito and Veronique de Rugy, "For Whom the Bell Tolls: The Midnight Regulation Phenomenon", Mercatus Center (December 2008).

procedural requirements of the APA, or that the rule is arbitrary or capricious or contrary to the underlying statute authorizing the rule in question. If an agency follows the APA's procedural requirements (even minimally) and can justify the rule based on the record and the underlying statute, a legal challenge to the rule is unlikely to succeed.

Legal challenges have been brought to the H-2A and H-2B rules. Neither court has issued an injunction staying the new rules during the pendency of the litigation. The AFL-CIO is not a party to the H-2A or H-2B legal challenges, and as such, it does not seem appropriate for me to address the specifics of the litigation or its likely outcome.

3. **What do the Bush Administration's H-2A and H-2B immigration-related rules referenced in your written statement accomplish, and what adverse long-term effects do you think they will have?**

The H-2A and H-2B visa rules accomplish a dramatic restructuring of the H-2A and H-2B visa process in a way that significantly weakens protections for both U.S. and foreign workers. If allowed to stand, the new rules will expose workers to exploitation and drive down labor standards in communities across the United States. The new H-2A and H-2B rules replace a system of government oversight and review, under which the government investigated employers' claims that insufficient U.S. workers were available for the jobs for which employers were seeking H-2A or H-2B workers, with a self-attestation system under which employers merely attest that they have followed the requirements to search for U.S. workers before seeking to hire foreign workers for the jobs. The new rules eliminated provisions that provided incentives for employers to hire U.S. workers, and expanded the definition of "temporary" so that jobs up to three years in duration can now be filled with "temporary" foreign workers. We are very concerned that under these new rules, employers will have much easier access to foreign workers, meaning that employers will have little or no economic incentive to meet the economic demands of U.S. workers seeking a better wage. This will drive down wage standards and harm workers and communities across the United States.

4. **In what respects did the Bush Administration treat labor less favorably than management in its midnight rule-making?**

Almost all of the Bush Administration Labor Department's midnight rules benefited corporations to the detriment of workers and unions. From the Labor Department's rules on investment advice, which made workers participating in 401(k) plans vulnerable to receiving conflicted investment advice, to the H-2A and H-2B rules that weakened or eliminated important worker protections in these programs, and more, the Labor Department's midnight rules went essentially in one direction – to ease the burden on businesses while weakening worker protections and imposing greater burdens on labor organizations.

5. **Were any of the labor and employment rules you identify in your written statement the product of organized lobbying efforts conducted by employer representatives and other special interests? Please explain.**

It is my understanding that representatives of the business community, the grower community, and the financial services community, among others, were actively involved in pushing many of the reforms outlined in my testimony, including but not limited to the investment advice rule, changes to the Family and Medical Leave Act rules, and the H-2A and H-2B rules. I do not have specific details on their involvement, but some of this information might be available from the Labor Department or from the entities' lobbying disclosure reports.

Questions from the Honorable Trent Franks, Ranking Member:

1. **You have a number of concerns about the foibles of midnight rulemaking that you saw in the labor area during the George W. Bush Administration. What concerns do you have, however, that you believe are generalizable to midnight rulemaking in all areas and in any administration?**

It is not unusual for outgoing administrations to seek to finish rulemaking initiatives that were started during their tenure. Simply because a regulation is issued in an administration's final months does not in and of itself make the rule problematic. My main concern is with those last-minute rules that short-circuit the process and deny the public sufficient time to comment and participate in the process, as well as with last-minute rules that seem to undermine the spirit and/or letter of the underlying statute. For example, we are very concerned about midnight rules like the H-2A and H-2B rulemakings. These rules were rushed through the process by the Labor Department and took effect in the minimum 30 days rather than the 60 days that is more typical for significant rules of this sort. And the rules are inconsistent with the language and intent of the H-2A and H-2B programs, which are concerned with assuring that these visa programs do not deprive U.S. workers of employment or drive down wage standards.

2. **Do you believe that reforming administrative law procedures generally to provide for, e.g., stronger requirements for more transparency, greater public participation, greater negotiated rulemaking, and other ways of involving the public and stakeholders, would go some of the distance to improving the results of midnight rulemaking?**

The Administrative Procedure Act mandates that agencies give the public an opportunity to participate in the rulemaking process, and agencies typically – but not always – respect this requirement. In my view, the problems with midnight rulemaking are not so much caused by shortcomings in existing law, but rather are caused by misguided decisions by executive branch leaders who, in their zeal to cement the policy views of an outgoing administration, sometimes short-circuit the process or take action that appears contrary to the underlying statute.

3. **Do you believe that the Office of Management and Budget's Office of Information and Regulatory Affairs could be strengthened in ways that could help it to assure higher quality rulemaking in general and during the end of a presidential term? If so, what are those ways?**

OIRA already has a major role to play in reviewing agency rulemaking under Executive Order 12866. I do not believe OIRA's role should be enhanced. OIRA and OMB could help with the rulemaking process by working to ensure that agencies have sufficient resources to undertake quality and timely rulemakings. In addition, OIRA could work with agencies to help them meet internal rulemaking deadlines.

Questions from the Honorable Robert C. "Bobby" Scott:

1. The Family Medical Leave Act was enacted in 1993. This law has allowed millions of workers to welcome new children in their homes or address serious health conditions without losing their jobs. During these challenging economic times we must ensure that workers are able to take their Family and Medical Leave without putting their job – and ultimately their economic security – in jeopardy. Unfortunately, the Bush Administration changes to the FMLA made it harder for workers to use their leave. Do you have any recommendations on how to deal with portions of the Bush FMLA regulations that makes it harder for workers to use their leave?

We share your concern about the Bush Administration's changes to the FMLA regulations that make it more difficult for workers to use their leave. The Obama Administration's Labor Department can, and should, undertake a new notice-and-comment rulemaking to change the problematic provisions of the Bush Administration's rules, such as the provisions on procedures for employers contacting employees' health care providers, the provisions on substitution of paid leave, the time period for notification of unforeseeable leave, medical recertification issues, and more. If the Labor Department determines that legislative action would be useful in addressing these issues, it should work with Congress on amendments to the Family and Medical Leave Act to address these matters. Congress could help focus the Labor Department's attention on this issue by letting the Department know that this is a priority area of concern.

RESPONSE TO POST-HEARING QUESTIONS FROM VERONIQUE DE RUGY, PH.D., SENIOR RESEARCH FELLOW, MERCATUS CENTER AT GEORGE MASON UNIVERSITY

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on "Midnight Regulations: Shining Some Light"
Wednesday, February 4, 2009

Dr. Veronique de Rugy, PhD., Mercatus Institute at George Mason University

Questions from the Honorable Steve Cohen, Chairman:

1. **You contend in your written statement that the "midnight regulation phenomenon is problematic." Do you believe that the midnight rule-making activity of the just-concluded Bush Administration was more problematic than that of its predecessors? Put in more general terms, how does the Bush Administration's record compare with that of its predecessors?**

The term "midnight regulations" describes the dramatic spike in new regulations promulgated at the end of presidential terms, especially during transitions to an administration of the opposite party. This phenomenon is problematic because it is the result of a lack of presidential accountability during the midnight period—the time after the November election and before Inauguration Day. Midnight regulations, however, present another problem that receives little attention: the prospect that an increase in the number of regulations promulgated in a given period could overwhelm the institutional review process that serves to ensure that new regulations have been carefully considered, are based on sound evidence, and can justify their costs.
On the accountability problem, the Bush midnight regulations were less problematic than most administrations before him. This is because the Bush administration started pushing their midnight regulations out as soon as June of 2008. However, on the oversight front, the Bush midnight regulations were as problematic as his predecessors'.

2. **Why does it happen that, as you note in your written statement, midnight rules so often survive a change in administration? Why doesn't the new administration simply rescind or modify a rule with which it disagrees after allowing an opportunity for public notice and comment?**

One would think that an incoming president could easily undo the midnight regulations of his predecessor. As it turns out, however, political and legal obstacles prevent extensive repeal. While it is true that, presidents can issue executive orders, proclamations, and rules to overturn actions taken by their predecessors and they can also block the implementation of the outgoing president's orders, more often than not, incoming presidents cannot alter orders set by their predecessors without paying a considerable political price or confronting serious legal obstacles. Also, as political scientists Howell and Mayer explain, "not only does it take time, but changing the status quo probably means taking on interest groups who are reticent to give up ground that

they have just won."[1] For instance, President George W. Bush experienced difficulties altering Clinton's January 2001 arsenic regulation. In spite of public outrage at the time the rule was issued, Bush faced considerable opposition when he tried to scrap the rule three months later, and ultimately lost the battle.

In fact, a recent empirical study by Jason M. Loring and Liam R. Roth confirms that passing midnight regulations is a winning strategy for an outgoing president who wishes to project his influence into the future.[2] The authors track the regulations passed in the midnight period of former presidents Clinton and George H. W. Bush, as well as the incoming administrations' responses to those regulations. Based on a selected sample of midnight regulations passed by those presidents, the authors find that only 9 percent of George H. W. Bush's last-minute regulations were later repealed, and 43 percent were accepted without any amendment by the Clinton administration.[3] By the same token, only 3 percent of President Clinton's midnight regulations were later repealed by the George W. Bush administration, and a staggering 82 percent of them were accepted without any changes.[4]

3. **You note in your written statement that the midnight rule-making period is the "perfect time for an administration or its party to favor a particular special interest without fear that it will be held accountable" (p. 9). Do you agree that, as some critics have contended, the administration of President George W. Bush favored politically powerful special interests in its midnight rule-making? How does the Bush Administration's record compare with that of its predecessors in this regard?**

Every president rewards or favors politically powerful interest groups in his last months in office. President Bush was no different, or worse than his predecessors.

4. **Is the "midnight regulation phenomenon" you identify in your written statement limited to executive-branch agencies or does it also extend to independent administrative agencies (e.g., the Securities and Exchange Commission)? Should we be concerned about independent administrative agencies in the context of discussing midnight rulemaking?**

I haven't looked at independent administrative agencies. However, I would imagine that the motives and incentives behind the midnight phenomenon exist for independent agencies. So yes, we should probably be concerned.

5. **You note in your written statement that proposed midnight rules often overwhelm the regulatory review process conducted by OMB's Office of Information and Regulatory Affairs (OIRA). Are you also concerned that proposed midnight rules**

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[1] William G. Howell and Kenneth R. Mayer, "The Last One Hundred Days," *Presidential Studies Quarterly* 35 (2005): 534.
[2] Jason M. Loring and Liam R. Roth, "After Midnight: The Durability of the 'Midnight' Regulations Passed By the Two Previous Outgoing Administrations," *Wake Forest Law Review* 40 (2005): 1441.
[3] Ibid., 1456.
[4] Ibid.

often overwhelm the review process conduct by the promulgating agencies? If so, what solution do you propose?

It is likely that the staff at the agency who need to make sure they are doing a good review before they send the regulations to OIRA are also swamped during the midnight period. And it is likely that the agency's review process might also be affected, but it shouldn't matter if OIRA credibly is such that it is able to stop inappropriate or insufficient regulatory review. In other words, it seems that the solution revolves around fixing the OIRA problem. Besides, it is not obvious to me what one can do to fix the problem at the agency level if there is one.

Questions for the Record
Subcommittee on Commercial and Administrative Law,
Hearing on "Midnight Regulations: Shining Some Light,"
Wednesday, February 4, 2009

Dr. Veronique de Rugy, PhD., Mercatus Institute at George Mason University

Questions from the Honorable Trent Franks, Ranking Member:

1. **In your view, will midnight regulations – or something like them – arise in any administration, no matter what we do?**

It is likely that it will. The most common explanation in the literature for the midnight regulation phenomenon is the attempt by agencies and the administration to extend their influence into the future. Knowing its successor will not share its policies or priorities, there is an incentive to write in stone as many of its policies as possible.

It means that as long as presidents will leave the White House, there will midnight regulations. The question is one of degree.

2. **You advocate forcefully for the strengthening of OMB's Office of Information and Regulatory Affairs as the key means of guarding against faulty midnight regulations.**

   a. **Do you believe that the authorities vested in OIRA by the series of Executive Orders under which it operates ought to be strengthened and codified?**

   Yes I do.

   b. **In either case, what are the top five things we can do to strengthen OIRA toward the end of guarding against faulty midnight regulations?**

Give OIRA an independent status
Give OIRA more resources to hire more employees to conduct better oversight during the midnight period.
Cap the number of regulation/per OIRA employee during the midnight period
Put in place a regulatory budget.
Extend and strengthen the use of cost benefit analysis within each agency

3. Are there other specific measures we should take to make sure that OIRA has the tools and time it needs to assure that key rulemaking procedures – like cost-benefit and cost-effectiveness analyses – are performed adequately no matter what the context?

Economists generally believe that cost-benefit analysis is a useful tool for helping decision makers better assess the impact of policies. Cost-benefit analysis can help decision makers select policies with positive net social benefits; identify the likely winners and losers from a policy; evaluate the impact of the net benefits or costs of different policies; and assess the potential value of new information. Cost-benefit analysis can also help identify key deficiencies in our understanding of a particular policy issue, and show how sensitive the results are to different assumptions.

In short, as President Obama's OIRA administrator nominee Cass Sunstein has shown, cost-benefit analysis can provide a useful framework for understanding the implications of different policy choices and whether a proposed regulation offers social net benefits It seems extremely important to improve how regulatory cost benefit analysis is done.

In 2004, Bob Hahn and Patrick Dudley wrote a paper to assess systematically how government cost-benefit analysis has changed over time and its quality. The data set they used for assessing the quality of regulatory analysis is the largest assembled to date for this purpose. The seventy-four analyses they examined span the Reagan, the first Bush and the Clinton administrations.

Their three key findings are: "First, a significant percentage of the analyses in all three administrations do not provide some very basic economic information, such as information on net benefits and policy alternatives. For example, over 70% of the analyses in the sample failed to provide any quantitative information on net benefits. Second, there is no clear trend in the quality of cost-benefit analysis across administrations. Third, there is a great deal of variation in the quality of individual cost-benefit analyses."

That should be changed.

Finally, scholars differ over the extent to which cost-benefit analysis should be used as a tool for making policy choices. However, very respected scholars like Cass Sunstein or American Enterprise Institute Bob Hahn, cost benefit analysis should be extended to independent agencies

4. Are there other measures we should take to make sure that agencies have the tools and time they need to contribute effectively to the preparation of end-of-term rules and other rules?

I am not sure about what should be done at the agency level. A regulatory budget could be a good idea but it has proven to be politically difficult to put in place. However, short of a regulatory budget, here is an idea about how to address the midnight regulation phenomenon.

My colleague Jerry Brito and I made a series of suggestions in the winter 2009 American University Law Review article called "Midnight Regulations and Regulatory Review." The main one is the following:

In theory, an agency should be allowed to regulate as much as it needs to, as long as there is good economic analysis that justifies the need. The OIRA review process is the check that helps ensure sound economic analysis of significant regulations. Therefore, a less restrictive and more politically feasible solution to the midnight regulations problem is to cap the *number* of significant regulations an agency is allowed to submit to OIRA during a given period.

Because OIRA has up to 90 days to review significant regulations,[5] a rolling 90-day window might be an appropriate period. That is, an agency would be allowed to submit no more than *X* number of significant regulations for review in any 90-day period. The number *X* would be based on the resources—budget and staff—available to OIRA. The number should be well above the "normal" levels of regulatory activity we see during non-midnight periods; the cap should only be approached during the periods of dramatic spikes seen at the end of presidential terms.

A flexible number cap is a practical approach. Unlike a regulatory budget approach, which has been politically unfeasible so far, there would be no limit to the total cost of an agency's regulations.[6] An agency would be able to regulate as it sees fit. The only limitation is that it cannot exceed OIRA's capacity to adequately check its work. In practice, this means that an agency will not be able to promulgate an abnormally large number of significant regulations in a short period, so the agency must therefore prioritize its proposed regulations.

Capping the *number* of regulations an agency can submit in a given period rather than the *total cost* also makes sense because there are fixed costs for reviewing each rule. When a regulation is submitted to OIRA, a "desk officer" that is specialized in regulations from a particular set of agencies conducts the review.[7] A spike in the number of reviews a particular desk officer must complete would seem to affect the quality of his work more than the total cost of the regulations. Additionally, if the desk officer charged with reviewing Department of Education regulations is flooded with proposed regulations from that agency, for example, the work cannot simply be shifted to the Homeland Security desk officer. It therefore makes sense to cap the number of regulations that can be submitted to OIRA by agency rather than in total.

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[5] Executive Order 12866, § 6(b)(2)(B).
[6] Currently the United Kingdom has designed such a budget cap which is scheduled to start a trial run in 2009 and be fully operational in 2010.
[7] Copeland, *Federal Rulemaking*, 1257, 1273–74, 1277.

Finally, because the number cap would exist only to ensure quality review, not to limit the amount of regulation, it should be based on the resources available to OIRA and especially the desk officers and other regulatory review staff available.[8] What this means is that the ceiling on the number of regulations that can be processed by OIRA in a given period can be raised by increasing the resources available to it.[9] In this way, Congress and the president can always choose to allow for regulatory spikes while preserving quality review.[10]

A cap could be implemented by presidential directive or by statute. The regulatory review process is completely a creature of executive order, the constitutionality of which has largely been recognized.[11] If the president has the authority to devise and enforce a system that checks his administration's regulatory decision making, it follows that he should be able to outline procedural rules to ensure that system's quality. Congress has also previously flirted with the idea of codifying the OIRA regulatory review process into law,[12] and if it ever did, it would be able to include our proposed safeguards.

5. What are the key things that you believe we *must* do to assure that the Obama Administration does not engage in faulty midnight regulations?

The Obama administration should put in place a series of reform now rather then later. First, it should give more powers to the OIRA administrator. Second, it should implement start capping the *number* of regulations an agency can submit in a given period as explained above.

6. Do you believe that broader reform of the current process for developing and promulgating regulations would be a better means of solving problems we encounter with midnight regulations?

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[8] Curtis W. Copeland explains the staff resources available to OIRA:

> When OIRA was created in fiscal year 1981, the office had a "full-time equivalent" (FTE) ceiling of 90 staff members. By 1997, OIRA's FTE allocation had declined to 47—a nearly 50 percent reduction. Although Executive Order 12,866 (issued in late 1993) permitted OIRA to focus its resources on "significant" rules, this decline in OIRA staffing also occurred during a period in which regulatory agencies' staffing and budgetary levels were increasing and OIRA was given a number of new statutory responsibilities.
>
> Starting in 2001, OIRA's staffing authorization began to increase somewhat, and by 2003 it stood at 55 FTEs. Between 2001 and 2003, OIRA hired five new staff members in such fields as epidemiology, risk assessment, engineering, and health economics. OIRA representatives indicated that these new hires reflected the increasing importance of science-based regulation in federal agencies, and would enable OIRA to ask penetrating technical questions about agency proposals.

Copeland, *Federal Rulemaking*, 1257, 1293.

[9] In fact, some have argued that OIRA's resources at present are inadequate and should be increased. Robert Hahn and Robert E. Litan, "Why Congress Should Increase Funding for OMB Review of Regulation" Brookings Institution (October 2003) http://www.brookings.edu/opinions/2003/10_ombregulation_litan.aspx.

[10] According to Copeland (2004), "Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs," CRS RL32397 p. 29 "OIRA does not have a specific line item in the budget, so its funding is part of OMB's appropriation. Similarly, OIRA's staffing levels are allocated from OMB's totals." This means that either Congress could increase OIRA's budget by creating a line item, or the president could increase the budget by prioritizing the distribution of OMB's budget differently.

[11] Ibid., "Although some observers continue to hold that view."

[12] Copeland, *Federal Rulemaking*,., 1306–07.

Yes. It is obvious that the midnight regulation phenomenon is only a symptom of the problems with the regulatory process in general.

7. **How would you measure whether the George W. Bush Administration's attempt to minimize midnight regulations through Joshua Bolten's May 9, 2008 memorandum to Department and Agency heads had any effect? For example, the Bush Administration's statistics for the post-election quarter look better than those of the Clinton Administration – 21,200 pages vs. 26,500 pages in the Federal Register, and 100 regulations vs. 143 regulations. The Bolten memo wasn't a complete moratorium on post-November regulations, but it looks like it had some effect, doesn't it?**

Unlike previous administrations, the Bush Administration made remarkable attempt to "resist the historical tendency of administrations to increase regulatory activity in their final months."[13] On May 9, 2008, White House Chief of Staff Joahua B. Bolten sent a memo to all executive agency heads instructing them to abstain from regulation in the last months of the administration except in extraordinary circumstances.[14] According to the memo, new regulations were to be proposed no later than June 1, and issued as final no later than November 1.[15] If the memo had had its intended effect, we would not have seen a spike during the midnight period. Unfortunately, the memo was not successful.

In the first seven years of the Bush Administration, the average number of significant regulations reviewed by OIRA was 7 per month.[16] Over the last three months of the term, however, that number doubled to 14.[17] Despite the Bolten Memo, OIRA reviewed 42 significant regulations in the period between Election Day and Inauguration Day.[18] This is little different from the 48 significant regulations Clinton's OIRA reviewed during its midnight period.[19]

While one could argue that there might have been a greater spike but for the Bolten Memo, the data suggest the memo's June 1 deadline for agencies to wrap up their regulations merely pushed back the beginning of the midnight period. During the period of June 1 to November 1 at the end of their respective presidencies, Bill Clinton's OIRA reviewed 36 significant regulations, while George H.W. Bush's OIRA reviewed 43.[20] During the June-November 2008 period covered by the Bolten Memo, however, that number grew to 58 significant regulations reviewed.[21]

The Bolten Memo created an incentive for agencies to issue regulations before the November 4 election, while the Administration was still technically politically accountable. That is a laudable achievement. However, it seems as if the toll exerted on OIRA was just as strong during the June-November period as during the midnight period proper.

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[13] *See* Memorandum from Joshua B. Bolten, White House Chief of Staff, to Heads of Executive Departments and Agencies (May 9, 2008), *available at* http://www.ombwatch.org/regs/PDFs/BoltenMemo050908.pdf [hereinafter Boltem Memo].
[14] *Id.*
[15] *Id.*
[16] Monthly figures generated using OIRA's online "review counts" database. See RegInfo.gov, Review Counts, http://www.reginfo.gov/public/do/coCountsSearchInit?action=init (last visited Aug. 15, 2008).
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*

8. Are there other ways by which we can tell whether President George W. Bush's post-election regulatory record was better or worse than President Clinton's? If so, what do they tell us?

I think the most important record set by President Bush and his administration is that most the midnight regulations were issued early in the midnight period rather than later. The bulk of the midnight regulations went through before the end of December. Very few rules went through in January. The reverse is true for the Clinton Administration. In January 2001, until the last minutes, the administration was still busy pushing regulations out the door. That didn't happen with the Bush administration. The process was more ordering and the Bush administration was far more accountable.

9. Please offer any additional views you would like to place before the Subcommittee, including, for example, your views on testimony offered at the hearing by other witnesses.

The most common way presidents have dealt with their predecessor's last minute regulatory activity has been to delay the effects of new rules and to rescind unpublished rules.

A new regulation cannot gain the force of law until it is published in the *Federal Register*.[22] Even then, once a regulation is published in the *Federal Register*, it will not become effective until later in order to allow regulated parties to come into compliance.[23] The minimum time in which a new rule can become effective after publication is thirty days, although agencies often set effective dates of sixty days or more. At any point before a proposed regulation is published in the *Federal Register*, the agency may rescind the rule at will.[24] Once a regulation is published, however, to repeal it an agency must engage in the same type of lengthy notice and comment rulemaking process it undertook to create the regulation.

With these constraints in mind, we see that the most direct course for a new president to address his predecessor's midnight activity is to "stop the presses" at the *Federal Register* until the new administration can review unpublished rules and decide which to keep and which to rescind. As for regulations that have recently been published but have not yet become effective, the president can delay their effective dates, but not postpone them indefinitely.[25]

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[22] 5 U.S.C. § 552(a)(1)(D) (2006).

[23] 5 U.S.C. § 553(d) (2006).

[24] *See* William M. Jack, *Taking Care That Presidential Oversight of the Regulatory Process is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions Under the Bush Administration's Card Memorandum*, 54 ADMIN. L. REV. 1479, 1488–97 (2002) (using *Kennecot Utah Copper Corp. v. Dep't of Interior*, 88 F.3d 1191 (D.C. Cir. 1996), as an example).

[25] *Id.* at 1503–11 (explaining, *inter alia*, that while the effective dates of rules may be delayed for good cause, they cannot be delayed indefinitely; and that courts will likely be skeptical of a simultaneous across the board claim of good cause by a large number of agencies). *See generally* Peter D. Holmes, *Paradise Postponed: Suspensions of Agency Rules*, 65 N.C. L. REV. 645 (1987) (outlining the history of suspension of agency regulations). Whether delay of effective dates is legally problematic or not, the fact remains that Presidents Reagan, Clinton, and Bush (each one a president who took over from the opposite party) have ordered the preceding administration's rules

This is precisely what Ronald Reagan did in Executive Order 12,291 less than a month after he took office.[26] As explained in Part II.B.1, *supra*, that order created the formal regulatory review process we know today. It also suspended the effective dates of recently published rules "to permit reconsideration in accordance with [the] Order," and directed agencies to refrain from publishing any new major rules until they had undergone regulatory review.

Since Reagan, every president taking over from a president of the opposite party has ordered a similar regulatory moratorium. Two days after taking office, President Clinton issued a directive to all agencies ordering them to "withdraw . . . all regulations that have not yet been published in the *Federal Register*."[27] George W. Bush issued a similar directive the day he took office, ordering agencies to halt rules from being published in the *Federal Register* and "temporarily postpone the effective date of [published] regulations for 60 days."[28]

The Congressional Review Act of 1996 (CRA) presents another tool to address the problem of midnight regulations.[29] It creates an expedited process for Congress to repeal any regulation by a simple majority vote in each house.[30]

The CRA requires agencies to submit to Congress all rules before they can take effect. In order for the CRA's expedited repeal procedures to control, a joint resolution of disapproval must be introduced in Congress within sixty days of an agency submission. If a resolution of disapproval passes both houses of Congress and the President signs it, then the regulation is repealed and "is treated as though the rule never took effect." Additionally, the agency may not issue another rule that is "substantially the same" unless later "specifically authorized" by subsequent legislation.[31]

Therefore, to the extent Congress is concerned that regulations issued during the midnight period suffer from a lack of accountability or regulatory review, it could quickly act to overturn them. However, the CRA will only be an effective check on midnight regulations if the incoming president and the Congress are of the same party. If the party of the outgoing president controls the Congress, and the incoming president is of the opposite party, then there is little reason to expect that the Congress will use its authority under the CRA to repeal midnight regulations. Conversely, if the president is of the same party as his predecessor, and the Congress is of the opposite party, it is likely that the new president will veto a congressional attempt to overturn his predecessor's last-minute rules.

It should therefore not be surprising that the CRA has only been used to successfully repeal a regulation once. The target was a controversial OSHA ergonomics regulation promulgated in the

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delayed as a first order of business. Jack, *supra* note 141, at 1482 & n.11.

[26] *See* Exec. Order No. 12,291, 3 C.F.R. 127, 131–32 (1982) ("Agencies shall . . . suspend or postpone the effective dates of all major rules that they have promulgated in final form as of the date of this Order, but that have not yet become effective . . . .").

[27] Regulatory Review, 58 Fed. Reg. 6074 (Jan. 24, 1993).

[28] Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001).

[29] 5 U.S.C. § 801 (2006).

[30] *See* Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 100–101 (1997) (explaining the expediting nature of the Act).

[31] 5 U.S.C. § 801(b)(2) (2006).

last few months of the Clinton Administration. It was disapproved by joint resolution of a Republican-controlled Congress and signed by President Bush.

Despite its practical constraints, congressional action to check midnight regulatory activity may yet be a useful tool. First, it should be noted that Congress has the inherent power to repeal federal regulations at any time and the CRA exists only to facilitate and expedite the process of congressional regulatory review and disapproval. With this in mind, one approach a new President could take is to conduct a review of rules promulgated during his predecessor's midnight period, identify any rules that are worthy candidates for repeal, and submit them to Congress as a package. The package approach can make it easier for Congress to take action on midnight regulations by focusing its attention on just one resolution. A package might also help overcome the influence that special interests opposed to repeal would otherwise exert if the regulations were considered individually.

Although the CRA would not control the package approach, it nevertheless would help facilitate it. Under the CRA, rules submitted to Congress less than sixty legislative days before a Congress adjourns are treated as if submitted on the fifteenth legislative day of the next Congress.[32] This means that all rules submitted to Congress during an outgoing administration's midnight period would be treated as if submitted in January.[33] The CRA further provides that the effective date of major rules—those designated as economically significant by OIRA[34]—are delayed by at least sixty days from the time they are submitted to Congress.[35] Therefore, the new President and Congress will have until at least March before a major rule submitted during the midnight period becomes effective. As a result, if the President and Congress act swiftly, they can ensure that major rules are repealed before they ever take effect.

The limited ability of an incoming president to address the midnight regulation phenomenon suggests that a better approach would be to try to prevent the midnight regulation phenomenon, or at least mitigate its negative effects. This is why we suggest by capping the number of regulations that can be submitted to OIRA in a given period.

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[32] 5 U.S.C. § 801(d) (2006); Cohen & Strauss, *supra* note 30, at 101.

[33] The midnight period begins on the day after the presidential election, early in November. The earliest day a new Congress may adjourn is January 3rd. U.S. CONST. amend. XX, §2. Even if a Congress does not adjourn until the day before the new one is to begin (January 2nd), any rule submitted after election day will be submitted less than sixty days before it adjourned. Therefore, for purposes of the CRA, it will be treated as having been submitted on the fifteenth legislative day of the new Congress. 5 U.S.C. § 801(d) (2000). The earliest this can be is January 18th.

[34] 5 U.S.C. § 804(2) (2006).

[35] 5 U.S.C. § 801(a)(3) (2006); Cohen & Strauss, *supra* note 30, at 98.

RESPONSE TO POST-HEARING QUESTIONS FROM MICHAEL ABRAMOWICZ, PROFESSOR, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on "Midnight Regulations: Shining Some Light"
Wednesday, February 4, 2009

Professor Michael Abramowicz, George Washington University School of Law

Questions from the Honorable Steve Cohen, Chairman:

1. **Gary Bass's written statement (available on the Committee's website) lists examples of "Rushed Regulations" (pp. 6-7). Are you troubled by the process by which any of these regulations were promulgated? Please explain.**

The written statement by Gary Bass claims that for a variety of regulatious at the end of the Bush Administration, the agency either rushed an effective date (as with the pledge requirements for HIV/AIDS grantees), changed provisions in the final rule without seekiug public comment (as in the gun safety in national parks regulation), or proceeded too quickly to have truly considered all submitted comments (as with the endangered species regulation). He also alleges, among other problems, that the White House Office of Management and Budget reviewed regulations too quickly or not at all.

I do not have personal knowledge and have not investigated the particular regulatory iuitiatives discussed by Dr. Bass. Nonetheless, it appears to be true that in general at the end of a Presidential administration, agency officials are eager to complete what they view as their important work and to ensure that new regulations in fact go into effect. It would thus not be surprising if this were in fact the case for the regulations Dr. Bass cites. I am troubled by the prospect of rushed regulations. The question is whether solutions such as earlier deadlines will lead to less rushed regulations and better overall regulatory performance. I am skeptical that this would be the case, because with any deadline, agency officials are likely to rush somewhat. Pushing a deadline up does not eliminate the deadline.

2. **Do you think that the so-called "Bolten Memo" (Memorandum from Joshua B. Bolten, White House Chief of Staff, to Heads of Executive Departments and Agencies (May 9, 2008)) had any negative effects on the regulatory process? Please explain.**

It is difficult to be sure. The Bolten Memo encouraged agencies to finish their work earlier rather than later. This led to more regulatory actiou a few months before the end of the Bush Administration than at the very end of the Administration. This may have simply changed the time frame in which agency officials rushed to complete regulations. In addition, it may have translated into less regulatory action overall, leaving some relatively routine matters for the Obama Administration to consider.

Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on "Midnight Regulations: Shining Some Light"
Wednesday, February 4, 2009

Professor Michael Abramowicz, George Washington University School of Law

Questions from the Honorable Trent Franks, Ranking Member:

1. **Could you please describe in more detail what you believe are the key constitutional and prudential limits on the degree to which the Congress could proscribe the President from engaging in end-of-term rulemaking?**

This is an area that the courts have not fully cousidered. The administrative state is a creature of Congress, and if Congress were to eliminate all rulemaking powers of all agencies, that would be constitutional (except insofar as it interfered with powers specifically delegated by the Constitution to the President, such as the powers of the Commander-in-Chief). One argument would thus be that the Congress has the lesser power of disabling the President from engaging in rulemaking over certain periods of time. One might, however, offer a structural constitutional argument, based on the Constitution's specification of a particular date for the transfer of power, that once Congress has granted power, it cannot take it away solely for the reason that such a transfer is imminent. I have uot researched the historical materials sufficiently to offer a confident assessment of the strength of this argument.

The prudential arguments seem much clearer. It seems inadvisable for Congress to proscribe end-of-term rulemaking, for the reasons that I elaborated in my submitted statement. Such a ban is far too crude a device for limiting rushed regulations. Its likely effect is simply to shift the time period in which rushing occurs.

2. **What do you believe would be the key mischief or "collateral damage" to the rulemaking process that could be caused if we were to adopt the ideas in H.R. 34 or other ideas for limiting end-of-term rulemaking?**

The principal mischief would be that the President would be prevented from exercising the ordinary powers of the Presidency and the Executive Branch. Given the enormous investments that taxpayers make in Executive Branch personnel, it would be foolish to prevent them from accomplishing work for a period of time. One might argue that the public may no longer support the President at the end of a Presidential term, and therefore some of the regulations created during this period are less likely to accord with popular sentiment. But if that were the rationale, it would make more sense for a bill to disable Presidential rulemaking whenever the President's popularity ratings dip below a particular level. After all, some Presidents may retain strong support at the end of their second terms.

There are, however, sonnd reasons that we do not make governmental decisions dependent on public polls, and that we invest elected officials with full powers dnring the entirety of their terms.

3. What do you believe are some important reforms we can make to existing means at Congress's disposal – such as the Congressional Review Act – to "check-and-balance" auy excesses in midnight rulemaking?

Bolstering the regulatory review process to ensure more consistent and scientifically and economically sound bases for rulemaking would help address concerns addressed by critics of midnight rnlemaking throngh the Presidential Administration. There may be a nnmber of possible reforms to OIRA that would be useful. For example, it might make sense to increase personnel, to expand OIRA's anthority to review decisions of independent agencies, and to make OIRA itself more independent. Additional substantive reforms—such as more rigorous and less subjective cost-benefit analysis—would also be useful.

4. What do you believe are the most important reforms we should consider making to the Administrative Procedure Act and other statutes affecting the rulemaking process to produce better rnles, both in general and during the midnight regulation period?

First, it would be useful to codify existing approaches to cost-benefit analysis. Although cost-benefit analysis has been snpported by both Republican and Democratic Administrations (including, it seems, the cnrrent one), there is a danger that some futnre Administration might abandon it or change it to please interest groups. Codification could also enhance judicial review of cost-benefit analyses.

Second, it would be helpful to require that rulemaking be as empirically supported as possible. For example, it would be useful to require that new regulatory initiatives generally be first tested with randomized, controlled experiments, at least when such experiments are feasible. Such an initiative would produce valuable information about different regulatory approaches, and ultimately should help to bring Democrats and Republicans closer together in their assessments of the impact of regulations. Another way to make rulemaking more scientific would be to use prediction markets whenever possible for forecasts that form part of regulatory analyses. (I have written more about prediction markets in my book *Predictocracy*.)

5. Do you believe that there is any set of specific limits on midnight regulations that would be truly effective at limiting midnight regulations, or, instead, that the better answer to the problems midnight regulations pose would be to reform the general process of developing and promulgating regulations to require greater transparency and objectivity?

Improving transparency and objectivity seem more likely to improve regulatory decisionmaking than specific limits based on time periods, for the reasons explained above.

6. Do you share the view that the "hard look" doctrine in administrative law was developed in response to early efforts by the Reagan administration to overturn existing regulations? Please explain.

The hard look doctrine in fact originated in the D.C. Circuit. For example, in *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), the court explained, "Its supervisory function calls ou the court to intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making."

The Supreme Court's most famous application of the hard look doctrine was in *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). This case did involve an effort by the Reagan Administration to overturn a regulation issued by the Carter Admiuistration. The Court ruled that the agency had not produced sufficient justification for its change in policy course. Such a decision does uot necessarily block an agency from proceeding, but merely requires an agency to document its decisions more carefully. This doctriue illustrates how the existing regulatory system already contains a corrective against ill-considered regulations. If an agency does rush a regulation without adequately considering plausible counterarguments, the courts will be relatively likely to strike it down.

7. Please offer auy additional views you would like to place before the Subcommittee, including, for example, your views on testimony offered at the hearing by other wituesses.

A number of the other witnesses spoke about coucerns with specific regulations. It would, of course, be appropriate for Congress to cousider these regulations, aud to determiue whether to use fast-track procedures to overturn them. It is important, however, that we not make general regulatory policy based ou concerns about specific regulations, or even specific Presidential administrations. A good test of arguments for any specific regulatory reform is whether the reform would still be appealing if its effective date were five or ten years into the future. Only when that is so can we be confident that decisions are being made on general grounds rather than based on specific concerns about the Bush Administration or the Obama Administration.

Thank you again for the opportunity to contribute to this importaut discussiou.

RESPONSE TO POST-HEARING QUESTIONS FROM CURTIS W. COPELAND, PH.D., SPECIALIST IN AMERICAN NATIONAL GOVERNMENT, GOVERNMENT AND FINANCE DIVISION, CONGRESSIONAL RESEARCH SERVICE

MEMORANDUM February 25, 2009

To: The Honorable Steve Cohen, Chairman, Subcommittee on Commercial and Administrative Law, House Committee on the Judiciary

From: Curtis W. Copeland, Specialist in American National Government, (202) 707-0632

Subject: **Post-Hearing Questions: Midnight Rulemaking**

This memorandum responds to your request that I respond to questions after my participation in the Subcommittee's February 4, 2009, hearing on "Midnight Rulemaking: Shedding Some Light." If you have further questions or need additional information, please do not hesitate to call me.

Question from the Honorable Steve Cohen, Chairman

Question: Does the Obama Administration's approach toward addressing midnight rulemaking differ from the approach taken by previous administrations? If so, how?

Answer: Thus far, the Obama Administration's approach to midnight rules is both similar to, and different from, the approaches taken in previous administrations. The Obama Administration's primary public reaction to date has been the issuance of a memorandum on January 20, 2009, by Rahm Emanuel, assistant to President Obama and chief of staff, to the heads of executive departments and agencies requesting that they generally (1) not send proposed or final rules to the Office of the Federal Register, (2) withdraw from the Office rules that had not yet been published in the *Federal Register*, and (3) consider postponing for 60 days the effective dates of rules that had been published in the *Federal Register* but had not yet taken effect.[1] All recent presidential administrations have established similar regulatory moratoria after a change in party control of the White House. For example:

- On January 29, 1981, shortly after taking office, President Reagan issued a memorandum to the heads of the Cabinet departments and the Administrator of the Environmental Protection Agency directing them to take certain actions that would give the new administration time to implement a "new regulatory oversight process," particularly for "last-minute decisions" made by the previous administration.[2] Specifically, the memorandum directed federal agencies to (1) publish a notice in the *Federal Register* postponing for 60 days the effective date of all final rules that were scheduled to take

[1] Executive Office of the President, "Memorandum for the Heads of Executive Departments and Agencies," 74 *Federal Register*, 4435, January 26, 2009.

[2] See http://www.presidency.ucsb.edu/ws/index.php?pid=44134 for a copy of this memorandum.

effect during the next 60 days, and (2) refrain from promulgating any new final rules. Executive Order 12291, issued a few weeks later, contained another moratorium on rulemaking that supplemented the January 29, 1981, memorandum.[3] Section 7 of the executive order directed agencies to "suspend or postpone the effective dates of all 'major' rules that they have promulgated in final form as of the date of this Order, but that have not yet become effective."[4]

- On January 22, 1993, Leon E. Panetta, the Director of the Office of Management and Budget for the incoming Clinton Administration, sent a memorandum to the heads and acting heads of Cabinet departments and independent agencies requesting them to (1) not send proposed or final rules to the Office of the Federal Register for publication until they had been approved by an agency head appointed by President Clinton and confirmed by the Senate, and (2) withdraw from the Office of the Federal Register all regulations that had not been published in the *Federal Register* and that could be withdrawn under existing procedures.[5]
- On January 20, 2001, Andrew H. Card, Jr., assistant to President George W. Bush and chief of staff, sent a memorandum to the heads and acting heads of all executive departments and agencies generally directing them to (1) not send proposed or final rules to the Office of the Federal Register, (2) withdraw from the Office rules that had not yet been published in the *Federal Register*, and (3) postpone for 60 days the effective dates of rules that had been published but had not yet taken effect.[6]

As I noted in my testimony, one of the major differences between the Emanuel memorandum and the efforts at the start of the Reagan and George W. Bush Administrations is in the degree of deference shown to the rulemaking agencies. For example, whereas the Emanuel memorandum requested agencies to "consider" extending the effective dates of rules that had not taken effect, the Reagan Administration efforts and the Card memorandum simply instructed the agencies to do so. Also, the Emanuel memorandum said that when the effective dates of rules are extended, the agencies should allow interested parties to comment for 30 days "about issues of law and policy raised by those rules." Neither the Reagan Administration efforts nor the Card memorandum had similar provisions regarding public comment. On the other hand, the Emanuel memorandum went further than the Panetta memorandum at the start of the Clinton Administration in that the Emanuel memorandum at least addressed the issue of published but not effective rules.

Questions from the Honorable Trent Franks, Ranking Member

Question 1: With which of Ms. de Rugy's and Prof. Abramowicz's observations about the midnight rulemaking phenomenon and the midnight rulemaking process do you agree?

Answer: I agree with Dr. de Rugy's observation that the midnight rulemaking phenomenon exists. Her study and those of other analysts clearly demonstrate an increase in rulemaking activity toward the end of a presidency, particularly one in which there is a change in the party controlling the White House. I also

[3] Executive Order 12291, "Federal Regulation," 46 *Federal Register* 13193, February 17, 1981.

[4] The CRA used the same definition of a "major" rule as was used in Executive Order 12291 (e.g., a $100 million impact on the economy).

[5] See http://www.prop1.org/rainbow/adminrec/930122lp.htm for a copy of this memorandum.

[6] U.S. White House Office, "Regulatory Review Plan," *Federal Register*, vol. 66, no. 16, January 24, 2001, p. 7702. To view a copy of this memorandum, see http://www.whitehouse.gov/omb/inforeg/regreview_plan.pdf.

agree with her observations about the various reasons that could possibly cause such increases in activity. Finally, I agree that the Congressional Review Act is one of several potential tools that Congress could use to address concerns about the quality of certain midnight rules.

In the first part of Professor Abramowicz's testimony, he discussed "potentially negative and unforeseen consequences to legislative deprecation of midnight rules." I agree with several of his observations therein, including that (1) most midnight rules issued in the last months of a presidency are relatively routine; (2) proposals to prevent all rulemaking during this period may have unintended consequences, particularly for the next administration; and (3) such proposals may simply move up the period in which an outgoing administration issues its midnight rules. The second part of Professor Abramowicz's testimony addresses H.R. 34 in the 111th Congress. As I mentioned in my testimony, while CRS takes no position on pending legislation, I agree that several key terms could be more clearly defined in order to ensure that the bill will have the desired effect, and that Congress may choose to be aware of potential balance of power issues when it gives Executive Branch officials authorities that it had previously reserved to itself.

Question 2: Which questions raised by the Subcommittee's Administrative Law, Process, and Procedure Project for the 21st Century do you think are most important for us to address in order to resolve problems with midnight rules (see Interim Report on the Administrative Law, Process, and Procedure Project for the 21st Century, 110th Cong., 2d Sess., Committee Print No. 10 (Dec. 2006))? To resolve problems with rulemaking in general?

Answer: The Subcommittee's more than 1,400 page report is replete with issues that the Subcommittee could address regarding rulemaking in general, and midnight rules in particular. In general, an underlying theme of the report is the need for an institution to pay continuing interest to the full range of administrative law issues, and to serve as a resource for both Congress and the executive branch. That type of institution has been missing since the Administrative Conference of the United States was abolished in the mid-1990s. With regard to midnight rulemaking, perhaps the most pertinent part of the report concerns the Congressional Review Act, and in particular, the structural and interpretive deterrents to the effective use of the act (e.g., the uncertainty of the effect of an agency's failure to report a covered rule to Congress).

Question 3: Do you believe that there are legitimate reasons to be concerned about some of the constraints on presidential rulemaking authority proposed in H.R. 34 and other suggestions for minimizing problems with midnight rules? If so, what are they, in your view?

Answer: As introduced, H.R. 34 would, if enacted, prohibit rules that are adopted in the final 90 days that a President serves in office until 90 days after an agency head is appointed by the new President. Notwithstanding the uncertainty associated with the meaning of the words "adopted" and "appointed," enactment of the legislation could result in rules not taking effect for more than six months after they were published in the *Federal Register* and scheduled to take effect. In that respect, therefore, H.R. 34 could be viewed as a constraint on presidential rulemaking authority. On the other hand, Congress enacted the statutes upon which the regulations are based, and arguably has the authority to control when those agency regulations should be allowed to take effect. Furthermore, H.R. 34 gives the outgoing President broad and unchecked authority to exempt rules from the delay in their effective dates (e.g.,

because they are necessary for national security, or because of an imminent threat to health or safety or "other emergency").