OBAMA'S CARBON MANDATE:

An Account of Collusion, Cutting Corners, and Costing Americans Billions

August 4, 2015

Majority Staff Report

United States Senate
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Executive Summary

The U.S. Senate Committee on Environment and Public Works (EPW or Committee) has been conducting oversight of the U.S. Environmental Protection Agency's (EPA or Agency) efforts to overhaul America's electricity generation in the name of combatting global climate change.

Since September 2014, the Committee's oversight has centered on the role played by the Natural Resources Defense Council (NRDC) among other environmental activists in influencing the policy options, technical support, legal rationale, and public relations campaign for these rules.

This Majority Staff Report provides an unprecedented look into the inner-workings of EPA's rulemaking process – from the time the Agency entered into "sue-and-settle" agreements with environmental activists in 2010 through its June 2014 proposal to limit carbon emissions from existing sources. This Report, for the first time, exposes in depth how the settlement process was abused in a way that prevented the American people and those parties responsible for implementing the rules from knowing basic details of EPA's plans to regulate, let alone from participating in the process.

This Report is a product of the EPA and NRDC documents obtained by the Committee thus far. These documents reveal excessive email exchanges on not only official government accounts but also use of private or alias accounts by senior EPA officials, meetings at EPA and off-site locations, and phone calls between NRDC and EPA staff dating back to early 2011. In particular, these exchanges demonstrate how EPA and NRDC sought to push the outer limits of EPA's Clean Air Act authority and to develop the analysis on which these highly controversial and legally suspect proposals are based. Despite public statements by EPA officials to the contrary, documents confirm that NRDC played a very integral and major role in developing these EPA policies.

It is also clear from the documents that the EPA policy makers and environmental activists involved had cozy relationships with each other on not only a personal level but through like-minded activism from years of working together. Indeed, the revolving door has swung freely between the Obama Administration and the environmental activist community.

Although documents suggest EPA and the environmental activists may have not always agreed on tactics, they worked incessantly over the years to develop a unified public message in support of these rules. Such efforts included coordination on press responses and sessions with the White House to discuss messaging. Further, this Report describes efforts to shift the public debate away from using cap-and-trade to fight climate change to touting these rules as needed to limit carbon emissions from power plants to ostensibly improve public health.

Critically, documents illustrate that EPA seemingly misjudged its ability – or was too willing to appease its environmental allies – to appreciate the complexity of the task at hand. EPA initially agreed to finalize rules for new, modified, and existing sources by May 2012, less than a year and a half after the settlement was reached and well within President Obama's first and potentially only term. That timeline quickly proved unrealistic as EPA realized these rules could cause political problems for the President or add to a regulatory "train wreck" during an election year. Despite environmentalists' angst over completing the rules before the 2012 election, EPA sought to manage the groups' expectations until after the President's reelection. Finally, this Report documents how in 2013 President Obama launched an all-hands-on-deck climate strategy in the form of his Climate Action Plan to quiet threats of additional litigation from environmental activists and to set in motion executive action for what he could not achieve through legislation in order to fulfill his initial climate campaign commitments before leaving office.

Findings

- The Environmental Protection Agency (EPA) efforts to regulate carbon emissions from power plants were driven by Obama Administration officials and environmental activist groups who worked to fulfill the President's climate commitments following the defeat of climate legislation in Congress and lack of support for an international climate treaty. – *pages 15-17, 29, 50, and 56*

- EPA rushed into a "sue-and-settle" agreement with the Natural Resources Defense Council (NRDC), other environmental activists, and several state and local governments in 2010 to issue unprecedented carbon regulations with little regard to the technical, legal, and policy challenges that that these rules would present. – *pages 14-19, 21, 26, 30-39, 45-48, 56, and 61*

- EPA played politics with the regulatory process by trying to manipulate rulemaking deadlines to avoid a public backlash close to the 2012 Presidential and 2014 midterm elections, and to push implementation of the rules to the next Administration. – *pages 16, 17, 31-34, 40-49, 55, and 64*

- The carbon rules were the product of the quintessential "sue-and-settle" scheme where EPA and environmental activists, such as NRDC, continued to negotiate behind closed doors, changing regulatory actions and deadlines without providing the public meaningful notice or opportunity to comment. – *pages 17-19, 24, 26, 31, and 40-45*

- EPA officials repeatedly misled the American people, the news media, and Congress about their negotiations with environmental activists and the contribution made by these activists to the development of the carbon rules. – *pages 4-6,43, 47, 48, 54, 62-64, and 67*

- The White House, EPA, and environmental activists worked together to manage the public message on the carbon rules. – *pages 28-29, 33-35, 39, 46, 47, 50-51, 54, and 68*

- The litigation settlement provided the environmental activists significant leverage to drive the timing of EPA's rulemaking and to influence the scope of its policies. – *pages 30-32, 35, 40-46, and 67*

- EPA's process for developing the carbon rules appears to have deviated from the Agency's statutory authority under the Clean Air Act and established policies and circumvented transparency laws and public participation requirements. – *pages 22, 23, 28, 32, 43, 48-49, and 62-64*

- Attorneys with NRDC and other environmental activist groups have worked with EPA to shore up the shaky legal basis for the carbon rules, issuing public statements criticizing opponents of the rule and submitting detailed legal analyses for EPA to rely on and cite in its rulemaking documents. – *pages 59-68*

- EPA and environmental activists had cozy relationships and egregiously used personal emails and held meetings away from EPA headquarters, thereby avoiding public transparency. – *pages 20, 22, 25, 28, 39, 43, 48, and 54-56*

Introduction

On June 25, 2013, President Barack Obama announced a plan to have the U.S. Environmental Protection Agency (EPA or Agency) issue rules under section 111 of the Clean Air Act to cut greenhouse gas emissions from new, existing, and modified power plants, as well as regulations for other industrial sectors, and to position the United States as a leader on the international stage in addressing climate change.[1] On August 3, 2015, EPA released its final rules regulating carbon emissions from power plants pursuant to this directive.

EPA had already been working on these rules for several years, pursuant to a settlement agreement with the Natural Resources Defense Council (NRDC), the Sierra Club, the Environmental Defense Fund (EDF) and several states and local governments.

In fact, EPA had already issued a proposal in March 2012 to regulate emissions from new sources that had attracted more than two million public comments. President Obama's directive called on EPA to issue a revised proposal for new sources by September 20, 2013, based on the public comments on the original proposal, and to release a separate proposed rule for existing and modified sources by June 1, 2014.

As directed, EPA's Administrator, Gina McCarthy, signed the revised new source proposal on September 20, 2013. On June 2, 2014, EPA released its long-awaited proposal for existing sources, which was the culmination of several years' of litigation and effort by EPA and its environmental activist allies to transform the way electricity would be generated in the United States.

Administrator McCarthy heralded the existing source proposal as "delivering on a vital piece of President Obama's Climate Action Plan"[2] and the President of NRDC, Frances Beinecke, praised the proposal as a "giant leap forward."[3] On the same day, a writer for *New York* Magazine contacted the head of EPA's Office of Public Affairs, Tom Reynolds, asking whether the idea for using Clean Air Act section 111(d) to regulate existing power plants came from NRDC or another source:

> I'm working on a story tracing the genesis of this basic idea. From my perspective, I started to hear right after the 2012 election that the administration was contemplating state-by-state regulation of existing power plants. From what I could see, the idea originated from the NRDC, though obviously the regulations described today differ from that original blueprint. But it's a fascinating story, and I haven't seen it told – it's so rare you see a completely new idea work its way from conception to policy so fast, and I want to tell it.[4]

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[1] "The President's Climate Action Plan," issued by the Executive Office of the President, June 2013, at 6; available at: https://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf. See also, "Presidential Memorandum – Power Sector Carbon Pollution Standards," issued June 25, 2013, at section 1; available at: https://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards. The directive in the Presidential Memorandum also applied to reconstructed and modified power plants as well as existing plants.

[2] Available at: http://yosemite.epa.gov/opa/admpress.nsf/596e17d7cac720848525781f0043629e/5bb6d20668b9a18485257ceb00490c98!OpenDocument.

[3] Available at http://www.nrdc.org/media/2014/140602.asp.

[4] June 2, 2014 email from J. Chait to T. Reynolds, subject: Just got off with [sic] phone with your boss.

Reynolds forwarded the press inquiry to Janet McCabe and Joe Goffman, senior political appointees in the EPA Office of Air and Radiation who oversaw work on the rulemakings. Goffman responded three minutes later, stating unequivocally: "NRDC did not factor into OAR's thinking."[5] Goffman followed up with Reynolds soon thereafter, tersely asking, "[n]eed more?" to which Reynolds replied, "Nah, this is great."[6] The *New York* Magazine writer dropped the story.

However, an explosive article appeared in the *New York Times* just days after the 2014 July Fourth holiday, setting off fireworks inside EPA and beyond over the influence and role NRDC had in shaping EPA's proposals.[7] According to the *Times*' article, a 110-page policy proposal issued in late 2012 by NRDC attorneys David Doniger and David Hawkins and climate scientist Daniel Lashof served as the blueprint for the rules eventually proposed by EPA.

The NRDC proposal which, according to the *Times*, Doniger, Hawkins, and Lashof had been working on since November 2010, recommended establishing state-specific emission limits that could be implemented through a variety of policy options. The *Times* characterized NRDC's influence as "a remarkable victory" and described Doniger, Hawkins, and Lashof "as seasoned and well connected as Washington's best-paid lobbyists because of their decades of experience and the relationships they formed in the capital."

EPA officials reacted quickly to deflect attention away from the *Times*' account that EPA's proposed rules were based on NRDC's work or that NRDC had any special role or access in EPA's rulemaking process. In a July 7, 2014 blog post, McCabe, EPA' top air official, wrote:

> One of the great values of the transparent process we used, and will continue to use, to collect input from the public is that no one person or group has the only, or best, idea. It takes all of us contributing our information and suggestions to fashion a good, workable rule that meets the requirements of the law and achieves meaningful public health and environmental benefits. And EPA's proposal does just that.[8]

EPA Administrator McCarthy ridiculed the *New York Times*' story in a July 10, 2014, memorandum emailed to staff:

> According to an article from Monday, you just cut and pasted a particular NGO's proposal and called it a day. If you're laughing right now, it's because you know just how preposterous that is. That is not how our process works. The work we do is too important to the health and future off [sic] of all Americans to be left to the influence of any single outside group.[9]

The *New York* Magazine writer who first inquired about NRDC's role later wrote about his experience trying to follow up on the NRDC rumors with EPA, explaining that, due to EPA's stonewalling, he had been unable to sufficiently confirm the story:

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[5] June 2, 2014, email from J. Goffman to T. Reynolds and J. McCabe, subject: Re: Just got off with [sic] phone with your boss.
[6] June 2, 2014 email from T. Reynolds to J. Goffman, subject: RE: Just got off with [sic] phone with your boss.
[7] "Taking Oil Industry Cue, Environmentalists Drew Emissions Blueprint," by Coral Davenport, The New York Times, published July 6, 2014.
[8] "Hundreds of ideas, one proposal: How EPA developed the Clean Power Plan," by Janet McCabe, EPA Connect—The Official Blog of EPA's Leadership, published on July 7, 2014; available at: http://blog.epa.gov/blog/2014/07/hundreds-of-ideas-one-proposal/.
[9] July 10, 2010 email from G. McCarthy to Regional Administrators, et al., subject: thank you.

> I tried to report out the story, but ran into fierce denials from officials at the Environmental Protection Agency, who insisted that they developed the standards almost entirely independent of the NRDC. I suspected the EPA was spinning me, perhaps out of a fear that conceding such a heavy influence to the NRDC would somehow weaken their defense against the coming legal challenge. But I also lacked the reporting to countermand the EPA — which, as they pointed out to me, consisted of the people who were in the room when the regulation was made — so I dropped the story.[10]

The story of NRDC's involvement in EPA's carbon rules did not end there. In many ways, the true story of how NRDC and other environmental activists influenced EPA has not been told before.

Soon after the *New York Times* story, the Senate Committee on Environment and Public Works Committee (EPW) held a hearing on July 23, 2014, about EPA's proposal to regulate existing sources. Senator John Barrasso (R-WY) asked Administrator McCarthy, "Why did you let high-powered Washington lobbyists with the Natural Resources Defense Council reach into the EPA and essentially write your climate change rules for you?"

Administrator McCarthy responded pointedly, "I did not."

EPA's swift and unequivocal denials to the American people, Congress, the media, and EPA's own staff advanced the narrative that NRDC had a minimal role in shaping EPA's deliberations. It is but one example of a larger effort by EPA to control the public message about the motives, process, and impacts of these unprecedented rulemakings.

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The EPW Committee, under then-Ranking Member Senator David Vitter (R-LA), launched an oversight investigation into the role NRDC played in EPA's rulemaking process with initial document request letters sent to both EPA and NRDC on September 2, 2014. Subsequent press accounts of the Committee's inquiry similarly sought to downplay NRDC's involvement with EPA. For instance, in December 2014, an NRDC official characterized the group's role as "the most innocent, everyday interactions between EPA and NRDC."[11]

Then under Chairman James M. Inhofe (R-OK), the EPW Committee sent a follow-up document request to EPA on April 17, 2015, expanding the scope of the original request to include the Sierra Club, the Environmental Defense Fund, the Clean Air Task Force, the American Lung Association, and the Center for American Progress. Although EPA has begun to provide documents in response to this second request, its responses have been untimely and incomplete.

This Majority Staff Report, based on the Committee's oversight to date, rebuts the Obama Administration's narrative that NRDC did not have any special access to EPA policy makers and that NRDC had minimal input into EPA's development of greenhouse gas rules for power plants. It also documents instances where other environmental activists were able to exert similar behind-the-scenes influence, which remains a subject of the Committee's ongoing oversight of these rules.

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[10] "The Environmental Protection Agency Is Furious with the New York Times," by Jonathan Chait, New York Magazine, published July 11, 2014; available at: http://nymag.com/daily/intelligencer/2014/07/epa-is-furious-with-the-new-york-times.html

[11] "NRDC fires back at Vitter, slams his 'illegitimate fishing expedition,'" Robin Bravender, Greenwire, December 11, 2014.

This Report demonstrates how NRDC and other environmental activist groups used the threat of litigation to drive federal policy making and how spurious "sue-and-settle" tactics would not be successful without the complicity of agencies like EPA that agree to use settlement agreements with their allies to make policy – often behind closed doors.

The Report also details how NRDC staff was able to get their ideas for imposing greenhouse gas limits on power plants before EPA officials, how EPA policy makers and attorneys worked closely with NRDC's experts on developing these regulations, and how EPA relied on groups like NRDC as partners to communicate messages to the public about the proposed rules.

The Committee's oversight investigation also calls into question the accuracy and completeness of EPA's public statements to date about its regulatory plans, as well as comments by senior EPA officials about NRDC's role, and raises further questions about the propriety of the close coordination between EPA officials and environmental activists, which often occurred during furtive phone calls, through private email exchanges, and meetings at coffee shops, a local park, and NRDC's office, all without adequate transparency.

Part 1: Green Lobby, Revolving Door

Presumed Civil Servants Picking Sides

Over both Democratic and Republican administrations, EPA leaders have pledged to operate in a "fishbowl" –meaning the Agency would act with transparency and accountability in serving the American public.

Shortly after becoming Administrator, Lisa Jackson, herself a former career EPA official, issued a memorandum on the subject of "Transparency in EPA's Operations," in which she stated:

> The success of our environmental efforts depends on earning and maintaining the trust of the public we serve. The American people will not trust us to protect their health or their environment if they do trust us to be transparent and inclusive in our decision-making. To earn this trust we must conduct business with the public openly and fairly.[12]

Government officials, whether political appointees or career civil servants, are accountable to the American people. Although Congress has passed numerous laws governing the conduct and procedures of the Executive Branch – from the Administrative Procedure Act ensuring order and accountability in the rulemaking process, to the Freedom of Information Act providing a window for the public to see the what the government is doing, to the Ethics in Government Act requiring impartiality in the actions of government employees – it is incumbent on government officials to act with the utmost professionalism and integrity in performing their agency's mission and complying with these myriad legal requirements.

However, the Committee's ongoing oversight and this Report document conduct by EPA officials, many of whom have close personal and professional ties to the environmental community, that allowed certain environmental activists to significantly influence the development of these sweeping Clean Air Act regulations to regulate carbon emissions from power plants.

For example, Joe Goffman, who serves as Associate Assistant Administrator and Senior Counsel in the EPA Office of Air and Radiation, previously worked at the New York-based activist group Environmental Defense Fund (EDF).[13] Michael Goo, former Associate Administrator for the EPA Office of Policy from 2011 to 2013, had served as a registered lobbyist for the New York-based NRDC in 2007 and 2008.[14] Bob Sussman, former Deputy Administrator in the Clinton Administration, rejoined EPA as Senior Policy Counsel to then Administrator Jackson in 2009 from the far-left Washington, D.C.-based Center for American Progress (CAP). David McIntosh, the EPA

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[12] Memorandum to All EPA Employees, from Administrator Lisa Jackson, sent April 23, 2009, subject: Transparency in EPA's Operations.

[13] "Clean Air Act guru returns to shape power plant rule," by Jean Chemnick, Greenwire, January 22, 2014; available at: http://www.eenews.net/greenwire/stories/1059993282.

[14] See, Secretary of the Senate, NRDC Lobbying Disclosure Form including Michael Goo (2007), *available at* http://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=62a11eb1-7c5a-4a96-8b8e-e9d8f6fd7232&filingTypeID=11 and; Secretary of the Senate, NRDC Lobbying Disclosure Form including Michael Goo (2008), available at http://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=4c3f9881-33e3-410e-8017-31621c81e946&filingTypeID=11. See also, Michael Goo, National Journal, http://www.nationaljournal.com/almanac/staff/223634

Associate Administrator for Congressional and Intergovernmental Relations at the start of the Obama EPA, was also a former NRDC attorney.

In addition to EPA, the Obama White House hired a number of individuals to work on climate rules who were part of the green revolving door. For example, Nathaniel Keohone worked as EDF's director of economic policy and analysis before joining the Obama Administration as Special Assistant to the President for Energy and Environment.[15] He returned to EDF in September 2012 as a vice president.[16] Megan Ceronsky, who represented EDF in the litigation that resulted in these power plant regulations and had numerous meetings with EPA officials while at EDF, joined the Obama Administration in early 2015 to serve as a senior advisor in the White House Office of Energy and Climate Change.[17] Indeed, so many staff from NRDC joined the Obama Administration that they were collectively referred to by the *New York Times* in 2009 as the "NRDC mafia."[18]

These ties to environmental activist groups are important because, as discussed in an EPW Committee July 30, 2014, Republican Staff Report entitled, "The Chain of Environmental Command: How a Club of Billionaires and Their Foundations Control the Environmental Movement and Obama's EPA," environmental activist groups like NRDC are integral to the green litigation and lobbying machine, while simultaneously serving as close allies and partners with the Obama EPA to advance a shared mission.

Environmental Activist Groups are Big Business

As discussed elsewhere in this Report, NRDC was one of three environmental activist groups that brought the lawsuit against EPA to issue these power plant regulations and whose role was featured in a July 2014 *New York Times*' article. Accordingly, this Report focuses on NRDC and, in particular, on the influence its leading climate activists had in the development of these EPA rules.

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[15] Nathaniel Keohane, Environmental Defense Fund, https://www.edf.org/people/nathaniel-keohane .
[16] Environmental Defense Fund, Nathaniel Keohane rejoins EDF as Vice President (September 14, 2012), *available at* https://www.edf.org/news/nathaniel-keohane-rejoins-edf-vice-president.
[17] https://www.linkedin.com/pub/megan-ceronsky/0/3b7/261.
[18] "'NRDC mafia' finding homes on Hill, in EPA," by Darren Samuelsohn, New York Times/Greenwire, March 6, 2009; available at: http://www.nytimes.com/gwire/2009/03/06/06greenwire-nrdc-mafia-finding-homes-on-hill-in-epa-10024.html. As discussed in the *New York Times* article, Michael Goo left a job as NRDC's legislative director on climate issues to go work for the House Select Committee on Energy Independence and Global Warming in 2009. From 2011 to 2013 he was in charge of EPA's Office of Policy, and he previously worked at EPA as an attorney during the Clinton Administration. The revolving door has spun both ways, with Obama Administration officials also joining the ranks of the environmental activists. More recently, NRDC's long-serving president, Frances Beinecke, stepped down in 2014 and was replaced by Rhea Suh, who had served as the Assistant Secretary for Policy, Management, and Budget at the U.S. Department of the Interior during the Obama Administration.

David Doniger, who began working at NRDC in 1978, currently serves as senior attorney and director of NRDC's Climate and Clean Air Program.[19] He left NRDC to work for the Clinton Administration before returning to NRDC in 2001.[20] Dave Hawkins joined NRDC in 1971 after graduating from law school and has served there continuously except for a stint as an Assistant Administrator in charge of EPA's air programs in the Carter Administration. He has worked as Director of NRDC Climate Programs since 2011. Daniel Lashof worked at EPA in the late 1980s before joining NRDC, where he worked as a climate scientist. Lashof joined billionaire climate activist Tom Steyer's NextGen Climate group as Chief Operating Officer in 2014.[21] Lashof has continued as a senior fellow in NRDC's Climate and Clean Air Program[22] and is married to a former EPA official who now works as a Senior Vice President of EDF.[23]

Environmental Non-Profits

There are several of key advantages to using 501(c)(3) groups for advocacy purposes instead of traditional lobbying firms. First, donors to 501(c)(3) groups have the benefit of being allowed to take a take tax deduction on their donations for federal income purposes. Second, these non-profits do not have to disclose their donors.

However, certain limits are imposed on these groups. For example, 501(c)(3) groups are strictly prohibited from participating in political campaigns. Violation of this provision could result in denial or revocation of tax-exempt status and the imposition of certain excise taxes. There are also limitations on 501(c)(3) organizations' ability to lobby and they cannot devote more than an "insubstantial" (i.e. between 5 and 10%) portion of their resources on lobbying activities.

In order to conduct more lobbying or to engage in political activity, 501(c)(3) organizations are allowed to incorporate an affiliated 501(c)(4) organization, which can participate in unlimited lobbying and political activity. Often these organizations are separate from their affiliated 501(c)(3) group in name only and share the same building and staff, and therefore the overall goals and mission are often the same, but the organizations are treated differently for tax purposes.

As way of background, NRDC is organized as a tax-exempt charity under section 501(c)(3) of the Internal Revenue Code.[24] According to the NRDC website, "NRDC is the nation's most effective environmental action group, combining the grassroots power of more than two million members and online activists with the courtroom clout and expertise of nearly 500 lawyers, scientists and other professionals."[25] Climate change is the first priority listed for the organization. Despite legal limitations on 501(c)(3) groups, this Report will demonstrate specifically how NRDC plays a very active and partisan role in the public policy process.

Indeed, NRDC is not a small, struggling non-profit; it is extremely well-financed and has a global reach beyond its New York City headquarters. NRDC reported $268,165,564 in total assets and

[19] David Doniger, NRDC, http://www.nrdc.org/about/staff/david-doniger.
[20] http://www.nrdc.org/about/staff/david-doniger.
[21] "Green Scientist is Tom Steyer's New Policy Guru," Christopher Snow Hopkins, National Journal, April 7, 2014; available at: http://www.nationaljournal.com/daily/green-scientist-is-tom-steyer-s-new-policy-guru-20140407.
[22] http://www.nrdc.org/about/staff/daniel-lashof.
[23] "Green Scientist is Tom Steyer's New Policy Guru," Christopher Snow Hopkins, National Journal, April 7, 2014; available at: http://www.nationaljournal.com/daily/green-scientist-is-tom-steyer-s-new-policy-guru-20140407.
[24] NRDC also has an affiliated 501(c)(4) organization that focuses on political activity.
[25] NRDC, *About,* http://www.nrdc.org/about/.

received $115,962,571 in total revenue, according to its most recent public tax filings.[26] In fact, NRDC received almost $1.3 million dollars in court-awarded fees in 2012 alone.[27] Moreover, NRDC received nearly $1.9 million in grants from the EPA between 2009 and 2014.[28] In a recent post to its website, the purportedly nonpartisan NRDC complains about efforts by Congressional Republicans to rein in the Obama Administration's activist environmental agenda that would stop much needed economic development and job creation.[29] The NRDC Action Fund is a 501(c)(4) headquartered in New York whose mission is, "To promote educational and legislative activities that protect the environment, to engage in targeted media campaigns and other outreach that promote NRDC Action Fund's objectives on environmental issues." Its most recent tax filing indicates that it had total revenue of $1,727,566 in 2013 and total assets worth $1,475,750.[30] The Action Fund has no registered lobbyists.

Revolving Door, Shared Mission

Stopping the revolving door and influence by Washington, D.C., insiders were among President Obama's early campaign themes and policy commitments. When initially running for President in 2007, then-Senator Obama pledged to limit the influence of lobbyists and special interests in public policy and also to usher in an unprecedented level of transparency in government.[31] Then-Senator Obama repeated the promise throughout his campaign to exclude lobbyists from his Administration, stating: "I am in this race to tell the corporate lobbyists that their days of setting the agenda in Washington are over."[32]

Despite the lofty rhetoric, the President's ban on lobbyists has not prevented his Administration from hiring or providing

Lobbying Disclosure Requirements

The complexity of the requirements of the Lobbying Disclosure Act (LDA) , 2 U.S.C. 1601, and nature of 501(c)(3) organizations allows environmental groups to influence policy largely without registering their activities as lobbying. To officially be required to register as a lobbyist under the LDA a person has to spend over 20 percent of their time engaged in what is considered "lobbying activities" within a three month period.

Furthermore, only specific types of communications with certain senior level executive branch officials trigger the requirement to disclose lobbying. For example, guidance to lobbyists for compliance with the LDA states, "Timing of the work performed, as well as the status of the issue, is also pivotal…" This means that communications and meetings about the status of certain actions without explicitly including an attempt to influence covered officials does not count as lobbying. Source: http://lobbyingdisclosure.house.gov/amended_lda_guide.html

[26] NRDC, IRS Form 990, 2012.
[27] NRDC, IRS Form 990, 2012.
[28] USASpending, NRDC FY-2012-2014, available at https://www.usaspending.gov/Pages/AdvancedSearch.aspx?sub=y&ST=G&FY=2014,2013,2012&A=0&SS=USA&k=natural%20resources%20defense%20council and USASpending, NRDC FY 2009-2014, available at https://www.usaspending.gov/Pages/AdvancedSearch.aspx?sub=y&ST=G&FY=2011,2010,2009&A=0&SS=USA&k=natural%20resources%20defense%20council.
[29] See, http://www.nrdc.org/energy/big-polluter-agenda.asp.
[30] NRDC Action Fund, IRS Form 990, 2012.
[31] Text of Senator Obama's February 10, 2007, speech announcing his campaign to seek the Democratic nomination for President; available at: http://www.washingtonpost.com/wp-dyn/content/article/2007/02/10/AR2007021000879.html.
[32] Office of the President Elect, *The Obama-Biden Plan*, available at http://change.gov/agenda/ethics_agenda.

environmental activists a seat at the table when developing the carbon rules. Instead, the ban appears to have simply pushed such advocacy into the shadows.

As has been previously documented, the Obama Administration's lobbying rules ushered in an era where a large number of registered lobbyists took steps to remove their names from the official rolls of registered lobbyists maintained by Congress.[33] NRDC lobbyists were no exception. In fact, in 2007, NRDC had 47 registered lobbyists, but following Obama's lobbying ban campaign commitment, there were only seven registered lobbyists for NRDC. Since 2009, NRDC has had only one or two registered lobbyists per year.[34]

As the *New York Times* pointed out, NRDC's Doniger, Hawkins, and Lashof were as "seasoned and well connected as Washington's best-paid lobbyists." Federal lobbying disclosure records indicate that Doniger and Hawkins, in fact, had previously served as registered lobbyists for NRDC. Doniger was a registered lobbyist in 2006, 2007, and 2008,[35] and Hawkins was registered in 1999 and 2000.[36]

Lobbyists for other environmental activist groups similarly took steps to deregister from the official rolls in conjunction with the Obama Administration, albeit on a smaller scale than NRDC. For example, in 2007, EDF had 18 registered lobbyists, but in 2014 that number had decreased to seven registered lobbyists.[37] So far in 2015, EDF has only has four registered lobbyists.[38]

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[33] "Obama promised to curb the influence of lobbyists. Has he succeeded?" by Juliet Eilperin, Washington Post, March 22, 2015; available at: http://www.washingtonpost.com/politics/obama-promised-to-curb-the-influence-of-lobbyists-has-he-succeeded/2015/03/22/e9ec766e-ab03-11e4-abe8-e1ef60ca26de_story.html.

[34] Opensecrets, Natural Resources Defense Council Lobbying and Influence Summary, available at: https://www.opensecrets.org/lobby/clientsum.php?id=D000036133 (Note: these totals do not include outside lobbyists who were hired to lobby on behalf of the organization).

[35] See, Secretary of the Senate, NRDC Lobbying Disclosure Form including David Doniger, available at: (2006) http://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=82234c96-656e-4538-afd6-cb80424db37f&filingTypeID=3; (2007) http://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=cb6ad642-79e2-4f22-8106-10ab5a978fe3&filingTypeID=3; and (2008) http://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=c558664d-b74a-4eb9-9867-40efc3825170&filingTypeID=55.

[36] See, Secretary of the Senate, NRDC Lobbying Disclosure Form including David Hawkins, available at: (1999) http://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=0c4d3e33-4d40-4b09-a041-48db9a23894f&filingTypeID=9; (2000) http://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=4180f868-d6ce-4a07-b133-63bc6c14021f&filingTypeID=1.

[37] Opensecrets, Environmental Defense Fund Lobbying and Influence Summary, available at: https://www.opensecrets.org/lobby/clientlbs.php?id=D000033473&year=2015

[38] EDF's attorneys involved in the New York v. EPA litigation, Vickie Patton, Tomas Carbonell, and Megan Ceronsky, have not been registered to lobby for EDF during the Obama administration. This however was not the case with the Sierra Club or CAFT. At Clean Air Task Force, one of the two staff members who communicated with EPA, Conrad Schneider, was registered to lobby from 2010 until 2014. Both of these staff members listed EPA as a federal agency they were lobbying. The Sierra Club's John Coequyt has been a registered lobbyist since 2009. See, Secretary of the Senate, Sierra Club Lobbying Disclosure Form; available at: http://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=535b6ea4-775f-4e91-a29c-578314a8d296&filingTypeID=69. Finally, the Center for American Progress (CAP), which is consistently described as Washington D.C.'s leading liberal think-tank, and has served as a revolving door for many senior officials in the Obama administration, went from having 10 registered lobbyists in 2007 to zero in 2014.

Indeed, there is a significant loophole in the U.S. tax code that allows non-profit 501(c)(3) organizations to engage in "nonpartisan analysis, study, or research" which "may advocate a particular position or viewpoint so long as there is a sufficiently full and fair exposition of the pertinent facts to enable the public or an individual to form an independent opinion or conclusion."[39]

This exception essentially allows 501(c)(3) organizations to share all their research with public officials without disclosing it as lobbying since the organizations already have to be "nonpartisan" to keep their tax exempt status. The exemptions and specificity of the definition of lobbying has allowed environmental groups to influence public policy without full disclosure of their activities.

It is clear from the Committee's oversight that representatives from environmental activist groups – whether currently registered as lobbyists or not – continued to have significant influence behind the scenes at the Obama EPA, despite the President's public commitment to rein in the Washington, D.C., influence industry.

[39] See, http://www.irs.gov/Charities-&-Non-Profits/Private-Foundations/Exception-for-Nonpartisan-Analysis,-Study-and-Research.

Part 2: "Sue-and-Settle" on a Carbon Mandate

Long-Standing Goal to Regulate Power Plant Emissions

The history behind the EPA's efforts to regulate carbon dioxide emissions from power plants is a quintessential example of the controversial practice known as "sue and settle."[40] Generally speaking, under a "sue-and-settle" agreement, an outside group such as NRDC sues a federal agency, such as EPA, then negotiates a settlement with the Administration that appeases the suing party's policy goals and locks in a timeline for issuing a rule, while often excluding other interested parties and the public and short-circuiting a more deliberate rulemaking process.

NRDC had been advocating in favor of EPA using Clean Air Act section 111[41] to regulate existing power plants long before Doniger, Hawkins, and Lashof publicly released their 2012 study featured in the 2014 *New York Times* article. In fact, it was something NRDC and others were pressuring EPA to endorse through lawsuits dating back to the George W. Bush Administration.

In February 2006, EPA issued a final rule that revised performance standards under section 111 for emissions of certain pollutants from some electric generating units. However, EPA declined to include emission standards for greenhouse gases in the revisions because "EPA has concluded that it does not presently have the authority to set [New Source Performance Standards] NSPS to regulate [carbon dioxide] CO2 or other greenhouse gases that contribute to global climate change."[42]

A group of three environmental activists – the NRDC, EDF, and the Sierra Club – and several state and local governments – led by New York state – filed lawsuits in September 2006 in the U.S. Court of Appeals for the D.C. Circuit challenging the EPA rule.

The greenhouse gas portion of the lawsuits challenging EPA's 2006 new source performance standard had been consolidated into a separate case, under the legal caption *State of New York, et al. v. EPA*.[43] The D.C. Circuit eventually remanded the power plant rule back to EPA in light of the

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[40] "How Green Groups Make the EPA Issue New Rules," Coral Davenport, National Journal, June 13, 2013; available at: http://www.nationaljournal.com/magazine/how-green-groups-make-the-epa-issue-new-rules-20130613.

[41] Section 111 (b) of the Clean Air Act requires EPA to issue a "standard of performance" to limit emissions from certain categories of sources and to base those standards on the "best system of emissions reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." 42 U.S.C. 7411(a)(1). The establishment of new source performance standards triggers a requirement under section 111(d) for EPA to issue a rule requiring states to establish plans for regulating emissions from certain existing sources as if they were new sources regulated by EPA under section 111(b), unless the pollutant at issue is already regulated under section 110 or the source is already covered under section 112. 42 U.S.C. 7411(d).

[42] "Standards of Performance for Electric Utility Steam Generating Units for Which Construction Is Commenced After September 18, 1978; Standards of Performance for Industrial-Commercial-Institutional Steam Generating Units; and Standards of Performance for Small Industrial-Commercial-Institutional Steam Generating Units," 71 FR 9866, 9869 (February 27, 2006).

[43] State of New York, et al. v. EPA, No. 06-1322 (D.C. Cir.)

Supreme Court's 2007 decision in *Massachusetts v. EPA*, which found that greenhouse gases fit within the Clean Air Act's definition of "air pollutant." [44]

Attorneys for the groups of states and local governments wrote to EPA on June 16, 2008, requesting that EPA develop the new source performance standard for power plants without further delay. EPA responded that it was premature to issue the standards since the Agency had just issued an Advanced Notice of Proposed Rulemaking (ANPR) outlining legal and policy issues associated with potential regulation of greenhouse gases.[45] "The issues raised by the litigation are both complicated and controversial and must be resolved in a responsible manner," wrote then Principal Deputy Assistant Administrator for Air and Radiation Robert Meyers. "EPA expects to receive extensive comment relevant to the NSPS program and boilers in particular and plans to carefully evaluate the comments it receives as it decides how to move forward regarding GHG emissions generally, and GHG emissions from boilers specifically."[46]

Obama's Climate Change Commitment

During his run for the Presidency in 2008, then-Senator Obama campaigned on promises to address climate change, but he judiciously looked to Congress to take the lead – not to the EPA and its authorities under the Clean Air Act.[47] Candidate Obama said companies would still be able to build coal plants in his Administration but doing so would "bankrupt" them.[48] The initial focus at the beginning of the Obama Administration was enactment of cap-and-trade legislation – not EPA regulations.[49]

This approach was echoed by Sussman, who, in a law review article published since he left EPA, wrote:

> During the first Obama term, expectations for the [Clean Air Act] CAA as a tool of climate policy were generally low. The conventional wisdom –including in the administration – was the threat of invoking the CAA was useful to prod Congress into acting, but the Act itself was a poor and probably unworkable vehicle for meaningful emissions reductions.[50] (emphasis added)

Accordingly, the passage of cap-and-trade legislation in the U.S. House of Representatives six months into the Obama Administration was considered a positive reinforcement of the President's campaign promises to address climate change. This legislation, commonly referred to as "Waxman-Markey," after its Democratic sponsors Henry Waxman of California and Edward Markey of Massachusetts, would have created a framework for 17 percent greenhouse gas (GHG) emissions

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[44] 549 U.S. 497.
[45] "Regulating Greenhouse Gas Emissions Under the Clean Air Act," Advanced Notice of Proposed Rulemaking, 73 FR 44354 (July 30 2008).
[46] Undated letter from Robert Meyers, Principal Deputy Assistant Administrator, Office of Air and Radiation, U.S. Environmental Protection Agency to Andrew Cuomo, Attorney General, State of New York.
[47] "Power Plant Regulation Under the Clean Air Act: A Breakthrough Moment for U.S. Climate Policy?" Robert M. Sussman, Virginia Environmental Law Review (2014).
[48] "Uttered in 2008, still haunting Obama in 2012," Erica Martinson, Politico, April 5, 2012; available at: http://www.politico.com/news/stories/0412/74892.html.
[49] Id.
[50] "Power Plant Regulation Under the Clean Air Act: A Breakthrough Moment for U.S. Climate Policy?" Robert M. Sussman, Virginia Environmental Law Review (2014), at 109.

reductions from 2005 levels by 2020.[51] In an apparent step to pressure the U.S. Senate into passing similar climate legislation, President Obama committed the U.S. to reduce GHG emissions by 17 percent from 2005 levels by 2020 – mirroring the reduction goals in Waxman-Markey – during December 2009 international climate negotiations in Copenhagen.[52]

While the environmental activist community celebrated the President's climate commitments, their fête was short-lived. The international climate negotiations ultimately failed to result in a legally binding agreement, leading activists such as the NRDC to focus on Congress, declaring: "This agreement is not all we had hoped for. There's still more work to be done. . . Now the Senate can take up clean energy and climate legislation."[53] More emphatically, NRDC's Lashof said in a December 19, 2009, blog post:

> Activist who poured their heart and soul into organizing a . . . binding agreement in Copenhagen are deeply disappointed and many are angry at President Obama… I think the anger is fundamentally misplaced and hope that energy will be turned toward rounding up the votes we need in the U.S. Senate.[54]

It appears EPA was eager to get deadlines in place for issuing the rules for both new and existing power plants as well as petroleum refineries during the first term – and at the time, possibly only term – of the Obama Administration.

Despite activists' efforts, Congress lost its zeal for pursuing U.S. climate policy coinciding with poor public support for climate action during the midterm congressional election campaign. According to an April 2010 Gallup poll, the environment and global warming ranked last among major issues for voters.[55] Thus, it was no surprise that – in line with public opinion and their constituency – in late July 2010, then Senate Majority Leader Harry Reid (D-NV) abandoned efforts to pursue can-and-trade legislation to regulate greenhouse gas emissions from power plants and other major sources.

On the heels of cap-and-trade's defeat in the U.S. Senate, environmental activist groups shifted climate action advocacy to the EPA. According to documents obtained by the Committee, on August 3, 2010, NRDC's Doniger and EPA's Goffman had scheduled a telephone call.[56] Less than two weeks later, NRDC, along with the Sierra Club and EDF, sent a letter on August 20, 2010, threatening legal action against EPA. Specifically, the groups requested EPA to take action on the D.C. Circuit Court's remand of *New York v. EPA* and "agree by no later than September 15, 2010, to include greenhouse gases in its upcoming [New Source Performance Standard] and to coordinate these measures with the forthcoming [Maximum Achievable Control Technology] rulemaking for utility boilers."[57] The

[51] See, http://www.epa.gov/climatechange/Downloads/EPAactivities/HR2454_Analysis.pdf.
[52] "Obama to Go to Copenhagen With Emissions target," John Broder, New York Times, November 25, 2009; available at: http://www.nytimes.com/2009/11/26/us/politics/26climate.html?pagewanted=all&_r=0.
[53] See, http://www.nrdc.org/media/2009/091218b.asp
[54] See, http://switchboard.nrdc.org/blogs/dlashof/copenhagen_accord_breakdown_or.html
[55] See, http://www.gallup.com/poll/127247/voters-rate-economy-top-issue-2010.aspx
[56] August 3, 2010 calendar entry, subject General Discussion.
[57] August 20, 2010 letter from Sierra Club, Natural Resources Defense Council, and Environmental Defense Fund to Lisa P. Jackson, re: New York v. EPA (D.C. Cir. 06-1322).

letter warned, "[b]arring agreement by September 15th, our remaining recourse will need to be seeking a court order compelling EPA action on the 2007 remand order."[58]

A month later, EPA had a meeting with the litigants to discuss a possible settlement of the power plants litigation and a related matter involving development of new source performance standards for petroleum refineries under Clean Air Act section 111. It appears based on documents obtained by the Committee that EPA was eager to get deadlines in place for issuing the rules for both new and existing power plants as well as petroleum refineries during the first – and at the time, possibly only – term of the Obama Administration.

In an email dated September 16, 2010, EPA's McCabe asked how the settlement meeting went. Goffman responded, "Went according to script – although the fact that we immediately put a proposal on the table disoriented them a bit. Doniger, true to form, spent a lot of time second-guessing our tactical judgment separating MACT and GHG NSPS. We will have to decide the 111(d) issue, though, if we want to close an agreement on this."[59]

McCabe sent a follow up message asking whether the parties raised the "111(d) issue."[60] Goffman replied, "Oh yeah. Big time. We've pretty much consented to include it in the draft refineries agreement."[61]

A week later, a Department of Justice (DOJ) attorney circulated a draft settlement agreement, noting that EPA would agree to "make a stronger statement about the appropriateness of proposing regulations under both 111(b) and 111(d)." The draft agreement would have EPA proposing both the performance standards for new and modified power plants under 111(b) and the emission guidelines for existing sources under 111(d) by May 31, 2011, and issuing final rules for both no later than May 31, 2012. EPA did not provide the Committee with additional documents concerning the development or internal consideration of this original proposed settlement agreement.

With the November 2, 2010, midterm election, Democrats lost control of the House of Representatives, and as EPA's Sussman later explained, "climate legislation ceased to be viable."[62] Given resistance from Congress, the American people, and the international community to policies to address climate change during the first two years of the Obama Administration, attention quickly turned toward enlisting EPA to achieve through regulation what a Democratic-controlled Congress could not do through legislation.

Indeed, nearly six weeks after the 2010 midterm election, EPA announced that a settlement deal had been struck that would require EPA to issue greenhouse gas limits for power plants and refineries before the end of President Obama's first term.

The EPA announcement was made on December 23, 2010 – two days before Christmas.[63] The version of the settlement agreement announced by EPA, the environmental groups, and the states

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[58] August 20, 2010 letter from Sierra Club, Natural Resources Defense Council, and Environmental Defense Fund to Lisa P. Jackson, re: New York v. EPA (D.C. Cir. 06-1322).
[59] September 16, 2010 email from J. Goffman to J. McCabe, subject: Re: today.
[60] September 16, 2010 email from J. McCabe to J. Goffman, subject: Re: today.
[61] September 17, 2010 email from J. Goffman to J. McCabe, subject: Re: today.
[62] Sussman article "During the Obama first term, EPA cautiously tested the limits of the [Clean Air] Act as the White House pinned its hopes on cap-and-trade legislation . . . [but] [w]it the Republican takeover of the House in 2010, climate legislation ceased to be viable."
[63] EPA press release issued December 23, 2010; available at: http://yosemite.epa.gov/opa/admpress.nsf/e77fdd4f5afd88a3852576b3005a604f/d2f038e9daed78de8525

included different dates from what was in the September draft circulated among the parties. Although EPA pushed back the date for publishing the proposed rules by two months, to July 26, 2011, the date for issuing final rules was moved up five days, to May 26, 2012, the Saturday of the Memorial Day weekend.[64]

The day of the settlement announcement, NRDC's Doniger sent an email to McCarthy, writing, "Thank you for today's announcement. I know how hard you and your team are working to move us forward and keep us on the rails. The announcement is a major achievement. To paraphrase Ben Franklin: 'Friends, you have your NSPS, now let's see if you can keep it.' We'll be with you at every step in the year ahead." McCarthy responded, "I really appreciate your support and your patience. Enjoy the holiday. This success is yours as much as mine."[65]

> I really appreciate your support and your patience. Enjoy the holiday. This success is yours as much as mine.
>
> - *Gina McCarthy*

While press accounts framed the settlement in the context of fulfilling the President's climate commitment, documents illustrate EPA seemingly trying to distinguish the agreed upon action with the litigants from the failed attempt the legislate cap-and-trade. For instance, one article reported "[t]he agreement suggests the administration plans to press forward with its efforts to address climate change, despite the failure of the cap-and-trade bill in the Senate this year and the expectation of a backlash in Congress once regulation-averse Republicans seize control of the House next month."[66] Yet, when summarizing the news coverage of the announced settlement agreement, one EPA official noted, "Gina [McCarthy], was quoted frequently explaining the NSPS is not cap and trade."[67] One article at the time recounted: "'[t]his is not a cap-and-trade program,' McCarthy said. 'It's not in any way trying to get into the area in which Congress will be establishing a law at some point in the future, we hope.'"[68] It added, "EPA said it's too early to gauge the GHG impact of the rules," when asked whether EPA's rules would attain the same GHG reductions as cap-and-trade, or whether it would help attain President Obama's commitment in Copenhagen. [69] So in a matter of months the Administration went from endorsing and advocating for Congress to pass cap-and-trade legislation, to apparently distancing itself from the entire scheme and trying to pretend the rules were not related to President's international climate commitment.

780200568bec!OpenDocument. The announcement also stated that EPA and the parties had reached a separate proposed settlement of *American Petroleum Institute, et a., v. EPA*, No. 08-1277 (D.C. Cir.), that would require EPA to propose the new source performance standards in December 10, 2011 and finalize them by November 10, 2012. See, http://www2.epa.gov/sites/production/files/2013-09/documents/refineryghgsettlement.pdf.

[64] Pursuant to the settlement, EPA also agreed that every 60 days it would make staff available to update the state and environmental groups and to provide a status letter discussing EPA's progress in completing the actions required under the settlement. If EPA failed to meet the terms of the settlements, the sole remedy of the state and environmental groups would be to petition the court to compel EPA to act on the remand order.

[65] December 23, 2010 email from G. McCarthy to D. Doniger, subject: re: Happy Holidays.

[66] Gabriel Nelson, Climate: EPA agrees to limit emissions from power plants, refineries, Greenwire (Dec. 23, 2010), http://www.eenews.net/greenwire/stories/1059943567.

[67] December 23, 2010 email J. Millett to G. McCarthy, subject: re: NSPS news.

[68] http://www.reuters.com/article/2010/12/23/idUS80361635820101223

[69] http://www.reuters.com/article/2010/12/23/idUS80361635820101223

In accordance with section 113(g) of the Clean Air Act, EPA published a two-page notice in the Federal Register on December 30, 2010 – the day before New Year's Eve – providing the public with 30 days to comment on the proposed litigation settlement agreement. The notice advised, "EPA or the Department of Justice may withdraw or withhold consent to the proposed settlement agreement if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act."[70]

Despite burying the announcement of the settlement during the Christmas and New Year's holidays, EPA received 28 comments on the proposed settlement. Only eight comments supported the settlement and proposed timelines.[71] A number of industry representatives objected to the proposed timelines contained in the settlements, as well as the underlying legal justification and need for the regulations, and urged EPA and DOJ to withhold their consent.[72] Notably, the Small Business Administration Office of Advocacy (SBA Advocacy) also expressed concerns that the rulemaking deadlines would not allow for sufficient consideration of the rules' impacts on small businesses or the ability to conduct a robust interagency review process under Executive Order 12866.[73]

"[SBA] Advocacy is concerned that the timelines for rulemaking required by these settlement agreements do not provide for sufficient time for EPA to fully comply with the Regulatory Flexibility Act," wrote Chief Counsel for Advocacy Winslow Sargeant.[74]

Given the close coordination between EPA and the litigation parties, and EPA's apparent eagerness to agree to deadlines for issuing both sets of rules, opposing the settlement agreement was a Quixotic quest. Putting the proposed settlement out for public comment was a sham.

Notwithstanding the opposition voiced in a majority of the comments received, attorneys in the EPA's Office of General Counsel (OGC) recommended approval of the settlement agreement. In an internal memorandum dated February 28, 2011, OGC advised, "[w]e do not believe that the comments received disclosed facts or considerations which indicate that consent is inappropriate, improper, inadequate, or inconsistent with the Act."[75] The General Counsel approved the settlement on March 2, 2011.[76]

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[70] 75 FR 82392, 82393 (December 30, 2010).
[71] February 28, 2011 memorandum from S. Jordan, Attorney, to S. Fulton, General Counsel, subject: Approval of Settlement Agreement Resolving Potential Litigation concerning NSPS Rule regulating Greenhouse Gas Emissions from Electric Generating Units (EGU NSPS Rule). See also, EPA Docket for HQ-OGC-2010-1057; available at: http://www.regulations.gov/#!searchResults;rpp=50;po=0;s=HQ-OGC-2010-1057;dct=PS.
[72] See e.g., Comment submitted by Duke Energy Services; available at: http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OGC-2010-1057-0018; comment submitted on behalf of the Utility Air Resources Group; available at: http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OGC-2010-1057-0011; comment submitted by the National Mining Association; available at: http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OGC-2010-1057-0032.
[73] Comment submitted by Small Business Administration Office of Advocacy; available at: http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OGC-2010-1057-0008.
[74] Comment submitted by Small Business Administration Office of Advocacy; available at: http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OGC-2010-1057-0008.
[75] February 28, 2011 memorandum from S. Jordan, Attorney, to S. Fulton, General Counsel, subject: Approval of Settlement Agreement Resolving Potential Litigation concerning NSPS Rule regulating Greenhouse Gas Emissions from Electric Generating Units (EGU NSPS Rule).
[76] Id.

NRDC Involved in Rulemaking Since 2011

EPA's denials that NRDC had any role in crafting the power plant rules are not borne out by the documents obtained by the Committee as part of its oversight.

NRDC's Doniger wrote in an email to an EPA staffer on March 21, 2011, requesting a meeting with Gina McCarthy "on the subject of the Section 111 standards for power plants."[77] In his email, Doniger explained he was "following up on a conversation with Joe Goffman to ask for a meeting as soon as feasible with Gina McCarthy."[78] It is unclear, from the documents provided by EPA, when this prior conversation between Goffman and Doniger occurred.

EPA officially commenced action on the proposed rules for both new/modified and existing power plants on March 24, 2011.[79] Although EPA held a series of public "listening sessions" in February and March 2011, from the initial stages of developing the rules, EPA provided outsized access to NRDC officials. For example, a meeting between McCarthy and NRDC was scheduled for the afternoon of April 1, 2011.[80] The day before that meeting, on March 31, 2011, Michael Goo, the new head of EPA's Office of Policy, traveled five blocks north of EPA headquarters to attend a meeting at NRDC's Washington, D.C. office on March 31, 2010, with Doniger, Lashof, and Hawkins.[81] At the last minute, Goo asked if he could bring Sussman, to which Hawkins responded, "sure."[82]

From: 'Michael Goo/DC/USEPA/US'
Required Attendees: dhawkins@ndrc.org
Optional Attendees: Doniger, David; Lashof, Dan
Location: 1200 NY Avenue
Importance: Normal
Subject: Broadcast: General - 1200 NY Avenue (Mar 31 02:00 PM EDT in 1200 NY Avenue)
Start Date/Time: Thur 3/31/2011 6:00:00 PM
End Date/Time: Thur 3/31/2011 7:00:00 PM
ATT764946.htm
c143647.ics

At this point, EPA had less than four months left to develop and propose rules for new/modified and existing power plants pursuant to the settlement agreement. By April 14, 2011, EPA staff finished a preliminary blueprint to guide the internal development of the proposed rule for new sources.[83]

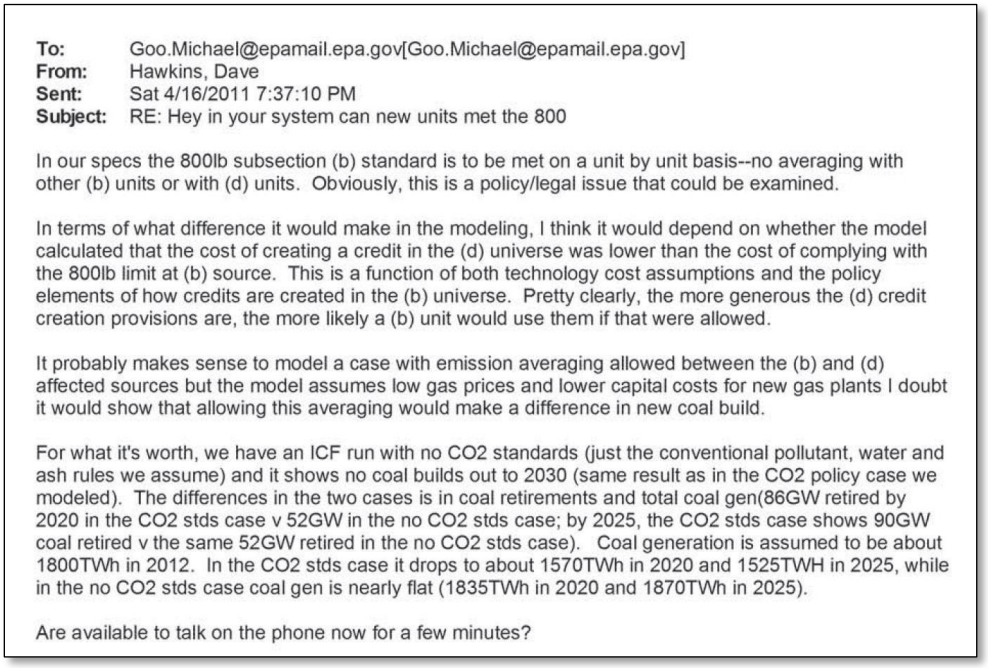
According to the blueprint document, EPA staff planned to work for six weeks and then, on May 28, 2011, Administrator Jackson would meet with key staff to select her preferred policy options. The proposal would then be refined and undergo final review and concurrence on June 5, 2011, by

[77] February, 21, 2011 email from D. Doniger to C. Hwang, subject: Meeting request.
[78] Id.
[79] EPA Action Development Process Tracker for SAN: 5548 (RIN: 2060-AQ91) and SAN:5548.1 (RIN: 2060-AR33). Copy on file with EPW Committee.
[80] March 31, 2011 calendar entry for meeting between M. Goo and NRDC at 1200 New York Avenue. This calendar entry was provided by NRDC, not EPA.
[81] March 30, 2011 email from D. Hawkins to M. Goo, subject: MT tomorrow.
[82] March 31, 2011 email from D. Hawkins to M. Goo, subject: Bob Sussman asked if he could.
[83] The key offices working on the proposals included the Office of Air and Radiation, the Office of General Counsel, the Office of Research and Development, and the Office of Policy within the Administrator's Office.

relevant EPA offices. Under this plan, the proposal was scheduled to go to the White House Office of Management and Budget (OMB) for inter-agency review on June 26, 2011, giving OMB and other agencies only one month to review the proposal before the Administrator was required to propose it under the settlement agreement. Notably, OMB interagency review is generally afforded 90 days. This schedule quickly began to unravel and prove unrealistic.

Early on, EPA policy makers and attorneys were focused on identifying options that would prevent not just new coal-fired power plants from being built – but also to force existing ones to shut down. EPA officials turned to their friends at groups like NRDC for help.

On April 16, 2011, a Saturday, Goo sent an email to NRDC's Hawkins asking about NRDC's views on whether new power plants could meet an 800 lb/MWh standard using credits from existing sources.[84] Hawkins responded the same day.[85]



To: Goo.Michael@epamail.epa.gov[Goo.Michael@epamail.epa.gov]
From: Hawkins, Dave
Sent: Sat 4/16/2011 7:37:10 PM
Subject: RE: Hey in your system can new units met the 800

In our specs the 800lb subsection (b) standard is to be met on a unit by unit basis--no averaging with other (b) units or with (d) units. Obviously, this is a policy/legal issue that could be examined.

In terms of what difference it would make in the modeling, I think it would depend on whether the model calculated that the cost of creating a credit in the (d) universe was lower than the cost of complying with the 800lb limit at (b) source. This is a function of both technology cost assumptions and the policy elements of how credits are created in the (b) universe. Pretty clearly, the more generous the (d) credit creation provisions are, the more likely a (b) unit would use them if that were allowed.

It probably makes sense to model a case with emission averaging allowed between the (b) and (d) affected sources but the model assumes low gas prices and lower capital costs for new gas plants I doubt it would show that allowing this averaging would make a difference in new coal build.

For what it's worth, we have an ICF run with no CO2 standards (just the conventional pollutant, water and ash rules we assume) and it shows no coal builds out to 2030 (same result as in the CO2 policy case we modeled). The differences in the two cases is in coal retirements and total coal gen(86GW retired by 2020 in the CO2 stds case v 52GW in the no CO2 stds case; by 2025, the CO2 stds case shows 90GW coal retired v the same 52GW retired in the no CO2 stds case). Coal generation is assumed to be about 1800TWh in 2012. In the CO2 stds case it drops to about 1570TWh in 2020 and 1525TWH in 2025, while in the no CO2 stds case coal gen is nearly flat (1835TWh in 2020 and 1870TWh in 2025).

Are available to talk on the phone now for a few minutes?

Separately, on April 16, 2011, an EPA attorney circulated by email a draft outline of several options for how EPA could legally justify retirements of existing coal-fired power plants, explaining: "At the meetings last week on GHG EGU NSPS options, I recall you saying that it would be useful to have a written explanation of why the retirement requirement meets the definition of a standard of

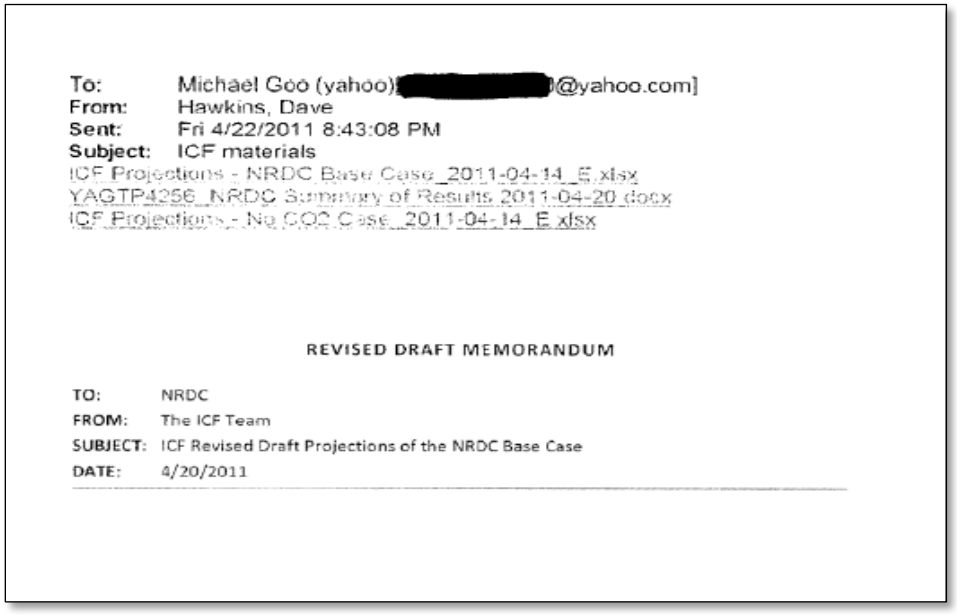
[84] April 16, 2011 email from M. Goo to D. Hawkins, subject: Hey in your system can new units met [sic] the 800.

[85] Id. In another example of EPA's focus on coal-fired power plants, Michael Goo and Alex Barron, also in the EPA Office of Policy, received an email from the Sierra Club's John Coequyt on April 29, 2011 with the subject line "Zombies." "Attached is a list of plants that the companies said were shelved because of uncertainty around GHG regulations. If a standard is set that these plants could meet, there is a not small chance that they [sic] company could decide to revive the proposal," Coequyt wrote in the email.

performance. Attached is an effort to do that."[86] The attorney added, "I thought I would send it now to help prepare for the meeting Mon. afternoon w/ NRDC."[87] (emphasis added)

In addition to working directly with EPA, NRDC also advocated before EPA as part of a coalition of other environmental groups, clean energy companies, and states that was organized by the consulting firm M.J. Bradley & Associates.[88] For example, on April 22, 2011, Michael Bradley sent a summary of the coalition's agreed upon principles for the development of existing source performance standards to several EPA senior officials, including Goo, Sussman, and McIntosh.[89]

The same day, Hawkins sent copies of the modeling runs NRDC had received from the ICF International consulting firm to Goo at his personal Yahoo! email account.[90] In addition to the work performed for NRDC, ICF has also been paid about $2.7 million by EPA for technical support and modeling work in connection with these rulemakings.[91]



To: Michael Goo (yahoo) [redacted]@yahoo.com]
From: Hawkins, Dave
Sent: Fri 4/22/2011 8:43:08 PM
Subject: ICF materials
ICF Projections - NRDC Base Case_2011-04-14_E.xlsx
YAGTP4256_NRDC Summary of Results 2011-04-20.docx
ICF Projections - No COC Case_2011-04-14_E.xlsx

REVISED DRAFT MEMORANDUM

TO: NRDC
FROM: The ICF Team
SUBJECT: ICF Revised Draft Projections of the NRDC Base Case
DATE: 4/20/2011

Notably, the document production from NRDC to the EPW Committee yielded a copy of this email – not the document production from EPA. It is unclear if Goo ever forwarded this email from his personal account to his official EPA account for management and preservation or if EPA otherwise ever received a copy. As discussed elsewhere in this Report, this use of Goo's personal email account was not an isolated incident. Use of personal email occurred on several occasions to

[86] April 16, 2011 email from H. Hoffman to J. Beauvais, subject: GHG EGU NSPS: argument that a retirement requirement comports with def. of standard of performance.
[87] Id.
[88] M.J. Bradley & Associates, LLC is a consulting firm with offices in Massachusetts and Washington, D.C., that operates several coalitions with an interest in EPA rulemakings. See, http://www.mjbradley.com/node/278.
[89] April 22, 2011email from M. Bradley to M. Goo, et al., subject: FW: Final Dialogue Comments Document.
[90] April 22, 2011 email from D. Hawkins to M. Goo (Yahoo!), subject: ICF materials. The two continued to trade emails using Goo's official EPA email account and telephone messages into the early part of May. See e.g., May 2, 2011 email from D. Hawkins to M. Goo, subject: checking in; and May 13, 2011 email from M. Goo to D. Hawkins, subject: Oh I forgot to ask ("How do deal with anyway retirements in developing credits.").
[91] Information provided by EPA on May 12, 2015. Copy on file with EPA Committee.

transmit background information about NRDC's proposal outside of official channels that ordinarily would result in transparency through Congressional oversight or public record requests.

Congress amended the Federal Records Act in 2013 to clarify that Executive Branch officials should use their official work email accounts and, in circumstances where that is not possible, to require them forward any work-related emails sent or received using a personal email account to their work account within 20 days.[92] Regardless, the Federal Records Act already required government officials to "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities."[93]

Putting Pen to Paper on a Carbon Plan

In the early morning hours of Sunday April 24, 2011, Lorie Schmidt, then a senior EPA air policy official, sent a draft 35-page PowerPoint presentation to Goo, Goffman, and several other senior EPA officials and attorneys outlining EPA's legal authorities and policy options for an upcoming meeting with Administrator Jackson.[94] It is clear from Schmidt's email and draft presentation how closely linked the new and existing source rulemakings were in order for EPA to achieve its overall policy goals of forcing retirements of coal-fired power plants – and how influential the views of NRDC and other environmental groups were to EPA's deliberations.

In discussing options for regulating existing sources under section 111(d), Schmidt wrote in part:

> I see two basic approaches. The first approach is to set a unit-specific standard with a phase-in schedule as a way of trying to force coal retirements. Without averaging, it's the [Clean Air Task Force] approach; with averaging, it's the NRDC approach. The second approach is to set a fleet-wide average (probably one that declines over time) and allow averaging – with broad enough range of sources to average, this could be described as a clean energy system. When averaging is allowed, the two approaches overlap.[95]

In contrast, in discussing the options for new sources, Schmidt wrote in part: "Make it clear that no option will model differently from any other new source option, but that they may have some differences in the real world."[96] Her email ends, "I try to use 'averaging' and 'credits' – if I've said 'trading' – it should be replaced with averaging[.] I'm also now wondering whether we need a discussion in here of pros and cons of going outside of the electricity sector for credits."[97] This email suggests EPA staff sought to avoid use of certain word choices to mask how similar these concepts were to cap-and-trade given public objections to such schemes.

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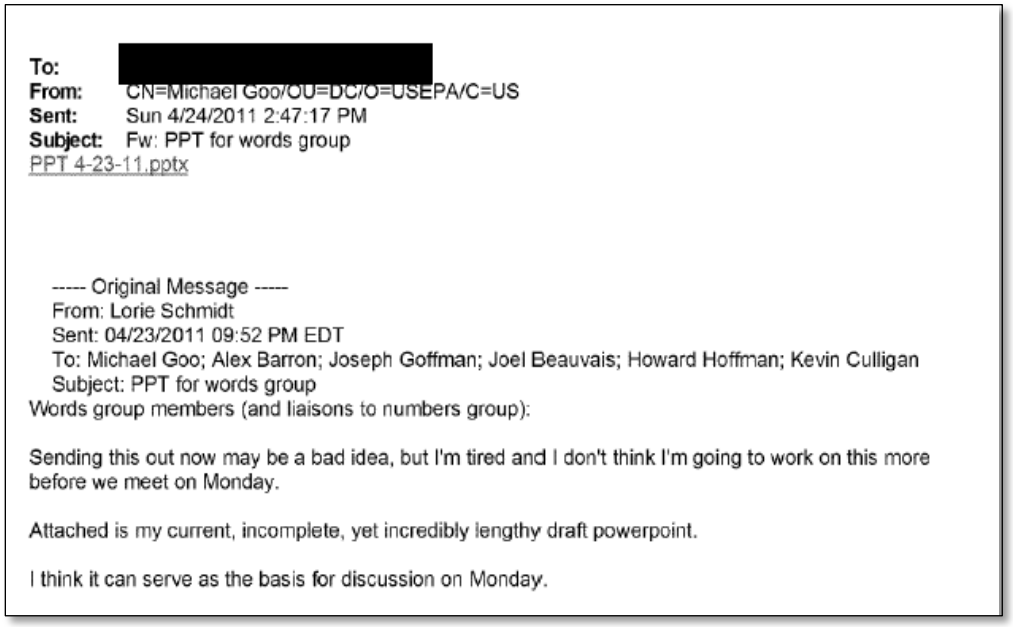
[92] Public Law 113-187.
[93] 44 U.S.C. § 3101.
[94] April 23, 2011 email from L. Schmidt to M. Goo, et al., subject: PPT for words group.
[95] April 23, 2011 email from L. Schmidt to M. Goo, et al., subject: PPT for words group.
[96] April 23, 2011 email from L. Schmidt to M. Goo, et al., subject: PPT for words group.
[97] April 23, 2011 email from L. Schmidt to M. Goo, et al., subject: PPT for words group.

The next day, April 24, 2011, Goo forwarded the internal, draft presentation to an unknown email address.[98]



To: [redacted]
From: CN=Michael Goo/OU=DC/O=USEPA/C=US
Sent: Sun 4/24/2011 2:47:17 PM
Subject: Fw: PPT for words group
PPT 4-23-11.pptx

----- Original Message -----
From: Lorie Schmidt
Sent: 04/23/2011 09:52 PM EDT
To: Michael Goo; Alex Barron; Joseph Goffman; Joel Beauvais; Howard Hoffman; Kevin Culligan
Subject: PPT for words group
Words group members (and liaisons to numbers group):

Sending this out now may be a bad idea, but I'm tired and I don't think I'm going to work on this more before we meet on Monday.

Attached is my current, incomplete, yet incredibly lengthy draft powerpoint.

I think it can serve as the basis for discussion on Monday.

In the following months, EPA officials met in person, communicated by email, and spoke by telephone with NRDC staff numerous times. One stark example of close EPA and NRDC coordination during this time involved an NRDC presentation to a high-level internal EPA workgroup developing the power plant rules on or around June 2011. This presentation was seemingly important for EPA officials to host at the time, as documents reveal Goffman was concerned about whether the workgroup-level meeting with NRDC had been scheduled. [99]

Concurrently, on June 3, 2011, Doniger contacted EPA staff to request a meeting with McCarthy:

> The purpose of the meeting is to present to Gina [McCarthy] new modeling results and a new approach to the structure of the 111(d) standard. I know Gina's schedule is very difficult, but we are hoping for the opportunity to present these ideas to her as soon as possible, given the approaching deadlines for internal decisions and given that NRDC's president Frances Beinecke will be talking with the Administrator about this next week.[100]

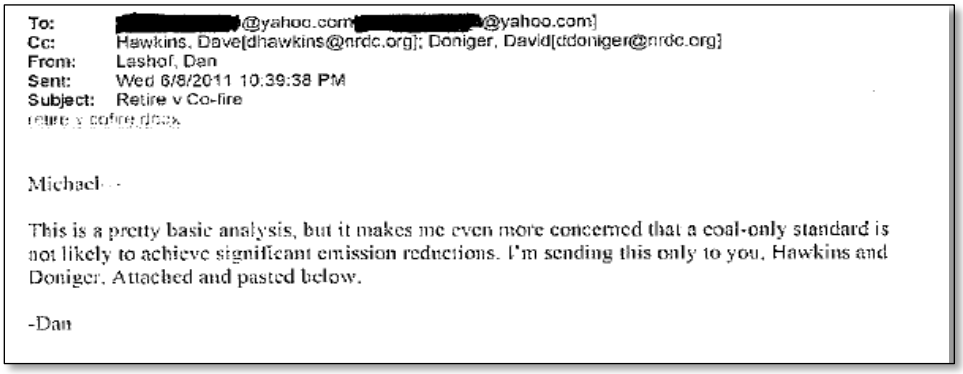
Less than a week later, on June 8, 2011, Doniger followed up directly with McCarthy about the meeting request:

[98] April 24, 2011 email from M. Goo to Redacted, subject: Fw: PPT for words group. It is unclear whether the redacted email address is Goo's personal email account or to another person's email.
[99] June 6, 2011 email from J. Goffman to C. Browne, subject: Re: Request for meeting with Gina McCarthy on power plant NSPS.
[100] June 3, 2011 email from D. Doniger to C. Browne, subject: Request for meeting with Gina McCarthy on power plant NSPS.

> Nice to bump into you yesterday. Here is the presentation we gave to the work group. I want to draw your attention especially to option 2 for existing sources (see pages 7 and 12). This is an approach that would achieve reasonable-cost reductions from the existing fossil power plant fleet on a continuing basis. It is state oriented, respects differences in state starting points, and avoids big transfers between states. It has other advantages.[101]

McCarthy responded later that day, writing "Let me take a quick look. I would never say no to a meeting with you. Let me see what my time looks like but its [sic] pretty tight. Will get back to you."[102]

Also on June 8, 2011, Lashof sent an email to EPA's Goo, again at his personal Yahoo! email account, comparing several policy options and commenting, "This is a pretty basic analysis, but it makes me even more concerned that a coal-only standard is not likely to achieve significant emissions reductions."[103]



To: [redacted]@yahoo.com; [redacted]@yahoo.com]
Cc: Hawkins, Dave[dhawkins@nrdc.org]; Doniger, David[ddoniger@nrdc.org]
From: Lashof, Dan
Sent: Wed 6/8/2011 10:39:38 PM
Subject: Retire v Co-fire
retire v cofire.docx

Michael -

This is a pretty basic analysis, but it makes me even more concerned that a coal-only standard is not likely to achieve significant emission reductions. I'm sending this only to you, Hawkins and Doniger. Attached and pasted below.

-Dan

In the early morning of June 9, 2011, McCarthy sent an email to Administrator Jackson and a handful of other senior political appointees updating them about EPA's work on both the new and existing source standards and ongoing discussions with NRDC about its proposal:

> We will also be meeting with NRDC next week as well. They will be coming in to talk about their latest and greatest idea which frankly I do not think is any better than the design outlines above. We can check back in after the meeting and see if you agree that your idea is better or if you want would like us to pursue it.[104]

Sussman and Goo went furtively behind McCarthy and other EPA Office of Air and Radiation officials to urge that Administrator Jackson keep an open mind toward the concepts being advocated by NRDC.[105]

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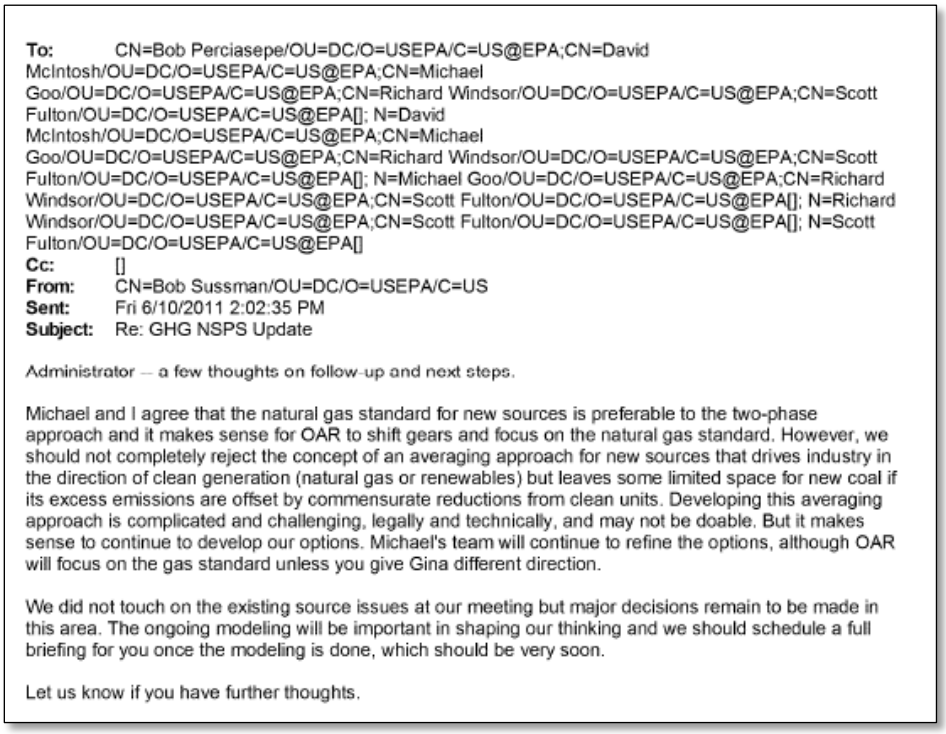
[101] June 8, 2011 email from D. Doniger to G. McCarthy, subject: Our briefing.
[102] June 8, 2011 email from McCarthy to Doniger, subject: Re: Our briefing.
[103] June 8, 2011 email from D. Lashof to M. Goo (Yahoo!), subject: Retire v Co-fire. It is unclear if Goo provided a copy of this email to EPA for management and preservation.
[104] June 9, 2011 email from G. McCarthy to R. Windsor (aka L. Jackson), et al., subject: GHG NSPS Update.
[105] June 9, 2011 email from B. Sussman to M. Goo, subject: Fw: GHG NSPS Update ("Want to talk later?"); June 10, 2011 email from B. Sussman to R. Windsor (aka L. Jackson), et al., subject: Re: GHG NSPS Update.



To: CN=Bob Perciasepe/OU=DC/O=USEPA/C=US@EPA;CN=David McIntosh/OU=DC/O=USEPA/C=US@EPA;CN=Michael Goo/OU=DC/O=USEPA/C=US@EPA;CN=Richard Windsor/OU=DC/O=USEPA/C=US@EPA;CN=Scott Fulton/OU=DC/O=USEPA/C=US@EPA[]; N=David McIntosh/OU=DC/O=USEPA/C=US@EPA;CN=Michael Goo/OU=DC/O=USEPA/C=US@EPA;CN=Richard Windsor/OU=DC/O=USEPA/C=US@EPA;CN=Scott Fulton/OU=DC/O=USEPA/C=US@EPA[]; N=Michael Goo/OU=DC/O=USEPA/C=US@EPA;CN=Richard Windsor/OU=DC/O=USEPA/C=US@EPA;CN=Scott Fulton/OU=DC/O=USEPA/C=US@EPA[]; N=Richard Windsor/OU=DC/O=USEPA/C=US@EPA;CN=Scott Fulton/OU=DC/O=USEPA/C=US@EPA[]; N=Scott Fulton/OU=DC/O=USEPA/C=US@EPA[]
Cc: []
From: CN=Bob Sussman/OU=DC/O=USEPA/C=US
Sent: Fri 6/10/2011 2:02:35 PM
Subject: Re: GHG NSPS Update

Administrator -- a few thoughts on follow-up and next steps.

Michael and I agree that the natural gas standard for new sources is preferable to the two-phase approach and it makes sense for OAR to shift gears and focus on the natural gas standard. However, we should not completely reject the concept of an averaging approach for new sources that drives industry in the direction of clean generation (natural gas or renewables) but leaves some limited space for new coal if its excess emissions are offset by commensurate reductions from clean units. Developing this averaging approach is complicated and challenging, legally and technically, and may not be doable. But it makes sense to continue to develop our options. Michael's team will continue to refine the options, although OAR will focus on the gas standard unless you give Gina different direction.

We did not touch on the existing source issues at our meeting but major decisions remain to be made in this area. The ongoing modeling will be important in shaping our thinking and we should schedule a full briefing for you once the modeling is done, which should be very soon.

Let us know if you have further thoughts.

Original "Sue-and-Settle" Agreement Proves Unworkable

After only a couple of months at work, EPA officials faced the reality that they needed more time under the settlement agreement for issuing the power plant regulations. This had been predicted in the public comments on the proposed settlement agreement, but EPA did not heed these concerns at that time. However, EPA's decision to enter into the settlement gave the environmental activists significant leverage and influence over the timing and scope of EPA's rulemakings.

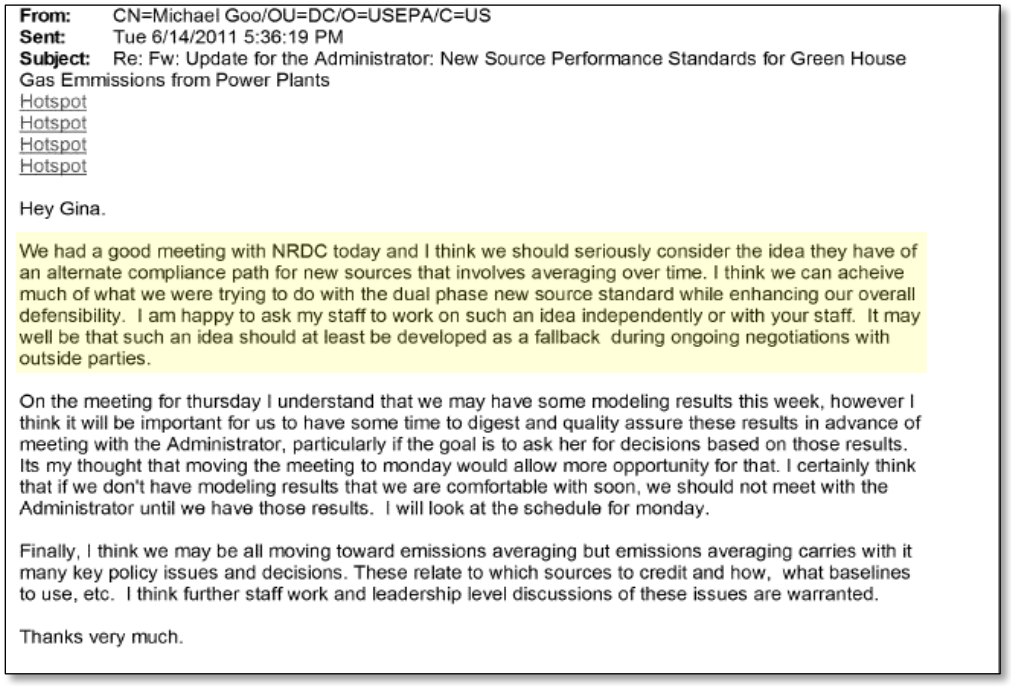
As work continued, EPA and the parties in the *New York* litigation reached an agreement on June 13, 2011, to revise the original settlement deadlines. Under the new agreement, EPA would issue a proposed rule under section 111(b) for new and modified power plants and a second proposed rule establishing guidelines under section 111(d) for existing power plants by September 30, 2011. The dates for issuing the final rules did not change and remained May 26, 2012. Notably, this revised agreement was not provided to the public for comment; Clean Air Act section 113(g) does not require public notice and comment for revisions to settlement agreements.

As discussed later in this Report, even these revised deadlines would also soon prove unrealistic and result in months of additional negotiations among the parties. Moreover, consistent with other "sue-and-settle" agreements, there was vast regulatory uncertainty that could have been avoided had EPA not been so willing to agree to the unrealistic terms of the original settlement in the first place.

On June 14, 2011, the day following approval of the revised settlement agreement, EPA officials met again with NRDC to discuss details of its policy proposal, which included allowing averaging of emissions over time as a way for new power plants to comply with the standards. NRDC's views

appear to have been gaining traction among the senior policy staff in advance of a planned internal, EPA briefing with Administrator Jackson.[106]

In a follow up email, Goo reported to McCarthy that the meeting with NRDC had been productive but that additional decisions needed to be made at the senior policy level:



From: CN=Michael Goo/OU=DC/O=USEPA/C=US
Sent: Tue 6/14/2011 5:36:19 PM
Subject: Re: Fw: Update for the Administrator: New Source Performance Standards for Green House Gas Emmissions from Power Plants
Hotspot
Hotspot
Hotspot
Hotspot

Hey Gina.

We had a good meeting with NRDC today and I think we should seriously consider the idea they have of an alternate compliance path for new sources that involves averaging over time. I think we can acheive much of what we were trying to do with the dual phase new source standard while enhancing our overall defensibility. I am happy to ask my staff to work on such an idea independently or with your staff. It may well be that such an idea should at least be developed as a fallback during ongoing negotiations with outside parties.

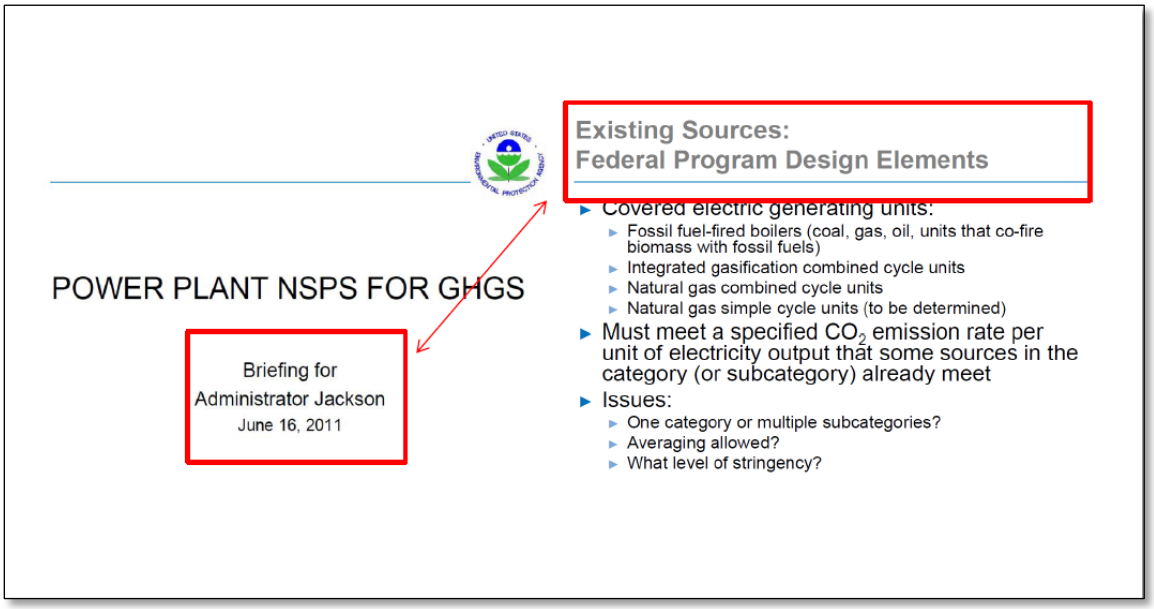
On the meeting for thursday I understand that we may have some modeling results this week, however I think it will be important for us to have some time to digest and quality assure these results in advance of meeting with the Administrator, particularly if the goal is to ask her for decisions based on those results. Its my thought that moving the meeting to monday would allow more opportunity for that. I certainly think that if we don't have modeling results that we are comfortable with soon, we should not meet with the Administrator until we have those results. I will look at the schedule for monday.

Finally, I think we may be all moving toward emissions averaging but emissions averaging carries with it many key policy issues and decisions. These relate to which sources to credit and how, what baselines to use, etc. I think further staff work and leadership level discussions of these issues are warranted.

Thanks very much.

Two days later, Administrator Jackson received a briefing by EPA staff on June 16, 2011 about the policy options and legal issues associated with the proposals to regulate new, existing, and modified power plants under section 111, including the use of averaging over time, credits from retiring power plants, and state-by-state targets.

[106] June 14, 2011 email from M. Goo to G. McCarthy, et al., subject: Re: fw: Update for the Administrator: New Source Performance Standards for Green House Gas Emmissions [sic] from Power Plants.

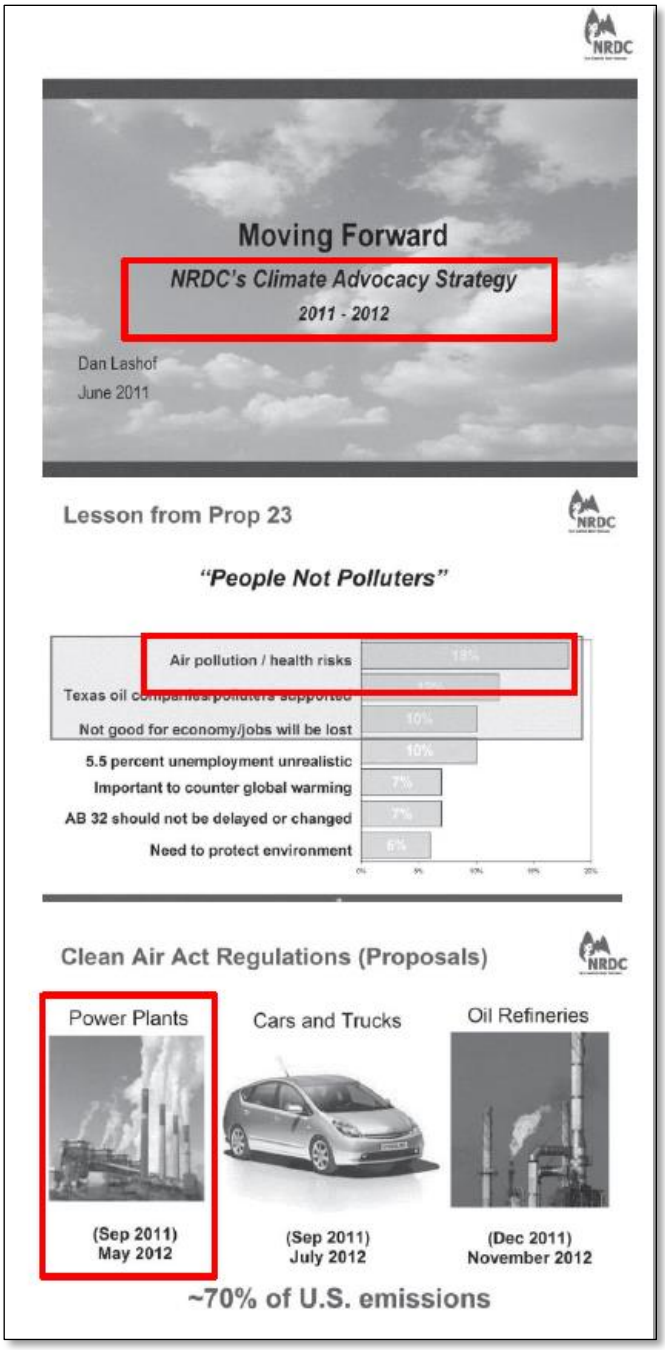


According to a calendar entry provided by NRDC to the Committee, McCarthy was scheduled to meet with NRDC's Doniger at the Starbucks inside the lobby of the J.W. Marriott hotel near EPA headquarters the afternoon of June 27, 2011.[107] A day after the Starbucks meeting between McCarthy and Doniger, Lashof forwarded an internal NRDC presentation titled, "Moving Forward, NRDC's Climate Advocacy Strategy 2011-2012," to Goo, again using his personal Yahoo! email account.[108] A copy of this email was provided by NRDC, not EPA. Critically, in the original email Lashof sent to NRDC staff, he wrote:

[107] It is unclear at this time if this meeting at Starbucks was properly disclosed on McCarthy's public calendar. In her April 2009 "Transparency" memorandum, then Administrator Jackson committed to disclose her appointment calendar showing meetings with the public on the EPA's website and directed "other senior Agency officials, including the Deputy Administrator, the Assistant Administrators, and the Regional Administrators, to make their working appointment calendars available to the public in a similar fashion." The schedules for EPA senior political appointees showing meetings with outside groups are generally posted on EPA's website. However, EPA's level of transparency falls short of what Administrator Jackson pledged. For example, the publicly available schedule for Gina McCarthy is incomplete and dates back only to July 19, 2013, the day after McCarthy was confirmed by the Senate to the Administrator position, rather than to June 2, 2009, when she was confirmed as Assistant Administrator for Air and Radiation. Similarly, the publicly available schedule for Janet McCabe, dates back only to July 19, 2013, when she took over management of the Office of Air and Radiation from McCarthy, rather than November 2009, when she became Principal Deputy Assistant Administrator. In other words, the schedules for McCarthy and McCabe from 2009 to July 18, 2013, are no longer publicly available on EPA's website. The EPA website also does not include schedules for other senior political appointees, such as the Associate Administrator for the Office of Policy, including Lisa Heinzerling or Michael Goo, or those who have left EPA, including former Administrator Jackson and Deputy Administrator Perciasepe. These omissions frustrate the public's ability to track meetings senior EPA officials are having with outside advocacy groups, particularly over the many years it often takes to develop regulations or resolve litigation disputes.

[108] June 28, 2011 email from D. Lashof to M. Goo (at Yahoo! personal email account), subject: FW: Maybe we are winning after all.

> Please see the attached presentation which is a draft attempt to frame our climate advocacy in the post-Waxman-Markey world. The bottom line is that the president has it within his power to make significant reductions to the two biggest sources of global warming pollution: Power plants and cars. … Right now the narrative about Obama and Climate is that he failed to deliver comprehensive legislation and he failed to deliver a strong agreement in Copenhagen (e.g. Al Gore in Rolling Stone). Neither of those fora were entirely within his control. These rules are. <u>The climate legacy of his first term can still be very positive if he delivers on these two rules and defends them.</u> All he needs to do is adopt rules that continue the recent rate of progress in these two sectors.[109] (emphasis added)



Notably, the "Moving Forward" presentation includes a slide stating "<u>same goal, new tactics</u>" and another titled "Clean Air Campaign" which referenced campaign organizing and communications, policy advocacy, and legal intervention.[110]

The presentation also includes a slide regarding efforts to defeat climate legislation in California, recommending a message around "people not polluters" as polling revealed "air pollution/health risks" were most important factor in supporting such climate action.[111] Interestingly, the slide further showed only 7 percent of people surveyed said climate legislation was important to counter global warming and only 6 percent said it was needed to protect the environment.[112] As discussed later in this Report, public views on climate change and public health heavily influenced EPA's messaging on the carbon rules. Thereafter, it was clear the rhetoric on climate change would be recast as a way to address health risks rather than fight global warming.

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[109] June 28, 2011 email from D. Lashof to Climate Center Staff, subject: Maybe we are winning after all. A copy of this email was provided by NRDC – not EPA – and it is unclear if Goo forwarded this document to his official EPA email account.

[110] "Moving Forward, NRDC's Climate Advocacy Strategy 2011-2012," at 2.

[111] Id, at 8.

[112] Id.

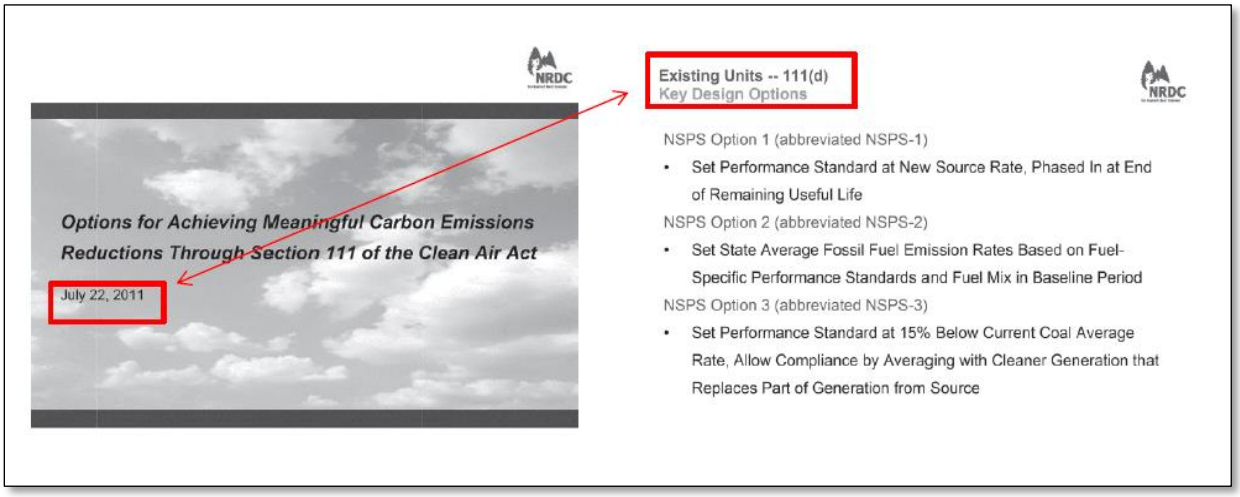
EPA staff met with Administrator Jackson again on July 8, 2011, and, according to the briefing materials, focused on options for regulating existing power plants under 111(d). The meeting also expressed concerns over whether power plants undergoing upgrades to their pollution control equipment in response to other EPA rules would be considered "modified" sources that would be subject to the new source performance standards being developed under section 111(b).[113]

In one significant departure, the briefing materials suggested treating modified power plants as existing sources and not including them in the new source rule, even though they were required to be included in the new source rule per the settlement agreement. However, EPA lacked the record support to justify such a rule at that time. The briefing materials note this course of action would "require a change to the settlement agreement" and "EPA will revisit the issue after receiving more info through State plans for existing sources."[114]

This admission – that EPA lacked the technical support to justify regulating modified power plants as part of its new source rulemaking – again shows that EPA officials were cavalier in their eagerness to finalize a settlement agreement without fully appreciating the complexity of the task at hand.

Meanwhile, NRDC technical staff continued to push EPA to consider its policy proposals. On July 22, 2011, NRDC's Lashof sent an updated presentation of NRDC's proposal to key EPA staff working on the proposed rules:

> Dear EPA NSPSers—I'm attaching a power point presentation that incorporates into the presentation we made to the Administrator new IPM modeling results for what we have called "Option 2" for the 111(d) standard. We found that this option, which sets state-level emission rate standards for all fossil generating unites, produced greater emission reductions at lower cost than our original proposal based on remaining useful life ("option 1").[115]



[113] July 8, 2011, "Power Plant NSPS for GHGs, Briefing for the Administrator," by EPA staff.
[114] July 8, 2011, "Power Plant NSPS for GHGs, Briefing for the Administrator," by EPA staff, at 7.
[115] July 22, 2011 email from D. Lashof to M. Goo, et al., subject: Updated IPM modeling on NSPS options.

By July 26, 2011 – the date under the original settlement agreement that EPA was supposed to propose the new source rule – EPA was instead making a pitch, first to NRDC and then to the other parties, to amend the settlement agreement again, this time to remove modified sources from the new power plant rulemaking altogether.[116] In fact, EPA went so far as to concoct a plan to use NRDC to garner support from other litigants to postpone the deadline. Illustrative of this scenario, one EPA attorney explained, "starting with Doniger," they need to contact certain attorneys as "[t]he purpose of these advance calls would be to gauge the individual reaction to our ideas, and possibly to get them to start working with the other litigant counsel."[117] Further, the EPA attorney wrote:

> The substance of the calls would be to explain why we think it would be wise not to set standards for modified sources, but to instead leave them regulated as existing sources. The focus would be on the pollution control projects and why it would create political hurdles to try to regulate them as new/modified sources.[118]

Meanwhile, on July 27, 2011, McCarthy sent a cryptic email to Doniger asking "Did we do ok?" in the subject line.[119]

The following day, Goffman sent an email to other EPA policy and legal staff indicating he had been pursuing sidebar conversations directly with Doniger to gauge his reaction to EPA's concerns about the need to handle "modified sources" as part of the existing sources rulemaking.[120]

A subsequent conference call was scheduled for August 3, 2011, with several parties to the *New York* litigation. Goffman advised EPA staff in advance of that call:

> As of the end of last week, [McCarthy] was of the mindset that we should take appropriate steps to provide them with as much assurance as we could that our approach to modifications and the way in which we will handle the issue will be designed to preclude any concerns they might raise, our basic stance has to be that we are committed to the path we have discussed internally.[121]

According to an EPA summary of the call, EPA staff argued that it could "achieve at least the same environmental outcome deferring modified sources and treating as existing." Moreover, in a shocking display of apparent politicizing of the rulemakings, one EPA official opined that separating the modified sources from the new source rulemaking "minimizes arguments that the GHG NSPS contributes to a 'train wreck'" and "it also may be an argument to make clear that we wouldn't take action under 2015" – well after President Obama's potential reelection and the 2014 Congressional

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[116] July 26, 2011 email from S. Jordan to J. Goffman, et al, subject: EGU GHG NSPS – Plan for Contacting Litigants re Revising Settlement Agreement concerning Modified Sources.
[117] July 26, 2011 email from S. Jordan to J. Goffman, et al, subject: EGU GHG NSPS – Plan for Contacting Litigants re Revising Settlement Agreement concerning Modified Sources.
[118] July 26, 2011 email from S. Jordan to J. Goffman, et al, subject: EGU GHG NSPS – Plan for Contacting Litigants re Revising Settlement Agreement concerning Modified Sources.
[119] July 27, 2011 email from G. McCarthy to D. Doniger, subject: Did we do ok? The following day, EPA announced proposed volatile organic compound standards for oil and gas drilling operations. See, July 28, 2011, EPA press release, available at: http://yosemite.epa.gov/opa/admpress.nsf/1e5ab1124055f3b28525781f0042ed40/8688682fbbb1ac65852578db00690ec5!OpenDocument.
[120] July 28, 2011 email from J. Goffman to K. Culligan, et al., subject: Re: NRDC Call on Modifications.
[121] July 29, 2011 email from J. Goffman to J. Goffman, et al., subject: Re: NRDC Call on Modifications.

midterm elections.[122] The environmental activists raised concern that agreeing to defer the "modified source" rule in this context would undermine their challenges to other rulemaking deferrals and put them in an "awkward position."[123] According to the EPA document, the environmental activists did express willingness to consider support for a "co-proposal" whereby EPA would propose and take comment on several regulatory approaches, which is another example of how closely the litigation settlement and policy making were linked and how the EPA had predetermined the outcome of the rulemaking, contrary to the Administrative Procedure Act.[124]

A week later after the conference call, EPA took cursory steps pursuant to its internal Action Development Process to finish work on the proposal so that it could be readied for review by the White House Office of Management and Budget and other interested federal agencies. EPA conducted a Final Agency Review for the New Source Performance Standard – an opportunity for the key program offices participating in the development of the rule to weigh in on any policy or legal concerns – on August 10, 2011. This was largely a paperwork exercise. According to an internal EPA memorandum describing the review process, the Office of Policy, the Office of General Counsel, and the Office of Enforcement and Compliance Assurance indicated that they could not at that time provide a formal position because the draft rule provided for review was incomplete.[125]

By September 15, 2011, EPA admitted publicly that it would not meet the revised settlement deadline to issue proposed greenhouse gas emission limits for power plants.[126] This news came on the heels of the President's September 2, 2011 decision to request EPA withdraw a draft revision to National Ambient Air Quality Standards (NAAQS) for Ozone[127] and following months of debate on Capitol Hill and in the press about the multitude of EPA rules causing a "regulatory train wreck."[128]

Concerned that the power plant rules were becoming another ozone rule, NRDC, Sierra Club, EDF and 16 other environmental activist groups sent a letter to President Obama asking "that the administration announce and stick to a remedial schedule requiring proposal of these standards

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[122] August 3, 2011 email from K. Culligan to J. McCabe, et al., subject: Summary of discussion with enviros and NY on modificatins [sic] under GHG NSPS.
[123] August 3, 2011 email from K. Culligan to J. McCabe, et al., subject: Summary of discussion with enviros and NY on modificatins [sic] under GHG NSPS.
[124] August 3, 2011 email from K. Culligan to J. McCabe, et al., subject: Summary of discussion with enviros and NY on modificatins [sic] under GHG NSPS.
[125] August 8, 31, 2011 memorandum from M. Cubeddu to W. Farrar and C. Fellner, subject: Final Agency Review for the Greenhouse Gas New Source Performance Standard for Electric Generating Units (SAN 5548); Tier 1, NPRM, RIN 2060-AQ91. It was not until November 4, 2011 that the draft proposed rule was ready for transmittal to the Office of Management and Budget. See, November 4, 2011 memorandum from G. McCarthy to M. Goo, subject: Greenhouse Gas New Source Performance Standards for Electric Utility Generating Units (Tier 1; SAN 5548; RIN 2060-AQ91).
[126] "EPA lets greenhouse gas deadline slip, promises new schedule," by Jean Chemnick, Environment and Energy Daily, September 15, 2011; available at: http://www.eenews.net/greenwire/stories/1059953720/print. However, in the following weeks, EPA continued to work on the prosed rule for new power plants, including continued coordination with NRDC to obtain updated modeling results. For example, in mid-August, NRDC responded to an EPA follow up request for information about whether certain assumptions – including natural gas co-firing at coal plants and biomass – were included in the modeling being performed by ICF International on behalf of NRDC. See, August 23, 2011 email from S. Yeh to A. Barron, et al., subject: RE: Follow up questions from EPA.
[127] September 2, 2011 Statement by the President on the Ozone National Ambient Air Quality Standards, available at: https://www.whitehouse.gov/the-press-office/2011/09/02/statement-president-ozone-national-ambient-air-quality-standards. See also, http://www.eenews.net/greenwire/stories/1059953217.
[128] See, http://www.eenews.net/eedaily/stories/1059950175.

without further delay and completion of them as soon as possible in 2012."[129] Interestingly, Doniger was quoted in one news article as saying, "the letter was an attempt to focus the White House's attention on the issue" and that the litigants were not "willing to wait until the president's hypothetical second term to see NSPS rules for electric utilities," and that President Obama should not "dare kick this over to 2013, like . . . ozone."[130]

> [The] Existing Source standard is very challenging substantively as well as politically, and we need more time and latitude to work through the substantive problem solving in order to make the standard truly meaningful, and more time to get state-level and public buy-in. This combination approach – marshalling our forces behind the New Source standard and nurturing the Existing Source more slowly – is our best shot at making significant GHG policy through NSPS.
>
> - *Gina McCarthy*

"Sue and Settle" Agreement Up in the Air

With the September 30, 2011, settlement agreement deadlines up in the air, the draft power plant rules remained a work in progress, prompting another flurry of negotiations with NRDC and the other parties to reach agreement on a second revision to the settlement – all of which happened behind closed doors and without public input. In the following weeks, while the settlement negotiations appeared to be at a standstill, EPA continued to work on the proposed rule for new power plants and continued coordination with NRDC to obtain updated modeling results.[131]

EPA was now seeking not just additional time for the new source proposal, but it may also have been trying to slow down its existing source proposal as the environmental activists had feared. Because of the settlement agreement, EPA could not walk away or defer the rulemaking without approval from the environmental activists. It appears based on documents obtained by the Committee that EPA and the parties may have reached an alternative arrangement – on timing, substance, or both, but they did not finalize a second revised settlement agreement. However, the parties' only recourse for EPA missing the rulemaking deadline under the existing settlement agreements would be to petition the court for an order compelling EPA to act. According to the D.C. Circuit court records, no such action was filed.

In a meeting with the parties scheduled for September 26, 2011, EPA was prepared to offer "a firm schedule, with a final by November 2012, on New Source NSPS and opening up the door to an accompanying [Advanced Notice of Proposed Rulemaking] in January, 2012 for Existing Source NSPS."[132]

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[129] September 20, 2011, letter from 20 environmental groups to President Obama.
[130] See, http://www.eenews.net/greenwire/stories/1059953915.
[131] For example, in mid-August, EPA requested additional information from NRDC about whether certain assumptions – including natural gas co-firing at coal plants and biomass – were included in the modeling being performed by ICF International on behalf of NRDC. See, August 23, 2011 email from S. Yeh to A. Barron, et al., subject: RE: Follow up questions from EPA.
[132] September 26, 2011 email from G. McCarthy to R. Windsor (aka L. Jackson), subject: GHG NSPS Calls.

McCarthy and EPA General Counsel Scott Fulton advised then Administrator Jackson that a call from her to the heads of the "big three" environmental activist groups involved in the litigation "would be helpful" in breaking the stalemate and "would help pave the way for a more fertile discussion" with the groups' attorneys.[133] The "main points you may want to make" are:

> New Source standard will be very strong. It will ensure that no new uncontrolled coal plant is built going forward. That is a significant policy achievement, and we are going to need all of our political capital to achieve it. Existing Source standard is very challenging substantively as well as politically, and we need more time and latitude to work through the substantive problem solving in order to make the standard truly meaningful, and more time to get state-level and public buy-in. This combination approach – marshalling our forces behind the New Source standard and nurturing the Existing Source more slowly – is our best shot at making significant GHG policy through NSPS.[134]

The following day, correspondence between senior EPA officials further exposed the extent to which the prior settlement agreement increased the leverage for NRDC to keep pressure on the EPA at the same time EPA was trying to push back the rulemaking deadlines until after the 2012 election. Illustrative of this scenario is an email sent on the evening of September 27, 2011, from Goffman to McCarthy laying out NRDC's concerns.[135]

From: Joseph Goffman
Sent: 09/27/2011 11:30 PM EDT
To: Gina McCarthy; Scott Fulton; Avi Garbow
Subject: Fw: Update

David followed up the note below with a phone call a little while ago. Briefly, for background, we ended today's call with our request that the settlement parties determine whether or not they were willing to continue the discussions knowing that we were not prepared to agree to a promulgation date for the 111(d) program at any time before 2013, and whether, if they were willing to accept that constraint, they thought that the way to proceed was to talk about a schedule past the January ANPRM

As you see below, the parties have since conferred but have not reached an agreement among themselves. From my call with David just now, several things seemed to emerge:

He has spoken to "people in the WH" and raised the specter of this issue becoming "another ozone NAAQS", and reported to me that that was an outcome that Nat Keohane at least was not interested in seeing occur. He also reported that Nat told him that the Administrator was, as far as he knew, under no pressure from the WH to adopt the approach we are taking in the negotiations.

It seems from what David said that they can't imagine accepting a schedule for 111(d) that contemplates a proposal any later than spring of 2012. A concern that loomed very large in David's thinking -- -and which gives an additional meaning to the "another ozone NAAQS" theme -- is that he doubts that NRDC could stand up to the backlash against the settlement parties themselves if they agreed to a 111(d) proposal date any later in time than spring of next year. Apparently, NRDC and others issued statements on the NAAQS decision and on the news that we would not make the September 30 deadline on the NSPS with statements that others in the environmental community did not think were sufficiently critical of the administration.

Almost regardless of what the prospects of ultimate agreement might be, he offered to start having a side discussion, perhaps with DOJ's David Gunter, to formulate a bridge agreement to get us past Friday for a long enough period of time to keep talking. He himself brought up the idea of simply altering the proposal dates in the agreement only to reject the idea before I could say anything, and instead opined that his group would be more comfortable with an exchange of letters.

In addition to a disagreement about the timing for the 111(d) rule for existing power plants, Doniger's apparent sidebar discussion with a senior White House official with strong ties to EDF, Nat Keohane, is interesting given the reaction it prompted from McCarthy:

[133] September 26, 2011 email from G. McCarthy to R. Windsor (aka L. Jackson), subject: GHG NSPS Calls.
[134] September 26, 2011 email from G. McCarthy to R. Windsor (aka L. Jackson), subject: GHG NSPS Calls.
[135] September 27, 2011 email from J. Goffman to G. McCarthy, et al., subject: Fw: Update.

> We should talk to Nat and advise him of the fact that we are in confidential discussions and he needs to not engage. I know he comes from that world but he doesn't [sic] work there anymore. On the other hand, it feels a bit like shutting the barn door after the cows have go [sic] grazing.[136] (emphasis added)

Notably, this and other EPA emails indicate the Agency was working on an ANPR for existing power plants as a precursor – and perhaps legal alternative – to issuing the emissions guidelines under section 111(d) required under the settlement agreement. An ANPR is a non-regulatory action whereby the EPA can layout and seek comment on a range of policy or legal issues that can inform a subsequent regulatory process. An ANPR is also an option that affords greater public participation in advance of a rulemaking, which ostensibly leads to better rulemaking decisions.

EPA famously issued an ANPR in July 2008 as a way to obtain public comment on the ramifications of the Supreme Court's *Massachusetts v. EPA* decision on regulating greenhouse gases under the Clean Air Act.[137] At that time, NRDC's Hawkins criticized EPA's use of an ANPR as a tactic "designed to delay any real action to reduce global warming pollution for as long as possible and certainly until the next administration."[138] NRDC did not seem any warmer to the idea of an ANPR when the Obama Administration pushed for one in lieu of regulating greenhouse gasses from existing power plants.

EPA's negotiating position also appears to have hardened during this time as well, reflecting the political and legal reality that these rules would take years of additional deliberations and buy-in that had yet to materialize. EPA emails indicate that senior policy and legal staff continued to debate the demands by NRDC and the other parties that EPA agree to propose an existing power plant rule in spring 2012 and a final rule in 2013.

"I will check with the Administrator this morning. Is it doable, while still doing justice to the process started with the ANPRM? And should we assume this would still go with a 2013 final date?" wrote Fulton.[139] "Unfortunately, I don't see how we can have an npr [notice of proposed rulemaking] by spring without some significant shortcuts and no surprises/delays. Obviously omb review time is key here," advised a senior EPA policy official.[140]

Later that day, a senior Office of General Counsel attorney advised the Deputy General Counsel that the parties were open to a short-term extension to allow for additional negotiations on a revised settlement and that the heads of the environmental groups may contact the Administrator directly to press their case "about what they think 2012 is important."[141] According to the attorney, "It seemed to me that Doniger signaled towards the end they don't really want to walk away from the settlement and would rather end up with an agreed-upon modification of it. I don't recall when you left, but they pushed a bit for an earlier proposal date, e.g., March instead of May."[142]

On the day EPA was required to act under the revised settlement agreement, it received a reprieve from the parties in the form of a letter. "We were only able to move the date in the GHG EGU NSPS

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[136] September 28, 2011 email from G. McCarthy to J. Goffman, et al., subject Re: Update.
[137] 73 FR 44354 (July 30, 2008).
[138] NRDC Press Release, available at: http://www.nrdc.org/media/2008/080327a.asp.
[139] September 28, 2011 email from S. Fulton to J. Goffman and G. McCarthy, subject: Re: Update.
[140] September 28, 2011 email from P. Tsirigotis to J. Goffman and K. Culligan, subject: Re: Update.
[141] September 28, 2011 email from K. McLean to A. Garbow, subject: Re: nsps.
[142] September 28, 2011 email from K. McLean to A. Garbow, subject: Re: nsps.

settlement extension letter from October 7 to October 14. David Doniger would not go beyond 2 weeks," a senior OGC attorney advised Fulton.[143] Fulton then informed the Administrator:

> Basically reflects their understanding that we will not meet today's deadline for proposing rules and their commitment to stand down for 2 weeks with respect to any responsive action … The schedule under discussion would have us proposing a new source standard in January 2012, proposing an existing source in the May 2013, and promulgate final rules for both new and existing source in late 2012.[144]

Settlement negotiations progressed through early October 2011, with the parties nearing agreement on a tentative deal to revise the settlement a second time that would have EPA issuing a proposed rule under section 111(b) for new and modified power plants by January 31, 2012, with a final rule due by November 19, 2012, and a proposed rule under section 111(d) for existing power plants by May 15, 2012, and a final rule by December 14, 2012.[145]

An agreement seemed so close that EPA was preparing a press release, with Goffman telling EPA's public affairs staff:

> It looks like we will be on schedule to sign an amended settlement agreement on Friday, October 14. We should start figuring out our public announcement strategy. It is not unlikely that the settlement parties will want to make some positive hay out of this, but at the very least I don't think we are bound by their desires.[146]

EPA press staff thought an agreement to split the timeline for the existing power plants rules from the rule for the new and modified sources would "likely be the biggest news" and recognized that "NRDC wants us to make a big deal out of this decision (similar to what we did last year), but don't think there's any desire (in OAR at least) to do that. … We will also post the updated settlement agreement on the NSPS website once it's finalized."[147]

However this deal for a new settlement agreement appears to have fallen through. Neither EPA nor NRDC issued a press release touting a new agreement, and a second revised settlement was never posted to EPA's website or filed with the court. Press accounts quote McCarthy as admitting EPA was "a little bit behind the eight ball" but did not provide additional clarity about when EPA would issue the rules.[148]

Although section 113(g) of the Clean Air Act requires EPA provide public notice and opportunity to comment on proposed litigation settlement agreements, again that obligation does not extend to revisions or side agreements between the parties. This lack of transparency and opportunity for the public to participate in subsequent settlement agreements revisions frustrates the goals behind

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[143] September 30, 2011 email from P. Embrey to S. Fulton, subject: NSPS EGU extension letter.
[144] September 30, 2011 email from S. Fulton to R. Windsor, subject: Fw: NSPS EGU extension letter. EPA did not provide a copy of the draft or the final letter. It is unclear if there is a typo or mistake in the dates in this email, given the apparent inconsistency between issuing a proposal for existing power plants in May 2013 and a final rule in late 2012.
[145] October 11, 2011 email from P. Embrey to S. Fulton, subject: Fw: Boiler NSPS settlement.
[146] October 12, 2011 email from J. Goffman to J. Millett, et a., subject: Fw: Utility Boiler GHG NSPS settlement.
[147] October 12, 2011 email from A. Drinkard to B. Alcantara, subject: Fw: Utility Power Plant GHG NSPS settlement.
[148] "EPA, green extend talks on CO2 from power plants," by Gabriel Nelson, Energy and Environment News, October 31, 2011; available at: www.eenews.net/greenwire/stories/1059955714/.

section 113(g). The public and regulated community are left on the outside, looking in at a process from which they are excluded.

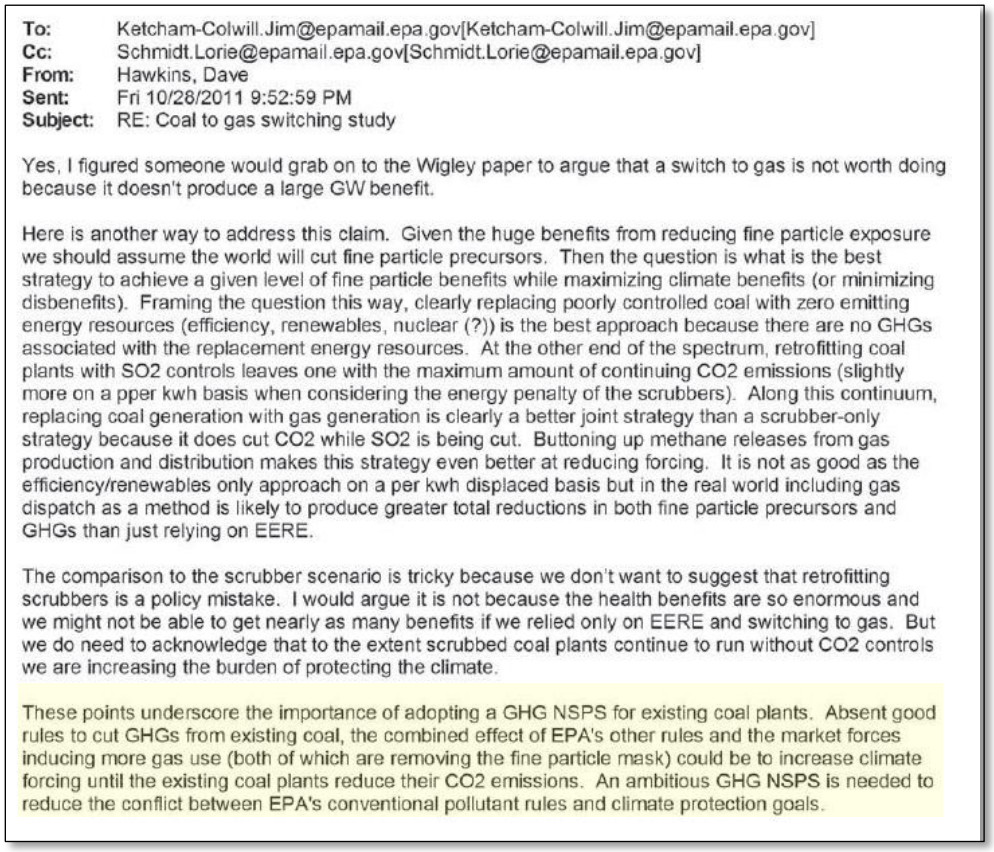
Despite the missed deadlines, NRDC continued to coordinate with EPA and press for a formal extension.

In a series of brief messages in late October 2011, NRDC's Hawkins appeared anxious to talk to EPA's Goo, but EPA has not provided documents that would explain the context of these messages. In one message, Hawkins wrote only, "Please call,"[149] followed with a message the next day asking, "time to talk?"[150] It is unclear if the two men connected, because the following morning Hawkins sent a note asking, "talk now for 5 min?"[151] before sending another message less than an hour later stating, "need to talk ASAP."[152] Goo responded later that afternoon, first writing, "Just called"[153] and then following a few minutes later, "Ok message relayed."[154] Hawkins wrote back three minutes later, "Thx [sic] Let's talk next steps when you are free."[155]

Although a revised settlement agreement remained out of reach, the parties to the *New York* litigation filed a letter with the court late on October 28, 2011, stating that they would forbear from filing a lawsuit to force EPA to issue the rules until at least November 30, 2011.[156]

Also on October 28, 2011, an EPA air policy official contacted Hawkins to discuss a recent study on whether switching to natural gas for electricity generation created sizable greenhouse gas benefits, writing, "Dave, thanks for your reactions. This issue may well come up in the the [sic] communications context of NSPS."[157] Hawkins followed up later that night with more information about how to characterize the study.[158]

[149] October 26, 2011 email from D. Hawkins to M. Goo, subject: Please call.
[150] October 27, 2011 email from D. Hawkins to M. Goo, subject: time to talk?
[151] October 28, 2011 email from D. Hawkins to M. Goo, subject: talk now for 5 min?
[152] October 28, 2011 email from D. Hawkins to M. Goo, subject: need to talk ASAP.
[153] October 28, 2011 email from M. Goo to D. Hawkins, subject: Re: talk now for 5 min?
[154] October 28, 2011 email from M. Goo to D. Hawkins, subject: Ok message relayed?
[155] October 28, 2011 email from D. Hawkins to M. Goo, subject: RE: Ok message relayed?
[156] "EPA, greens extend talks on CO2 from power plants," by Gabriel Nelson, Greenwire, published October 31, 2011; available at: www.eenews.net/greenwire/stories/1059955714. EPA did not provide a copy of this letter in its document productions.
[157] October 28, 2011 email from J. Ketcham-Colwill to D. Hawkins, subject: Re: Coal to gas switching study.
[158] October 28, 2011 email from D. Hawkins to J. Ketcham-Colwill, subject: RE: Coal to gas switching study.



To: Ketcham-Colwill.Jim@epamail.epa.gov[Ketcham-Colwill.Jim@epamail.epa.gov]
Cc: Schmidt.Lorie@epamail.epa.gov[Schmidt.Lorie@epamail.epa.gov]
From: Hawkins, Dave
Sent: Fri 10/28/2011 9:52:59 PM
Subject: RE: Coal to gas switching study

Yes, I figured someone would grab on to the Wigley paper to argue that a switch to gas is not worth doing because it doesn't produce a large GW benefit.

Here is another way to address this claim. Given the huge benefits from reducing fine particle exposure we should assume the world will cut fine particle precursors. Then the question is what is the best strategy to achieve a given level of fine particle benefits while maximizing climate benefits (or minimizing disbenefits). Framing the question this way, clearly replacing poorly controlled coal with zero emitting energy resources (efficiency, renewables, nuclear (?)) is the best approach because there are no GHGs associated with the replacement energy resources. At the other end of the spectrum, retrofitting coal plants with SO2 controls leaves one with the maximum amount of continuing CO2 emissions (slightly more on a pper kwh basis when considering the energy penalty of the scrubbers). Along this continuum, replacing coal generation with gas generation is clearly a better joint strategy than a scrubber-only strategy because it does cut CO2 while SO2 is being cut. Buttoning up methane releases from gas production and distribution makes this strategy even better at reducing forcing. It is not as good as the efficiency/renewables only approach on a per kwh displaced basis but in the real world including gas dispatch as a method is likely to produce greater total reductions in both fine particle precursors and GHGs than just relying on EERE.

The comparison to the scrubber scenario is tricky because we don't want to suggest that retrofitting scrubbers is a policy mistake. I would argue it is not because the health benefits are so enormous and we might not be able to get nearly as many benefits if we relied only on EERE and switching to gas. But we do need to acknowledge that to the extent scrubbed coal plants continue to run without CO2 controls we are increasing the burden of protecting the climate.

These points underscore the importance of adopting a GHG NSPS for existing coal plants. Absent good rules to cut GHGs from existing coal, the combined effect of EPA's other rules and the market forces inducing more gas use (both of which are removing the fine particle mask) could be to increase climate forcing until the existing coal plants reduce their CO2 emissions. An ambitious GHG NSPS is needed to reduce the conflict between EPA's conventional pollutant rules and climate protection goals.

By early November 2011, a draft of the proposed "Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Generating Units" was circulated among relevant EPA offices for a second round of Final Agency Review. This Final Agency Review was conducted "virtually" by email without a physical meeting of the workgroup representatives, and EPA program offices were given until 12 noon on November 4, 2011, only a day and half total, to review and to provide their comments or concurrence.[159] According to EPA's Action Development Process, the Final Agency Review generally should occur no sooner than 15 days after the draft rule package is circulated for final review.[160] The Office of General Counsel, the Office of Policy, the Office of Research and Development, and the Office of Enforcement and Compliance Assurance each concurred with comment on the draft, and the proposal was submitted to OMB for review on November 4, 2014.[161]

[159] November 2, 2011 email from A. Rush to S. Durkee, et al., subject: Virtual FAR this Friday (SAN 5548).
[160] Action Development Process, at 42; available at: http://yosemite.epa.gov/sab%5CSABPRODUCT.NSF/5088B3878A90053E8525788E005EC8D8/$File/adp03-00-11.pdf.
[161] November 8, 2011 memorandum from N. Owens to W. Farrar, subject: Final Agency Review for Greenhouse Gas New Source Performance Standard for Electric Generating Units (SAN 5548); Tier 1, NPRM, RIN 2060-AQ91.

Hollow Deadlines Call for a New Strategy

After the draft rule was sent to OMB, NRDC's Doniger sent an "urgent" message to EPA attorneys asking for guidance about how to answer expected press inquiries about the rule:

> Since the NSPS notice posted on the OMB site is exceedingly spare, we need to know how the agency is answering various questions that reporters are asking us and are sure to ask you. We want to be out there in this news cycle in a very supportive way, but cannot get ahead of the agency. So your answers are quite urgent.[162]

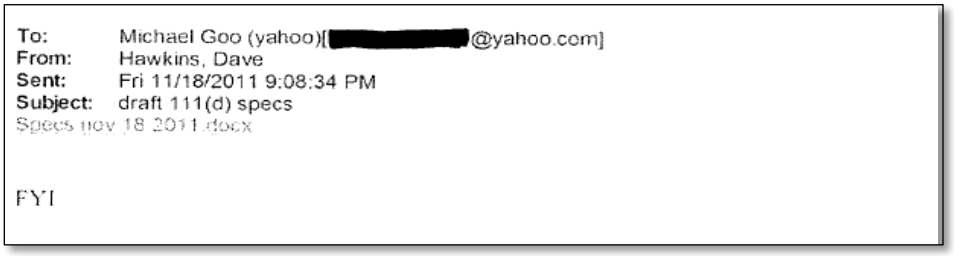
Among the potential questions Doniger wanted help answering in the event of a press call was the scope of the proposal and the timing:

> When will these rules (presumably clarified to be limited to new sources) be proposed and promulgated? Is there a new settlement schedule? What about the schedule/settlement for existing sources? (Is EPA going to say anything about the intended proposal and promulgation dates? Regarding the settlement, are you going to say more than 'we're still negotiating with the petitioners'?[163]

EPA's communication staff advised answering these questions generically: "Draft response: EPA is working with OMB through the interagency review process and will issue proposed standards when that process is complete. EPA continues to work with petitioners on a schedule."[164]

Indeed, EPA's public statements sought to refrain from any mention of work on other rules or the status of the parties reaching an agreement on revised deadlines.

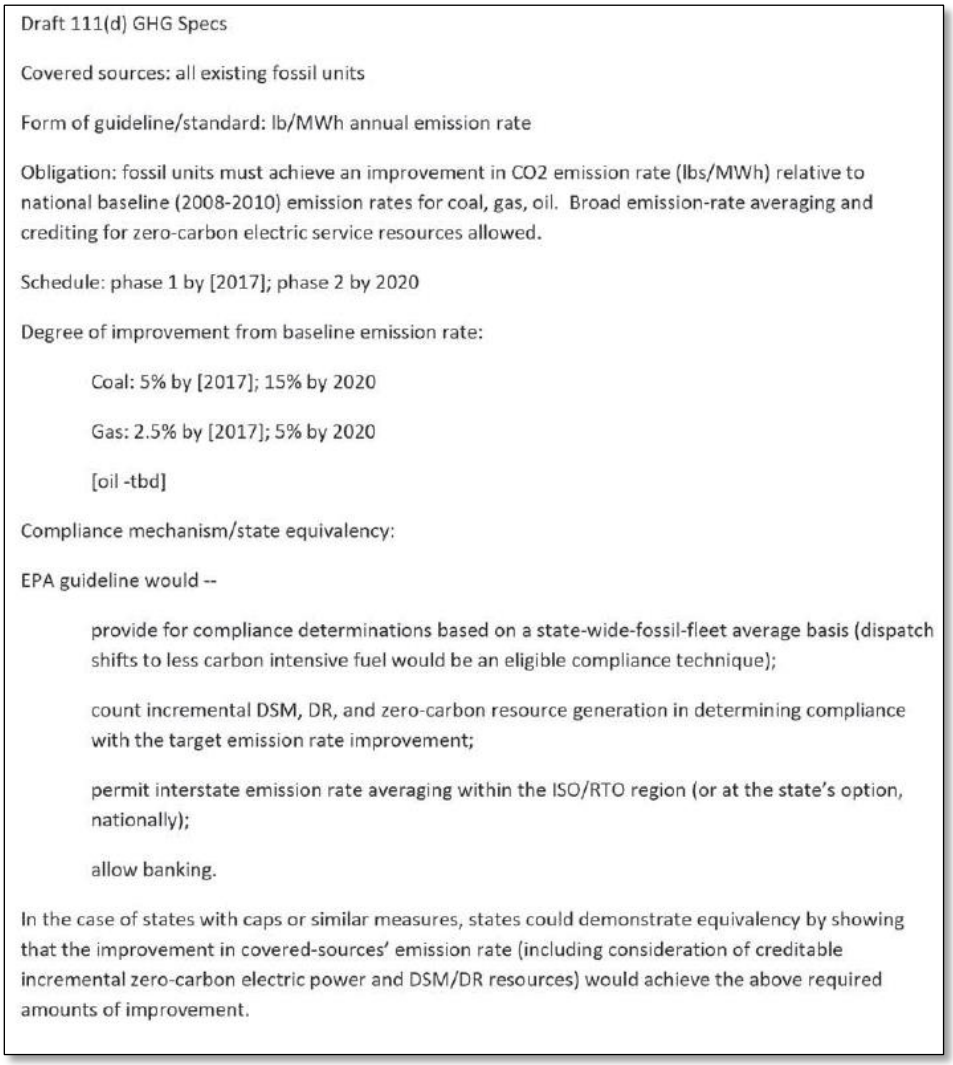
While the draft new source rule was at OMB and a proposed existing source rules was still up in the air, Hawkins sent a private message to Goo at his personal Yahoo! email account with a another pitch for how EPA should regulate under section 111(d).[165]



To: Michael Goo (yahoo)[redacted@yahoo.com]
From: Hawkins, Dave
Sent: Fri 11/18/2011 9:08:34 PM
Subject: draft 111(d) specs
Specs nov 18 2011.docx

FYI

[162] November 8, 2011 email from D. Doniger to A. Garbow and P. Embrey, subject: URGENT: NSPS guidance.
[163] November 8, 2011 email from D. Doniger to A. Garbow and P. Embrey, subject: URGENT: NSPS guidance.
[164] November 8, 2011 email from A. Drinkard to A. Drinkard, et al., subject: UPDATE: Re: Fw: URGENT: NSPS guidance.
[165] November 18, 2011 email from D. Hawkins to M. Goo (at Yahoo! email), subject: draft 111(d) specs. This email was provided by NRDC – not EPA. Based on documents provided by EPA, it appears Goo did not forward the original November 2011 email to his official EPA email account until May 9, 2013. EPA provided a copy of the forwarded email. Hawkins sent another email to Goo at his personal Yahoo! email account and his official work email account on November 23, 2011 stating only "Returned your call."



Draft 111(d) GHG Specs

Covered sources: all existing fossil units

Form of guideline/standard: lb/MWh annual emission rate

Obligation: fossil units must achieve an improvement in CO2 emission rate (lbs/MWh) relative to national baseline (2008-2010) emission rates for coal, gas, oil. Broad emission-rate averaging and crediting for zero-carbon electric service resources allowed.

Schedule: phase 1 by [2017]; phase 2 by 2020

Degree of improvement from baseline emission rate:

Coal: 5% by [2017]; 15% by 2020

Gas: 2.5% by [2017]; 5% by 2020

[oil -tbd]

Compliance mechanism/state equivalency:

EPA guideline would --

provide for compliance determinations based on a state-wide-fossil-fleet average basis (dispatch shifts to less carbon intensive fuel would be an eligible compliance technique);

count incremental DSM, DR, and zero-carbon resource generation in determining compliance with the target emission rate improvement;

permit interstate emission rate averaging within the ISO/RTO region (or at the state's option, nationally);

allow banking.

In the case of states with caps or similar measures, states could demonstrate equivalency by showing that the improvement in covered-sources' emission rate (including consideration of creditable incremental zero-carbon electric power and DSM/DR resources) would achieve the above required amounts of improvement.

As the November 30, 2011, deadline loomed, EPA's senior political appointees also tried developing a new strategy for engaging with the litigation parties that emphasized the importance of building public support over time and downplaying the need for EPA to act immediately on the existing power plants rule. Presumably, EPA sought delay on the existing rule due to the upcoming 2012 presidential election. For example, in a November 23, 2011, email, McCarthy wrote to Goffman suggesting a strategy for engaging with the litigants.[166]

[166] November 23, 2011 email from G. McCarthy to J. Goffman, subject: GHG EGU NSPS.

To: CN=Joseph Goffman/OU=DC/O=USEPA/C=US@EPA[]
Cc: []
Bcc: []
From: CN=Gina McCarthy/OU=DC/O=USEPA/C=US
Sent: Wed 11/23/2011 11:58:24 PM
Subject: GHG EGU NSPS

I would suggest that you talk to NY first to see what the states might want to keep their momentum while we raise awareness of the GHG EGU NSPS for existing facilities.

Ok, this would be my pitch.

We want to focus on new and we make the time commitment to get that done. Its a big win and will raise the profile of the NSPS while avoiding baggage associated with existing.

We also want to delay putting out an existing source standard at this time:
It isn't needed this year given decision timeframe related to MATS
It will act as additional fuel for congressional action on power plant regs
There is little public acknowledgement of climate change actions that do not also offer other overriding benefits like efficiency improvement so we need to generate interest and support.
Near-term climate efforts will take place at state and regional levels and we may be better able to focus attention on benefits of those actions if we do not propose federal measures. As an alternative we can: Put out a white paper in February that lays out a number of strategies for an existing standard. It would primarily focus on state and regional efforts and the fact that any existing source standard should begin by recognizing the value of on-going state and regional efforts. It could lay out the NRDC CES approach, the value of RF standards or EE standards, etc. Then it would compare those efforts to the costs and benefits of our more traditional approaches that we have modeled and point to the cost effectiveness of state/regional approaches.
We would offer to use that as a way to launch a comprehensive strategy: 1) Conduct a series of regional visits to talk about and highlight best practices and climate initiatives across the states and regions. 2) Seek comment on federal barriers and oppt that could enhance state and regional efforts, including EPA efforts to build energy efficiency into our program and policies, congressional strategies related to CES, etc (with friendly congressmen); and 3) begin another interagency process to look at the social cost of carbon.
I would drag OAP into the strategy and outreach effort and see what they could do to bring visibility to climate efforts.

You get the idea.

Several days later Goffman replied to McCarthy, suggesting changing the argument to highlight the climate commitments the Obama Administration had already made as a way to establish goodwill with the litigation parties.[167]

To: CN=Gina McCarthy/OU=DC/O=USEPA/C=US@EPA[]
Cc: []
From: CN=Joseph Goffman/OU=DC/O=USEPA/C=US
Sent: Sun 11/27/2011 7:46:11 PM
Subject: Re: GHG EGU NSPS

Hi, Gina.

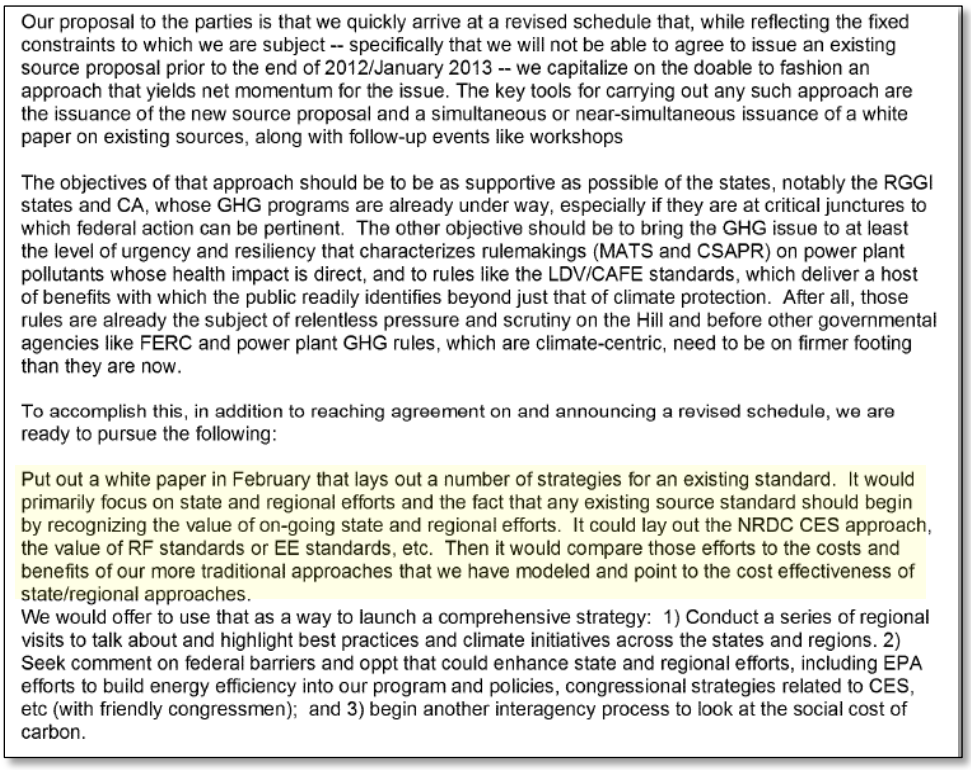
Wonder if we shouldn't be laying the case out a bit differently, with more emphasis on how to best effectuate the EPA/administration's commitment to progress on climate -- and the parties' stake in same.

First, I would review the bidding and remind them that since the Administrator's first conversation with the CEO's, close to two months have been spent trying to secure approval for a 2012 schedule for existing sources. That is enough time to conclude that additional efforts to do so may be fruitless and that the passage of more time without a public agreement may be damaging to the agency, the parties' credibility, the sutainability of the RGGI states' ongoing program and to the objective of establishing a meaningful GHG program for existing sources.

What has occurred to during that period is that we have sent a new source package over to OMB and that the Administrator has made a public statement to the effect that the new source proposal would be issued early next year.

[167] November 27, 2011 email from J. Goffman to G. McCarthy, subject: Re: GHG EGU NSPS.

Goffman continued that once the case had been made for delay with the litigation parties, EPA could then lay out a strategy to build further support, including issuing a White Paper reflecting NRDC's proposal and others for regulating existing power plants:



Our proposal to the parties is that we quickly arrive at a revised schedule that, while reflecting the fixed constraints to which we are subject -- specifically that we will not be able to agree to issue an existing source proposal prior to the end of 2012/January 2013 -- we capitalize on the doable to fashion an approach that yields net momentum for the issue. The key tools for carrying out any such approach are the issuance of the new source proposal and a simultaneous or near-simultaneous issuance of a white paper on existing sources, along with follow-up events like workshops

The objectives of that approach should be to be as supportive as possible of the states, notably the RGGI states and CA, whose GHG programs are already under way, especially if they are at critical junctures to which federal action can be pertinent. The other objective should be to bring the GHG issue to at least the level of urgency and resiliency that characterizes rulemakings (MATS and CSAPR) on power plant pollutants whose health impact is direct, and to rules like the LDV/CAFE standards, which deliver a host of benefits with which the public readily identifies beyond just that of climate protection. After all, those rules are already the subject of relentless pressure and scrutiny on the Hill and before other governmental agencies like FERC and power plant GHG rules, which are climate-centric, need to be on firmer footing than they are now.

To accomplish this, in addition to reaching agreement on and announcing a revised schedule, we are ready to pursue the following:

Put out a white paper in February that lays out a number of strategies for an existing standard. It would primarily focus on state and regional efforts and the fact that any existing source standard should begin by recognizing the value of on-going state and regional efforts. It could lay out the NRDC CES approach, the value of RF standards or EE standards, etc. Then it would compare those efforts to the costs and benefits of our more traditional approaches that we have modeled and point to the cost effectiveness of state/regional approaches.
We would offer to use that as a way to launch a comprehensive strategy: 1) Conduct a series of regional visits to talk about and highlight best practices and climate initiatives across the states and regions. 2) Seek comment on federal barriers and oppt that could enhance state and regional efforts, including EPA efforts to build energy efficiency into our program and policies, congressional strategies related to CES, etc (with friendly congressmen); and 3) begin another interagency process to look at the social cost of carbon.

According to documents provided by EPA, the parties were initially unwilling to agree to EPA's request to defer issuing a proposed rule for existing power plants until after the November 2012 presidential election, presumably in light of uncertainty over President Obama's reelection. Indeed, the attorney for the state of New York wrote:

> We cannot accept EPA's counterproposal given that it defers a rulemaking on existing power plants until 2013. We're not in a position to make a counteroffer at this time that we think the agency would entertain given what the agency communicated on the call Monday. Finally, although we don't believe that given the way things currently stand, there is a basis to execute an additional forbearance letter, we continue to be open to further discussions to arrive at a mutually acceptable resolution. We can schedule a call today to discuss further, if you'd like. Otherwise, we're prepared to the [sic] Nov. 30 deadline pass today without further discussion today.[168]

Disagreement about the deadlines did not stop NRDC and the environmental groups from continuing to push EPA on regulating power plants.[169] For example after EPA issued the final

[168] November 20, 2011 email from M. Myers to D. Gunter, et al., subject: Power Plant NSPS settlement.
[169] November 30, 2011 email from P. Embrey to S. Fulton and A. Garbow, subject: Fw: Power Plant NSPS settlement ("The States' response to our offer on the EGU GHG NSPS. I do not know if they are aware of the environmental groups' efforts to talk to the Administrator.") NRDC's Hawkins also sent an email to Goo at his personal Yahoo! email account in early December asking for details about the draft new power plant rule under review at the Office of Management and Budget. Goo responded the same day suggesting "lets [sic] talk

Mercury Air Toxics Rule in December 2011, Doniger contacted EPA's McCarthy to request a meeting, explaining:

> I would like to brief you on the scale of the support campaign that the community is planning for defending the MATS rule and to support the GHG standard for new power plants expected early year. Assuming the new source standard is proposed in January, there will be a very large effort in support, which will also show the scale of support that an existing source standard will receive.[170]

McCarthy agreed, responding, "Why dont [sic] we schedule a call right after the New Year."[171]

Documents obtained by the Committee indicate that in January 2012 EPA was still working on the White Paper (possibly as an alternative to the ANPR suggested by EPA in the fall of 2011) as a non-regulatory option to show progress on existing power plants, while NRDC was continuing to pressure EPA to agree on a timeline for such a rule. For example, while developing the White Paper, EPA staff debated whether the approach taken by EPA in its "NOx SIP Call" rulemaking[172] could be used:

> [A]s a way to do the state-level, and that the vision for this approach was coming from Gina. It sounded like the vision … that that it was not really a discussion of ways to regulate GHGs that may achieve state equivalence with guidelines, but seemingly a state-level (as opposed to a bottom-up unit-by-unit level) approach to setting a state's regulatory target (with NRDC's vision for implementation being one example of how a state might achieved [sic] its target).[173] (emphasis added)

EPA continued to discuss timing of an existing power plant rule in January 2012 with NRDC's Doniger, who was "interested in nailing down a resolution and path forward" given the uncertainty surrounding the upcoming 2012 presidential election. In a private meeting on a Saturday afternoon, Goffman reiterated an offer to issue the proposed rule for new power plants and the White Paper for existing power plants by early February 2012, followed by a proposed rule for existing sources in December 2012 and a final rule in mid-2013.[174]

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about this more when you get back—maybe a report or two or something in january showing that there is no new coal being built might be helpful." See, December 9, 2011 email from M. Goo (Yahoo! personal email) to D. Hawkins, subject: Re: Inside epa. Although this email has not been provided to the Committee by either EPA or NRDC, it has been released to the public under the Freedom of Information Act.

[170] December 19, 2011 email from D. Doniger to G. McCarthy, subject: Mercury … and beyond!

[171] December 19, 2011 email from G. McCarthy to D. Doniger.

[172] 63 FR 57356.

[173] January 4, 2012 email from D. Evans to B. Elman, subject: Re: Summary of 1/3 call on 111(d) white paper.

[174] January 15, 2012 email from J. Goffman to G. McCarthy, subject: Power Plants and Refineries Settlements.

To: CN=Gina McCarthy/OU=DC/O=USEPA/C=US@EPA[]
Cc: []
From: CN=Joseph Goffman/OU=DC/O=USEPA/C=US
Sent: Sun 1/15/2012 10:59:35 PM
Subject: Power Plants and Refineries Settlements

Gina -- Yesterday (Saturday) afternoon, I had a very lengthy face-to-face meeting with David Doniger to discuss these two matters. David made clear that he was not representing all of the litigants, but that he was interested in nailing down a resolution and path forward for each of these two matters that he could lay out for the other litigants with the recommendation that they support the approaches. .

The good news is that by the end of our session, he agreed to the proposal(s) that we have put on the table during past discussions with him individually in earlier informal communications and with the group in more formal negotiations. Assuming that he could bring along the rest of the litigants, he requested that we memorialize the agreement by formally amending the power plant settlement and the refineries settlement.

Specifically, he suggested amending the power plant agreement to specify February 4 as the date by which the new source proposal would be signed and the white paper would be issued, with the final new source standard to be signed before the end of the year. (If I recall correctly, the other litigants had pushed for the final to be signed around November 19 reflecting a desire to have that occur 60 days before Inauguration Day). The amendment would also contemplate a December 2012 date for issuing a formal NPRM for the existing source standard, with the final existing source rule to be issued some time after mid-year in 2013. At the end of the discussion David acknowledged that he was in fact agreeing to the approach that Lorie and I had presented to him at the end of August of last year.

EPA's plan to issue the White Paper appeared to be an important factor in Doniger's consideration and openness to accepting a deferred rulemaking on existing power plants:

One of the things that seemed to compel him to come to this agreement was a discussion of the extent to which the white paper would be substantively rich and would provide an opportunity for public events like workshops with stakeholders and the states, and I believe that he had had discussions within the past week with Kevin and Peter that also left him with a sense that the white paper would be strong.

In addition to helping persuade him to accept the power plant approach we had been proposing his sense of what the white paper would represent prompted him to suggest something roughly analogous in the refineries approach. He and the other litigants would agree to bifurcating the toxics component of the refineries rule and putting that on a March proposal-December final rulemaking schedule with the GHG/NSPS on a December 2012 (proposal)/late 2013 (final) schedule. At the same time, language would be added to the text of the settlement agreement that would create latitude for the agency to look more expansively approaches that would maximize achievable GHG reductions. David was not at all specific about what he had in mind, but we have had presentations from Exxon and other industry stakeholders suggesting that facility-wide approached might be more productive than trying to set component-by-component engineering standards.

It seems to me that David's position more or less accepts the approaches we have been urging the litigants to accept. The question is whether at this point we can put through the process on our side a revised power plant agreement that specifies a February 4 date for the new source proposal and specific dates for existing sources and specifies a white paper. David did ask to what extent OMB or other in the EOP were aware of the white paper and what kind of review might be demanded. As for the refineries agreement, the only wrinkle that David has introduced to the approach we have been advocating is the inclusion of some form of language signaling that we would contemplate an expansive approach to setting a GHG standard for refineries.

McCarthy initially reacted with praise for the apparent progress in the settlement talks, telling Goffman she would ask "the Administrator asap to confirm these schedules" and that "[t]his is a really significant [sic] step forward Joe. Congrats and let's hope we can keep people focused long enough to get the agreement done."[175] Reality quickly intruded, and McCarthy followed up less

[175] January 15, 2012 email from G. McCarthy to J. Goffman, subject: Re: Power Plants and Refineries Settlements.

than 30 minutes later to say, "it seems like Dec 2012 is a bit overloaded. We can't agree to a final for new power plant, and proposals for existing as well as refinery. Is there wiggle room?"[176]

Goffman agreed in a follow-up email, which further illustrated the influence of the 2012 election on EPA's plans:

> Yes, next December is jammed with deliverables, but I guess I had been assuming that if we are in a transition there will be impetus to achieve them and if the administration is staying on there will be latitude to slip the deadlines into the next year. But there may also be some wiggle room in the discussions now if, as they appear to be doing at this point, the litigants are willing to make some concessions to reality. If that's the way we want to go – pushing some of these deadlines back, then I think we should include in the memo to the Administrator our recommendation and then work it with David and the litigants.[177]

Upon receiving McCarthy's blessing to draft a memo for the Administrator, Goffman remarked, "[a]ll along, it felt as if we were all following the same playbook maneuvering this along, so we should still have enough momentum to get the agreements, at least, across the finish line."[178] (emphasis added)

While an extension on the existing source proposal deadline was pending, NRDC's Lashof continued to keep EPA policy staff apprised of the modeling data being developed to support NRDC's proposals.[179] Similarly, EPA officials consistently followed up with NRDC to make sure it accurately understood NRDC's findings and views.[180] Accordingly, as the 2012 Presidential campaign season went into full gear, it is no surprise that EPA was working on the unprecedented existing source rule in secrecy. During this time, no formal revision to the settlement agreement was reached and no new rulemaking deadlines announced – leaving Congress, the American public, and the regulated community in the dark about EPA's plans and timing for these rules.

[176] January 15, 2012 email from G. McCarthy to J. Goffman, subject: Re: Power Plants and Refineries Settlements.
[177] January 15, 2012 email from J. Goffman to G. McCarthy, subject: Re: Power Plants and Refineries Settlements.
[178] [178] January 16, 2012 email from J. Goffman to G. McCarthy, subject: Re: Power Plants and Refineries Settlements.
[179] January 25, 2012 email from D. Lashof to J. Ketcham-Colwill, subject: Specifications for modeling 111(d) policy options.
[180] February 6, 2012 email from J. Ketcham-Colwill to D. Lashof, subject: Request for accuracy – summary of NRDC 111(d) specs.

Part 3: EPA Proposes Controversial Rule for New Power Plants

On March 27, 2012, Administrator Jackson signed the proposed rule for new power plants.[181] Under the proposal, EPA determined that all new fossil-fueled power plants with a greater than 25 megawatts capacity would be barred from emitting more than 1,000 pounds of CO2 per megawatt hour. Although the proposal was "fuel neutral," it was based on the performance of natural gas combined cycle technology. EPA wrote the proposed rule based on an assumption that no new coal-fired power plants would be built in the next 30 years, but if any were built, EPA expected they would be able to meet the standard by installing expensive and undemonstrated carbon capture and storage (CCS) technology.

Environmental activists expressed public support for the rule, even though it did not include "modified" sources as was required under the settlement agreements. In fact, environmental litigants had a consistent public message when asked about the rule – with apparent coaching from the White House.[182] Not only did the White House public visitor log reveal that EDF's Megan Ceronsky and Sierra Club's John Coequyt attended a March 29, 2012, meeting with the President,[183] but EPA's Goffman confirmed to McCarthy the White House outreach to the groups to "control the message."

To: CN=Richard Windsor/OU=DC/O=USEPA/C=US@EPA;"Bob Perciasepe" [perciasepe.bob@epa.gov]; Bob Perciasepe" [perciasepe.bob@epa.gov]; Brendan Gilfillan" [gilfillan.brendan@epa.gov]
From: CN=Gina McCarthy/OU=DC/O=USEPA/C=US
Sent: Mon 3/26/2012 2:41:37 AM
Subject: Fw: Enviros fine. Can call you if you want to hear details.

Fyi. Joe's email below indicated that there is a WH call with enviros tomorrow at 2:15. They want to control the message re: existing facilities.

----- Original Message -----
From: Joseph Goffman
Sent: 03/25/2012 10:36 PM EDT
To: Gina McCarthy
Subject: Re: Enviros fine. Can call you if you want to hear details.
Btw, WH had already scheduled an enviro outreach mtg/call at 2:15 tomorrow (I learned from NRDC and from EDF), and the key nuance is sensitivity about what is and is not said about existing sources.

Downplaying an Existing Source Rule until Reelection

The issue of when – or even, if – EPA would take steps to regulate existing power plants was of paramount concern to Congress, the American public, and the electric power sector. EPA officials worked hard to downplay that possibility, ostensibly to continue their efforts to get President Obama reelected. While the public was left in the dark as to EPA's plans, environmentalists were still in closed door negotiations with EPA.

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[181] Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Generating Units, Proposed Rule, 77 FR 22392 (April 13, 2012).
[182] March 26, 2012 email from G. McCarthy to R. Windsor (aka L. Jackson), et al., subject: Fw: Enviros fine. Can call you if you want the hear details.
[183] Available at: https://www.whitehouse.gov/briefing-room/disclosures/visitor-records.

Media coverage of the new source proposal reflected the previously discussed strategy whereby environmental groups sought to garner public support for an existing source rule as EPA sought to downplay the proposal for political purposes. For instance, *Politico* reported "EPA Administrator Lisa Jackson earlier today said the agency currently has 'no plans' to create greenhouse gas limits for current power sources." The same article quoted NRDC's Doniger saying "[NRDC] look[s] forward to reaching an agreement with EPA on a schedule for completing the standard for new sources and developing standards for existing sources." Upon seeing the *Politico* article, Administrator Jackson remarked to her spokesman, "They can't be mad about that."[184]

Privately, though, Doniger reached out to Goffman and Goo to ask if EPA could "help me out here" and reaffirm EPA's commitment to the existing source rule:

> This is really terrific. You've seen our positive reax [sic] by now. The comment about 'no plans' for existing sources is kicking up a storm among reporters. Being taken a repudiation of the settlement. Can you please clarify that you are not walking away from the settlement, that you are continuing to negotiate with a goal of coming to a solution?[185]

The comment about 'no plans' for existing sources is kicking up a storm among reporters. Being taken a repudiation of the settlement. Can you please clarify that you are not walking away from the settlement, that you are continuing to negotiate with a goal of coming to a solution?

- *NRDC's David Doniger*

Later that night, Goffman and others conferred on how to put the tempest back in the teapot and to minimize any questions about the future of an existing power plant rule during the Presidential campaign. One senior staff person suggested telling the press, "Once we regulate new sources, we have an obligation to address existing sources but, because there is no statutory deadline for existing sources, the timeframe for action is totally within our discretion."[186] Goffman agreed with the statement and added, "Now, we just have to manage the Doniger quote."[187]

Goffman apparently got the message through to Doniger as a news article the next day included statements from Doniger and another attorney involved in the underlying litigation, EDF's Ceronsky, dismissing any concerns about Jackson's "no plans" statements.[188] "I think the fact that the president went forward with this standard today is a huge statement about his commitment to making serious progress toward reducing greenhouse gas emissions," Ceronsky was quoted as saying.[189] Doniger said, "I don't interpret what she said as any kind of statement that they're not

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[184] March 27, 2012 email from R. Windsor (aka L. Jackson) to B. Gilfillan, subject: Re" Politico blurp.
[185] March 27, 2012 email from D. Doniger to J. Goffman and M. Goo, subject: Congrats! But help me out here …
[186] March 27, 2012 email from P. Tsirigotis to G. McCarthy, subject: existing sources.
[187] March 28, 2012 email from J. Goffman to P. Tsirigotis, subject: Re: Existing sources.
[188] "After yesterday's announcement, enviros confident EPA won't shirk other greenhouse gas rules," by Jean Chemnick, Energy & Environment News, March 28, 2012; available at: http://www.eenews.net/eedaily/stories/1059962106.
[189] "After yesterday's announcement, enviros confident EPA won't shirk other greenhouse gas rules," by Jean Chemnick, Energy & Environment News, March 28, 2012; available at: http://www.eenews.net/eedaily/stories/1059962106.

going to work on that."[190] He added that NRDC would be focusing on generating "an unprecedented number of public comments" in support of the proposed news source rule, which he said looked similar to what NRDC has been advocating for.[191]

Indeed, Doniger's blog on NRDC's website trumpeted the proposed rule and encouraged the public to advocate for an existing source rule in their comments on the new power plant proposal:

> Today's action, of course, is only a proposal and not yet a sure thing. … So it's critical that concerned citizens step up to voice their support for cleaning up power plants, in the public comment period and public hearings later this Spring. You can click here to send EPA a message of support. Tell EPA that you support its standard to cut the carbon pollution from America's new power plants. And urge EPA to act swiftly to cut the dangerous carbon pollution coming from our existing power plants too.[192]

EPA's statements at the time of the new source proposal were misleading and appear to be designed to downplay the prospects of issuing the existing power plant rule in an election year. EPA officials seemingly recognized such a rule would add yet another layer of burdensome red tape on the American people on top of other EPA regulations.

EPA's statements at the time of the new source proposal were misleading and appear to be designed to downplay the prospects of issuing the existing power plant rule in an election year.

As the news media noted, references to the section 111(d) rule for existing power plants were even removed from the new source proposal by OMB during interagency review. These articles did not go unnoticed within EPA.[193] For example, EDF's Vickie Patton forwarded one of the articles to Goffman at his personal email account asking if he had seen it.[194]

In addition to managing the public message on the rule, EPA held only two public hearings, albeit simultaneously, one in Washington, D.C. and the other in Chicago, on May 24, 2012. Hundreds of people participated at the hearings. Notably, the hearings were just two days before the original deadline for finalizing the rules. The confluence of these dates reinforces the extent to which the original settlement agreement was wholly unrealistic. EPA also received more than 2.6 million public comments on the new source proposal by June 25, 2012, further illustrating the public's upheaval over the rules.

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[190] "After yesterday's announcement, enviros confident EPA won't shirk other greenhouse gas rules," by Jean Chemnick, Energy & Environment News, March 28, 2012; available at: http://www.eenews.net/eedaily/stories/1059962106.

[191] "After yesterday's announcement, enviros confident EPA won't shirk other greenhouse gas rules," by Jean Chemnick, Energy & Environment News, March 28, 2012; available at: http://www.eenews.net/eedaily/stories/1059962106.

[192] See, http://switchboard.nrdc.org/blogs/ddoniger/cleaner_power_starts_today_epa.html.

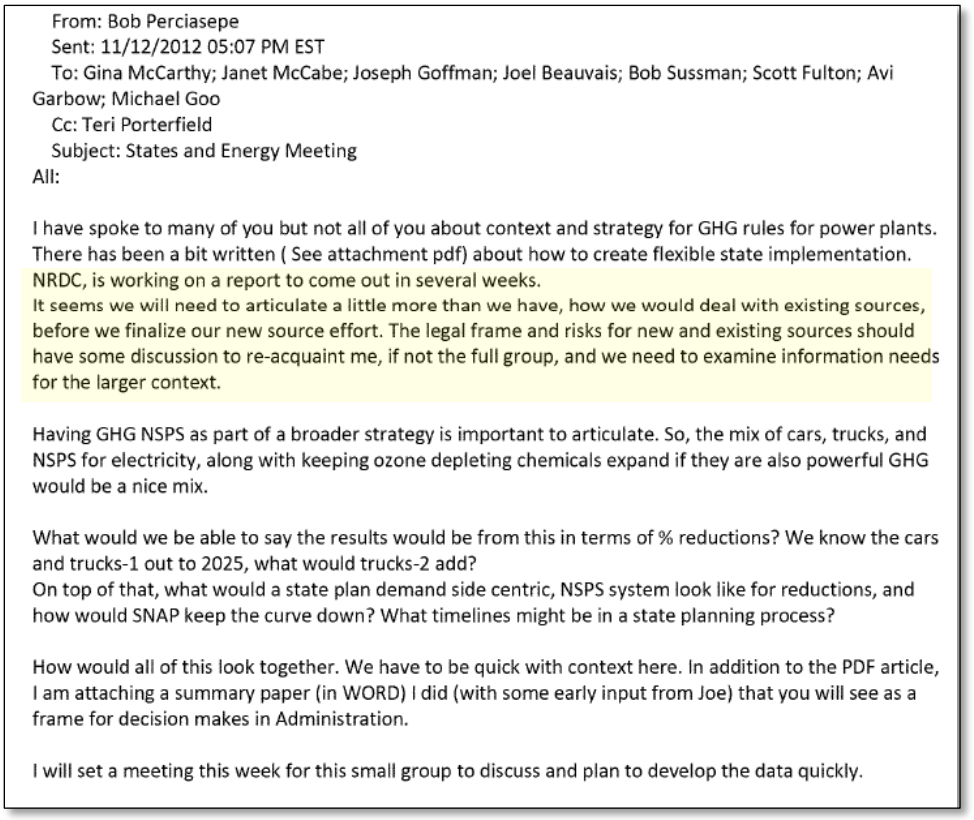
[193] "EPA's 'no plans' stance on existing power plants doesn't jibe with text of GHG rule," by Jean Chemnick, Energy & Environment News, April 17, 2012, available at: http://www.eenews.net/greenwire/stories/1059962999/. "CO2 rules: Now you see 'em, now you don't," by Erica Martinson, Politico, April 17, 2012; available at: www.politico.com/news/stories/0412/75216.html.

[194] April 16, 2012 email from V. Patton to J. Goffman (at personal Gmail account), subject: Fw: OMB review draft of GHG NSPS available. Goffman forwarded the personal email to his official EPA email account almost a year later. See, March 19, 2013 email from J. Goffman (personal Gmail account) to J. Goffman (official EPA account), subject: Fwd: Fw: OMB review draft of GHG NSPS available.

Throughout the summer of 2012, as the Presidential election campaign raged on, EPA staff continued working to flesh out the concepts for an existing source rule as advocated by NRDC and other environmental activists while at the same time keeping these efforts hidden from public view.[195]

Second Term Starts an Amplified Climate Agenda

In the days immediately after President Obama won reelection, there were a series of meetings and phone calls between senior EPA officials and NRDC,[196] and then Deputy Administrator Bob Perciasepe convened an internal EPA meeting to discuss how to publicly describe the status of EPA's work on the existing power plant rulemaking.



From: Bob Perciasepe
Sent: 11/12/2012 05:07 PM EST
To: Gina McCarthy; Janet McCabe; Joseph Goffman; Joel Beauvais; Bob Sussman; Scott Fulton; Avi Garbow; Michael Goo
Cc: Teri Porterfield
Subject: States and Energy Meeting

All:

I have spoke to many of you but not all of you about context and strategy for GHG rules for power plants. There has been a bit written (See attachment pdf) about how to create flexible state implementation. NRDC, is working on a report to come out in several weeks.
It seems we will need to articulate a little more than we have, how we would deal with existing sources, before we finalize our new source effort. The legal frame and risks for new and existing sources should have some discussion to re-acquaint me, if not the full group, and we need to examine information needs for the larger context.

Having GHG NSPS as part of a broader strategy is important to articulate. So, the mix of cars, trucks, and NSPS for electricity, along with keeping ozone depleting chemicals expand if they are also powerful GHG would be a nice mix.

What would we be able to say the results would be from this in terms of % reductions? We know the cars and trucks-1 out to 2025, what would trucks-2 add?
On top of that, what would a state plan demand side centric, NSPS system look like for reductions, and how would SNAP keep the curve down? What timelines might be in a state planning process?

How would all of this look together. We have to be quick with context here. In addition to the PDF article, I am attaching a summary paper (in WORD) I did (with some early input from Joe) that you will see as a frame for decision makes in Administration.

I will set a meeting this week for this small group to discuss and plan to develop the data quickly.

As this and other emails show, Perciasepe and other senior EPA policy makers were familiar not just with the regulatory concepts for an existing power plant rule that NRDC was pushing, but also with the formal NRDC report at least one month before it was publicly released. Critically, NRDC's

[195] June 26, 2012 email from J. Ketcham-Colwill to M. Adamantiades, subject: Item 1 – FW: Stakeholder files – section 111(d) alternative proposals ("For current stakeholder positions on section 111(d), get the last draft of the white paper [], and see the footnotes for the most recent stakeholder position statements or proposals. Groups like NRDC, EDF and CATF evolved over time, and they not want people to focus on their old stuff.")
[196] See e.g., November 7, 2012 email from M. Goo to D. Doniger and D. Lashof, subject: I'm running late; November 11, 2012 email from B. Perciasepe to D. Hawkins, subject: Quick Call; November 11, 2012 email from D. Hawkins, subject: RE: Quick Call; November 11, 2012 email from D. Doniger to M. Goo (at Yahoo! personal email account), subject Sunstein on power plants.

report provided the blueprint for achieving a 17 percent greenhouse gas reduction by 2020, to fulfill President Obama's 2009 climate commitment in Copenhagen, by regulating existing power plants under section 111(d) of the Clean Air Act.

The issue of how to characterize EPA's work on the existing power plant rule was brought to a head, in part, by the impending release of NRDC's report.

On November 26, 2012, NRDC was invited to meet with EPA air policy officials to discuss "Upcoming Energy Issues."[197] Four days after this NRDC meeting, Goffman provided Perciasepe detailed information about potential greenhouse gas reductions that could result from various Clean Air Act measures affecting the power sector and other industrial sectors.

Perciasepe sent an email a couple of days later thanking Goffman for the information and adding, "There was much discussion at the 'Energy Cabinet' Thursday. I will have a summary for the morning (Monday)[.] We may need to get together this week some time. I believe NRDC is springing their report this week sometime also."[198]

McCarthy followed up later that day to add:

> Joe [Goffman] let me know that NRDC expects EPA may gets [sic] press calls when their event happens on Tuesday. NRDC called him to express concerns that our responses re: existing facilities not be as constrained as it has been in the past. They fear folks will interpret a response 'we are not currently working on a rule re: existing facilities' as inconsistent or even unsupportive of the NRDC report. I do know that the WH met with reps from major enviro groups last week and the WH expressed their intent to tackle the climate issue this term – with no real detail of course. So we may want to see how best to respond if calls come in. While NRDC may be overblowing the newsworthiness of their report, we probably do need to check in on our public message.[199] (emphasis added)

NRDC called [Goffman] to express concerns that our responses re: existing facilities not be as constrained as it has been in the past. They fear folks will interpret a response 'we are not currently working on a rule re: existing facilities' as inconsistent or even unsupportive of the NRDC report. I do know that the WH met with reps from major enviro groups last week and the WH expressed their intent to tackle the climate issue this term.

- *Gina McCarthy*

Perciasepe responded, "[M]ore than check on our message, we need to have one."[200]

Attorneys in the EPA Office of General Counsel were also aware of the planned release of the NRDC report: "The only [sic] I have heard is this: … Doniger told Gina earlier this week that NRDC is

[197] November 26, 2012 calendar entry, subject: Upcoming Energy Issues. This document was provided by NRDC.
[198] December 2, 2012 email from R. Perciasepe to J. Goffman, et al., subject: Re: GHG Estimates.
[199] December 2, 2012 email from G. McCarthy to J. Goffman, et al., subject: Re: GHG Estimates.
[200] December 2, 2012 email from B. Perciasepe to G. McCarthy, et al, subject: Re: GHG Estimates

preparing a paper with their recommendations on how to proceed on the GHG NSPS rulemakings – EGUs, refineries, etc. – and that NRDC is planning to send Gina that paper next week."[201]

According to plan, on December 4, 2012, NRDC issued its report delineating how EPA could use section 111(d).[202]

A representative for state air programs remarked at the time how NRDC's plan could influence EPA in its development of an existing source rule under 111(d). "What NRDC is doing is beating EPA to the punch," Bill Becker, executive director of the National Association of Clean Air Agencies, said. Becker was further quoted as saying, "The importance of this is that it's the first proposal that attempts to define the structure of how a 111(d) program would work throughout the country."[203]

Inside EPA and the White House on the day NRDC released its report, officials were coordinating press statements. Interestingly, EPA had originally drafted a statement, but the White House decided to prepare a single Administration statement in a seeming effort to distance the EPA from the NRDC:

To: CN=Bob Perciasepe/OU=DC/O=USEPA/C=US@EPA[]
Cc: "Scott Fulton" [fulton.scott@epa.gov]; Arvin Ganesan" [ganesan.arvin@epa.gov]; Michael Goo" [goo.michael@epa.gov]; Gina McCarthy" [mccarthy.gina@epa.gov]; Bob Perciasepe" [perciasepe.bob@epa.gov]; Bob Sussman" [Sussman.Bob@epamail.epa.gov]; Diane Thompson" [thompson.diane@epa.gov]; Laura Vaught" [vaught.laura@epa.gov]; Richard Windsor" [Windsor.Richard@epamail.epa.gov]
From: CN=James O'Hara/OU=DC/O=USEPA/C=US
Sent: Tue 12/4/2012 10:08:39 PM
Subject: Re: Fw: Wash Post: How to cut U.S. carbon emissions by 10 percent — without Congress

WH approved statement:

The Administration can't comment on the report as we have not had the chance to review it. The President has made clear that climate change is real, and that it is largely attributable to human activities and carbon pollution. We will continue to pursue opportunities to build on our success to date through commonsense policies that create jobs, enhance security and reduce carbon pollution.

not as felicitous as what Gina and I did, but still forward leaning...and quotes the POTUS

Despite the Administration's public statement, documents demonstrate that EPA was well aware of the NRDC report and would eventually utilize the report in developing the existing source rule.

A week later, Administrator Jackson announced her resignation from EPA.[204] While Jackson may have been on her way out, NRDC and the other environmental activists remained a force behind the scenes as the Obama Administration began the New Year and its second term.[205]

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[201] December 1, 2012 email from L. Schmidt to E. Zenick and H. Hoffman, subject: did I hear one of you say that NRDC is coming in to talk about their ideas on 111(d)? If so, I would like to come to the meeting."
[202] NRDC Press Release, December 4, 2012 for report entitled, "Closing the Power Plant Carbon Pollution Loophole."
[203] "Environmental group has plan to slash power plant emissions," by Tiffancy Stecker, Energy and Environment News-ClimateWire, December 2, 2012; available at: http://www.eenews.net/climatewire/stories/1059973408.
[204] "EPA Administrator Lisa Jackson stepping down after tumultuous term," Associated Press, published December 27, 2012; available at: http://www.foxnews.com/politics/2012/12/27/epa-administrator-lisa-jackson-resigns/.

Part 4: Obama Second Term Resets EPA Agenda

Upon his second inauguration, President Obama pledged to respond to climate change and to support renewable energy sources.[206] On January 22, 2013, the day after the inauguration, EPA's Perciasepe forwarded a *New York Times*' article about the President's speech to his staff and called upon them to immediately redouble their work on power plant regulations. Specifically Perciasepe advised:

> It puts the point on why we are urgently needing to lay this out now. I will set a meeting on Thursday afternoon to follow up on new source options and a refined draft framework for existing sources. I would like everyone working together on this, it is highest priority.[207]

EPA staff was already scheduled to brief McCarthy on the new source rule later that day and Perciasepe on January 24, 2013.[208] McCarthy sent Perciasepe an email promising to "be ready for the [January 24] mtg. [sic] We will have an options briefing for the new source rule and a power point for you to walk thru that overviews EPA's potential role in the Administration's climate agenda."

In the interim, a conference call was scheduled between Goffman and Doniger for the afternoon of January 23, 2013.[209] And minutes before the January 24 meeting with Perciasepe, Goffman sent Doniger a short message trying to find time for a call the following day.[210] A few days later, NRDC's Hawkins contacted Goo, asking if he was free "[t]o chat for a couple of minutes?"[211] It is unclear what they discussed.

EPA's lack of public transparency for its power plant rulemakings continued to attract media scrutiny – and concerns from NRDC about public statements from EPA suggesting a lack of urgency. For example, in early February 2013, *Politico* published an article that EPA had not begun work on an existing power plant rule and would not discuss the timing for such work until EPA had finished the new source performance standards.

> Please note that the language you seem to be concerned with is *Politico*'s, not Gina's. I have spoken to her about this, and that is not what she thinks she conveyed or intended to convey.
>
> - *Joe Goffman*

Doniger promptly forwarded the article to Goffman, who responded: "Please note that the language you seem to be concerned with is *Politico*'s, not Gina's. I have spoken to her about this, and that is

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[205] See, January 8, 2013 calendar entry for telephone call between R. Perciasepe and D. Doniger, re: Power Plant. January 22, 2013 email from D. Doniger to J. Goffman, subject: RE: Call.
[206] Second Inaugural Address, President Obama, January 21, 2013; available at: https://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama.
[207] January 22, 2013 email from R. Perciasepe to G. McCarthy, et al., subject: Follow-Up to Our Friday Discussion.
[208] January 22, 2013 email from J. Goffman to G. McCarthy, subject: Re: Follow-Up to Our Friday Discussion.
[209] January 23, 2013 calendar entry for conference call between J. Goffman and D. Doniger.
[210] January 24, 2013 email from J. Goffman to D. Doniger, subject: Let's schedule a call for some time on Friday. See also January 25, 2013 calendar entry for call between J. Goffman and D. Doniger.
[211] January 30, 2013 email from D. Hawkins to M. Goo, subject: you around.

not what she thinks she conveyed or intended to convey."[212] On March 4, 2013, the President nominated McCarthy to the position of Administrator,[213] but until confirmed Perciasepe would officially serve as Acting Administrator and McCarthy remained the Assistant Administrator for the Office of Air and Radiation.

During this time, EPA's Goo and Goffman continued to communicate regularly with their counterparts at NRDC.[214]

On March 27, 2013, the one year anniversary of the new source proposal, the environmental activist groups sent a letter to EPA putting the Agency on notice of its obligation, under the Clean Air Act to finalize the new source rule within one year of its date of proposal; the letter also threatened legal action for unreasonable delay of a mandatory duty to issue emission guidelines for existing sources.[215]

EPA's work surrounding the power plant rules was shrouded in such secrecy and public uncertainty that when Acting Administrator Perciasepe told reporters in early April 2013 that EPA would propose an existing source rule in the next fiscal year, it made headlines and another public relations crisis within an Administration intent on obscuring its regulatory plans.

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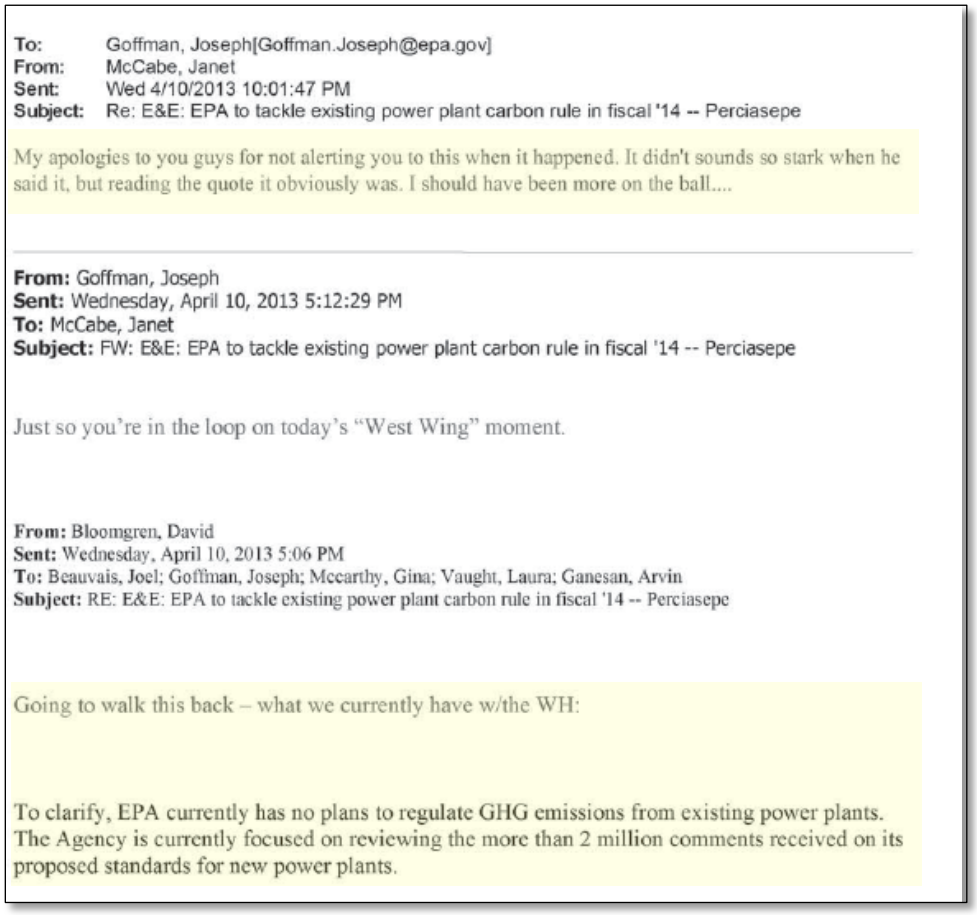
[212] February 7, 2013 email from Goffman to D. Doniger, subject: Re: McCarthy: We'll work with states on CO2.
[213] See, https://www.whitehouse.gov/blog/2013/03/04/president-obama-announces-three-nominees-help-tackle-our-most-important-challenges.
[214] See, February 21, 2013 email from D. Doniger to J. Goffman, subject: Free noon to 1:15; February 21, 2013 email from J. Goffman to D. Doniger, subject: RE: Free noon to 1:15; March 7, 2013 email from D. Doniger to J. Goffman, subject: Friday 1 looks good; March 8, 2013 email from G. Goffman to D. Doniger, subject: Re: Friday 1 looks good CONFIRMING; March 11, 2013 email from D. Hawkins to J. Goffman, subject: Quick chat; March 12, 2013 email from D. Hawkins to M. Goo, subject: call? March 13, 2013 email from M. Goo to D. Hawkins, subject: Re: call?; March 14, 2013 email from D. Hawkins to J. Goffman, subject: back at my desk; March 15, 2013 email from D. Hawkins to J. Goffman, subject: chat quickly?; March 15, 2013 email from D. Hawkins to J. Goffman, subject: I am available to talk now; March 15, 2013 email from D. Hawkins to J. Goffman, subject: ON A CALL.
[215] March 27, 2013 email from M. Ceronsky to R. Perciasepe, et al., subject: Notice re Carbon Pollution Standards for New and Existing Power Plants. Although the proposed new source performance standards were not published in the Federal Register until April 13, 2012, the groups' letter said they were sending the 60-day notice letter at this time to preserve their rights in case a court would determine the proposal had been promulgated on date of signature and posting on the internet, rather than date of publication. However, the Sierra Club's John Coequyt apparently called Goffman to inform him the groups also wanted to be the first to file to "control" the litigation in case industry groups also filed challenges. See, March 28, 2013 email from J. Goffman to J. Beauvais, subject: RE: Notice re Carbon Pollution Standards for New and Existing Power Plants. EPA was already facing legal challenges to other greenhouse regulations. See, Utility Air Regulatory group v. EPA, 573 U.S. ___ (2014).



To: Goffman, Joseph[Goffman.Joseph@epa.gov]
From: McCabe, Janet
Sent: Wed 4/10/2013 10:01:47 PM
Subject: Re: E&E: EPA to tackle existing power plant carbon rule in fiscal '14 -- Perciasepe

My apologies to you guys for not alerting you to this when it happened. It didn't sounds so stark when he said it, but reading the quote it obviously was. I should have been more on the ball....

From: Goffman, Joseph
Sent: Wednesday, April 10, 2013 5:12:29 PM
To: McCabe, Janet
Subject: FW: E&E: EPA to tackle existing power plant carbon rule in fiscal '14 -- Perciasepe

Just so you're in the loop on today's "West Wing" moment.

From: Bloomgren, David
Sent: Wednesday, April 10, 2013 5:06 PM
To: Beauvais, Joel; Goffman, Joseph; Mccarthy, Gina; Vaught, Laura; Ganesan, Arvin
Subject: RE: E&E: EPA to tackle existing power plant carbon rule in fiscal '14 -- Perciasepe

Going to walk this back – what we currently have w/the WH:

To clarify, EPA currently has no plans to regulate GHG emissions from existing power plants. The Agency is currently focused on reviewing the more than 2 million comments received on its proposed standards for new power plants.

The environmental activists sent a second letter to EPA on April 15, 2013, tied to the anniversary of the proposed rule's publication in the *Federal Register*, reiterating their intent to file a lawsuit if EPA continued to delay acting on its power plant rulemaking.[216] According to one article covering the letter, "The Natural Resources Defense Council, Environmental Defense Fund and others said their aim was to press EPA to move more quickly on the rule, which it was required by law to finalize Saturday."[217]

While publicly the groups sent EPA a formal letter, internal meetings and communications among the parties and EPA continued. For instance, Goffman and Doniger were already scheduled to attend a meeting together on the Tuesday following the 2013 Memorial Day holiday, but the two agreed to meet privately at Mitchell Park the Saturday before.[218]

[216] April 15, 2013 email from Tomas Carbonell to R. Perciasepe, et al., subject: Notice of Intent Re: Greenhouse Gas Standards for New and Existing EGUs.
[217] "Greens prepare to go back to court in wake of missed EPA deadline," by Jean Chemnick, Environment and Energy News, April 16, 2013; available at: http://www.eenews.net/eedaily/stories/1059979521.
[218] May 25, 2013 email from J. Goffman to D. Doniger, subject: Re: Tuesday morning.

Presidential Directive Drives EPA Action

On June 25, 2013, at a speech at Georgetown University, President Obama unveiled his pivotal "Climate Action Plan," in a seeming effort to protect his climate legacy by pushing EPA regulatory action. Specifically the plan outlined ways to reduce greenhouse gas emissions and plans for domestic and international efforts to address climate change. In conjunction with the release of his Climate Action Plan, President Obama issued a directive for EPA to issue a new proposal to regulate emissions from new power plants by September 30, 2013, and a proposed rule for existing, reconstructed, and modified power plants by June 1, 2014.[219] The directive for EPA to issue a revised new source proposal did not specifically address whether EPA should withdraw the March 2012 proposal or simply re-propose it based on the public comments. EPA was also directed to finalize the rule for new power plants "in a timely fashion after considering all public comments, as appropriate" and to finalize the existing source rule by June 1, 2015.[220]

As President Obama enjoyed modest public approval on the heels of his reelection, his directive provided EPA the political cover and momentum needed to get the rules across the finish line before the end of the Obama Administration, while simultaneously distancing the rules' nexus to the original "sue-and-settle" with environmentalists. Indeed, Lashof praised the President for showing leadership and delivering on his climate commitments.[221] NRDC's Lashof even invited EPA's Goo to attend a party featuring NRDC's president, Frances Beinecke, to celebrate the President's announcement.[222]

Days after the President's announcement, EPA undertook a Final Agency Review on June 27, 2013, for the revised new source rule, but according to EPA documents:

> At the time of the FAR, the rule package was still undergoing revision at the direction of senior leadership. Given the direct involvement of senior leaders at the end of the process and the changing documents, most individual offices opted not to provide concurrent memos for this action. The exception was the Office of Research and Development, which noted the very short review time.[223]

In other words, the process for the revised new source proposal was too quick to allow for thoughtful deliberation by EPA's policy, scientific, and legal experts. Departing from Agency policy, senior EPA leaders moved the rule forward in a seeming effort to appease the President's political objectives, without formal concurrence from the relevant EPA program offices involved in the rulemaking. By July 1, 2013, a draft of the updated new source rule was sent to the Office of Management and Budget for interagency review.

Simultaneously, EPA moved forward on the existing source proposal in coordination with the groups. For instance, in late June 2013, Lashof sent a lengthy message to Goffman discussing how EPA could develop Federal Implementation Plans for states as part of its 111(d) rule for existing

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[219] Section 1, "Presidential Memorandum – Power Sector Carbon Pollution Standards," issued June 25, 2013; available at: https://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards.
[220] Id.
[221] See, http://switchboard.nrdc.org/blogs/dlashof/this_is_what_climate_leadershi.html.
[222] June 25, 2013 email from D. Lashof to M. Goo, subject: Re: Get together next Tuesday?
[223] EPA print out of Action Development Tracker (SAN: 5548/RIN: 2060-AQ91) as of November 11, 2014.

power plants in a way that could avoid potential legal problems stemming from a separate Clean Air Act case pending before the Supreme Court.[224]

Based on records obtained by the Committee, senior EPA officials continued to have numerous phone calls and meetings in July 2013 with NRDC staff, including several to discuss technical analysis and modeling that NRDC had developed to support its policy proposals.[225]

As of July 18, 2013, NRDC's Derek Murrow described the group's plans for a meeting with EPA the following Monday:

> A whole series of new IPM runs on our original proposal, with a few new twists and a lot more sensitivities. See scope of work attached. But we'd also like to discuss additional work that we are thinking about or others are completing: state focused bottom-up analysis, utility holding company analysis, comprehensive within the fence-line analysis, additional macroeconomic/job analysis, reliability assessments, DOE analysis of energy efficiency potential and electric sector analysis as a service to the states, etc.[226]

This email was then forwarded to EPA staff, where one official said in talking with Murrow "[w]e emphasized to them that we are not able to get into broad policy discussions at this time, but would be happy to hear about specific analytic efforts they had underway/planned."[227] After the meeting with NRDC that Monday, an EPA official then forwarded several NRDC documents, including a summary of non-governmental organizations' new source performance standard studies as well as the NRDC's updated modeling work from ICF.[228] The email prompted follow-up questions by other EPA officials including whether they had or could get NRDC's databases supporting their analysis of energy efficiency.[229]

Notably, the same day NRDC's Lashof was planning to meet with EPA's Goo, but first he said "Doniger and I are meeting with Sarah Dunham [EPA's Director for the Office of Atmospheric Programs in the Office of Air and Radiation] at 4:00 on L st. It will take me a few minutes to get down there."[230] Goo replied to confirm their meeting at the Marriott hotel.[231]

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[224] June 25, 2013 email from D. Hawkins to J. Goffman, subject: FW: Power plant rule schedule and CSAPR.
[225] July 1, 2013 email from M. Goo to D. Hawkins, subject: Re: Have a moment for a quick call?; July 2, 2013 email from D. Doniger to J. Goffman, subject: Time to talk?; July 14, 2013 email from D. Lashof to M. Goo, subject: Re: Get together on 7/22 or 23?; July 18, 2013 email from J. Bryson to R. Wayland, et al., subject: Mtg/call w/ NRDC Staff re their New EGU NSPS Analysis (Monday at 2:00); July 22, 2013 email from B. Conlin to J. Bryson, subject: RE: NRDC Summary of NGO NSPS Studies & their SOW for IPM work w ICF; July 22, 2013 email from M. Goo to D. Lashof, subject: Re: Is 5:15 ok?; July 24, 2013 email from D. Doniger to L. Schmidt, subject: Chance to chat?; July 25, 2013 email from D. Doniger to J. Goffman, subject: Time to talk?; July 25, 2013 email from L. Schmidt to D. Doniger, subject: Friday????; July 26, 2013 email from D. Doniger to J. Goffman, et al., subject: RE: Monday call; July 29, 2013 email from L. Schmidt to D. Doniger, subject: RE: Following up.
[226] July 18, 2013 email from D. Murrow to J. Bryson, subject: RE: topics for Monday?.
[227] July 18, 2013 email from J. Bryson to R. Wayland & R. Srivastava, subject: Mtg/Call w/ NRDC Staff re their New EGU NSPS Analysis (Monday at 2:00).
[228] July 22, 2013 email from J. Bryson to R. Wayland et al., subject: FW: NRDC Summary of NGO NSPS Studies & their SOW for IPM work w ICF.
[229] July 22, 2013 email from R. Wayland to J. Bryson, subject: RE: NRDC Summary of NGO NSPS Studies & their SOW for IPM work w ICF.
[230] July 22, 2013, D. Lashof to M. Goo, subject: Is 5:15 ok?
[231] July 22, 2013, M. Goo to D. Lashof, subject: Re: Is 5:15 ok?

During this time, the Senate also confirmed McCarthy as EPA's Administrator, prompting NRDC's Doniger to send McCarthy an email congratulating her on being confirmed as Administrator and also asking for a meeting to discuss "climate and clean air priorities."[232] McCarthy responded, "Of course we can talk to soon. Let's [sic] to talk about."[233]

Multiple Groups, Same Message

A number of documents also reveal significant coordination between EPA and groups like NRDC in developing public statements in support of the President's plan and EPA's power plant rules, culminating in a meeting at EPA headquarters on July 31, 2013. The purpose of this meeting was:

> [T]o inform and lay out the process for engagement per the Presidential Memorandum. This is an opportunity to solicit their ideas and suggestions on how to structure the engagement process that is being developed. <u>It is also an opportunity to ensure that they feel included in the process from the beginning</u>.[234] (emphasis added)

The invitee list included Doniger from NRDC, Ceronsky from EDF, and Coequyt from the Sierra Club and representatives from the American Lung Association, Clean Air Task Force, Center for American Progress, and League of Conservation Voters.[235] NRDC's Action Fund, its political arm, did not waste any time getting started on its public relations campaign to support the President by releasing a video ad connecting asthma with carbon pollution the same day.[236] Two days after the public relations meeting, EPA's McCabe had a private telephone call scheduled with Doniger.[237]

Over the next two months, a number of environmental activist groups met with the Office of Management and Budget to press their case that the new source rule should be as stringent as possible.[238] Similarly, NRDC continued to press EPA. In one early September 2013 exchange, Doniger asked Goffman "[w]hen can we chat? ('power plants, methane …?')," to which Goffman replied:

> On power plants and the issues of concern to you, please be assured that Kevin and Peter, Kevin and I, and Peter and I have had discussions over the course of the past couple of days going over the issues you discussed with Kevin and then with Peter on Thursday or Friday of last week – which all three of us believe are quite close to the issues you, Peter and I discussed at the end of July/beginning of August. At that time, if memory serves, you had already had discussions with Kevin and with OGC on the key issues and arguments. So, substantively your concerns are well covered. Meanwhile, you'll just have to forgive me,

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[232] July 19, 2013 email from D. Doniger to G. McCarthy, subject: Congratulations.
[233] July 19, 2013 email from G. McCarthy to D. Doniger, subject: Re: Congratulations!
[234] EPA Briefing Paper and Talking Points, July 31, 2013 meeting, subject: GHG Regulations for Power Plants Stakeholder Engagement Discussion.
[235] EPA Briefing Paper and Talking Points, July 31, 2013 meeting, subject: GHG Regulations for Power Plants Stakeholder Engagement Discussion.
[236] See, "Another green group joins effort to promote president's action plan," Jean Chemnick, Energy and Environment News, July 31, 2013; available at http://www.eenews.net/eedaily/stories/1059985360; see also, https://www.youtube.com/watch?v=xwjxkYQxplI&feature=youtu.be.
[237] August 2, 2013 calendar entry for telephone call between J. McCabe and D. Doniger, subject: Meet/Greet Call.
[238] September 13, 2013 email from J. Spalding to J. McCabe and J. Goffman subject: Fwd: Sierra Club meeting materials.

> David, but with the severe demands on everybody's time here, it may be a couple of days at elast [sic] before I can get back to you.[239]

Indeed, despite his attempt to manage NRDC's expectations, Goffman kept Doniger informed of EPA's progress as the Agency was scrambling to meet the President's September 20, 2013, deadline for the revised new source rule, stating "[a]s soon as we ourselves can sort out the rumors and realities I will let you know. The moving parts are still in motion."[240]

Interestingly, the same day, McCabe explained to Goffman, "Gina's asking what we can do this week to get EDF and Ann Weeks [with Clean Air Task Force] to stand down, at least publicly, on our decision to rescind the prior [new source] proposal. She's willing to make calls if needed."[241] Although documents provided to the Committee to date do not reflect whether McCarthy ever contacted EDF and CATF to "stand down," it appears EPA was able to influence the group's response since the EPA, in fact, rescinded the original new source proposal without public backlash from the environmentalists.

On September 20, 2013, Administrator McCarthy signed the revised proposal for new sources. Unlike the March 2012 proposal, which set a single standard for all new fossil-fuel-fired power plants, the revised proposal, in effect, created separate categories for coal-fired and natural-gas-fueled power plants. Specifically, the proposal would establish one limit for natural gas-fired stationary turbines and a separate limit for fossil-fueled fired steam generating units (utility boilers and integrated gasification combined cycle). In proposing the 1,100 lb CO2/MWh emission rate for natural gas stationary turbines, EPA determined that carbon capture and storage (CCS) was not the best system of emissions reduction available; however, for fossil-fuel fired steam generating units, EPA determined that partial CCS was the best system of emission reduction available to reach an emission limit of 1,050 or 1,100 lb CO2/MWh emissions rate (depending on the size of the unit).

NRDC's President Beinecke praised EPA's actions in a press release, highlighting the rule's health impacts and looking toward an existing source rule:

> The standard makes clear that tomorrow's power plants won't be built at the expense of our children's future. … We limit the amount of arsenic, mercury and soot from power plants, but not dangerous carbon pollution. That's not right. It's not good for our children or our environment. It's time to set limits, for the first time ever, on the carbon pollution from existing power plants, which account for 40 percent of our national carbon footprint. We know where this pollution is. It's time to clean it up.[242]

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[239] September 10, 2013, email from J. Goffman to D. Dongier, subject: Re: When can we chat?.
[240] September 16, 2013 email from J. Goffman to D. Doniger, subject: roll-out – timing, etc.
[241] September 16, 2013 email from J. McCabe to J. Goffman, subject: Re: 111(d) materials … so far.
[242] NRDC Press Release, September 20, 2013; available here: Full Press Release Available at: http://www.nrdc.org/media/2013/130920.asp.

Part 5: Ready, Set, Regulate Existing Sources

Legal Questions Surround Both Power Plant Rules

Despite having nearly a year and a half to iron out concerns with the original new source proposal, even EPA's September 2013 revised rule sparked caustic questions about EPA's legal authority for requiring CCS technology. EPA relied on certain projects to support its claim that CCS technology had been adequately demonstrated, as required by the Clean Air Act. Notably, the U.S. House of Representatives' Committee on Energy and Commerce wrote to EPA on November 15, 2013, questioning whether EPA's reliance on the Agency's certain projects violated provisions of the Energy Policy Act of 2005 (EPAct), which prohibited EPA from using projects that had received certain federal funding or support to determine whether CCS had been adequately demonstrated.[243] Since three of the cited projects had received such funding and support, the Congressional letter requested EPA withdraw the legally suspect proposal.

EPAct prohibits EPA from considering technology used at a facility receiving DOE assistance or at a facility receiving a tax credit, as being "adequately demonstrated" for purposes of regulating under section 111 of the Clean Air Act. The new source proposal marked the first time that EPA would require all future coal-fired power plants to use CCS technology. The original proposal, though establishing similar CO2 emission limits, did not require a certain technology to achieve the reductions and would have allowed CCS technology to be phased in after the first decade of operation. The revised proposal, however, would outright require all new coal-fired power plants to use the technology.

While the 400-page proposed rule did not reference the EPAct, the internal EPA analytical blueprint, briefing materials, and other documents provided to the Committee also do not reference EPAct or suggest EPA staff even considered this prohibition when they developed the rule.

Interestingly, within days after the Energy and Commerce Committee letter, staff with the Office of Management and Budget reviewing the proposed rule wrote EPA, asking to discuss the issue.[244] A senior air policy official responded:

> We are still working through the issues with OGC/management and will follow up with you once we have a more complete assessment. However, our initial assessment is that we can address the concerns that have been raised, but we're just working through the best way to do that. As soon as we have some resolution internally, we'll be glad to have a discussion with you and others.[245]

Aside from EPA and OMB officials' ignorance of the EPAct issue, it appears even environmentalists were caught off guard by the challenge. On November 21, 2013, Doniger had just scheduled a meeting with Goffman for November 26, 2013, the Tuesday before Thanksgiving, when he wrote to ask, "Is there a pub date for the power plant NSPS yet? There's a new problem we should discuss beforehand."[246] NRDC documents indicate that Doniger and Hawkins separately tried contacting Goffman on November 21, 2013, prompting Goffman to ask if they both were contacting him about

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[243] November 15, 2013 letter from Chairman F. Upton, et al. to Administrator G. McCarthy.
[244] November 19, 2013 email from N. Frey to K. Culligan, et al., subject: FW: NSPS.
[245] November 19, 2013 email from R. Wayland to N. Frey, et al., subject: RE: NSPS.
[246] November 21, 2013 email from D. Doniger to J. Goffman, subject: Re: are you around next week?

the same matter and suggesting a single conversation, "perhaps with one or two key colleagues here also joining in?"[247] A meeting was scheduled for the afternoon of November 22, 2013.[248]

Although the topic of their concern is not clear from the context of these emails, during this time frame Hawkins published rebuttals on the NRDC website arguing that the members of the House Energy and Commerce Committee were "idiotic" and "flat wrong" in their understanding of the EPAct provision.[249] Doniger also posted an analysis of EPA's legal authority to regulate power plant emissions under both section 111(d) and section 112(n)(1) of the Clean Air Act.[250] Despite such rhetoric and arguments from NRDC, this episode serves as another example of how EPA's rush to enter into the "sue-and-settle" agreements and the resulting regulatory timelines constrained EPA's deliberative process and led to shoddy analysis and legally suspect proposals.

NRDC was not the only environmental activist group trying to bolster EPA and undermine the House Energy and Commerce Committee's letter. On December 5, 2013, EDF's Ceronsky released a White Paper titled, "The Strong Legal Foundation for the Carbon Pollution Standards for New Power Plants: A Response to the House Energy & Commerce Committee's Letter on the Energy Policy Act of 2005 and Carbon Capture and Storage Technology." Ceronsky then sent a related blog post she wrote about the White Paper directly to a senior attorney in EPA's OGC.[251] EDF's Patton also forwarded Ceronsky's blog post to Goffman, Schmidt, and McCabe.[252]

The EPAct issue was also questioned at a January 16, 2014, EPW Committee hearing with Administrator McCarthy. For example, Senator Vitter asked McCarthy how such a legal hurdle went overlooked by EPA in developing the long-awaited rule, especially when at least one comment on the original proposal cited this very issue. Despite McCarthy's claim that EPA had read each and every comment to the original proposal to ensure they would "do it right, to do it correctly under the law" in developing the revised proposal, she admitted to Senator Vitter, "I certainly was not aware that we should raise that issue."

While McCarthy and EPA did not address the issue on the front end of the rule, the Agency quickly developed a response, presumably based on the materials provided by NRDC and other environmental groups. Indeed, at the hearing McCarthy dodged detailed questions on the issue and pointed Senator Vitter to a technical support document on the EPAct issue EPA had just released for public comment on EPA's authority to rely on the CCS facilities.[253]

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[247] November 21, 2013 email from J. Goffman to D. Hawkins and D. Doniger, subject: A single conversatio [sic], perhaps?
[248] November 22, 2013 calendar entry for meeting with J. Goffman and NRDC.
[249] See, http://switchboard.nrdc.org/blogs/dhawkins/smoke_from_capitol_hill.html; see also, http://switchboard.nrdc.org/blogs/dhawkins/read_my_lips_no_tax_credit_pol.html.
[250] See, http://switchboard.nrdc.org/blogs/ddoniger/grasping_at_straws_why_a_legis.html.
[251] December 10, 2013 email from M. Ceronsky to S. Silverman, subject: EPA's Proposed Carbon Pollution Standards are Legally and Technically Sound.
[252] December 11, 2013 email from V. Patton to J. Goffman, et al., subject: EPA's Proposed Carbon Pollution Standards are Legally and Technically Sound.
[253] Technical Support Document: Effect of EPAct05 on BSER for New Fossil Fuel-fired Boilers and IGCCs (Docket EPA-HQ-OAR-2013-0495), January 8, 2014; available at: http://www2.epa.gov/sites/production/files/2014-01/documents/2013_proposed_cps_for_new_power_plants_tsd.pdf.

On January 8, 2014, the withdrawal of the original new source proposal and the revised proposal were published in the Federal Register.[254] The technical support document related to EPAct was published in the Federal Register on February 25, 2014.[255]

Science Advisory Board Backs Down from Review

At the same time complaints about the new source rule swept through Capitol Hill, members of the EPA Science Advisory Board (SAB) questioned whether studies EPA had relied for its revised new source rule had been adequately peer reviewed.[256] In a November 12, 2013, memorandum, an SAB work group asked the chartered SAB to review the rule because of questions about the adequacy of the peer review of certain studies used to justify the rule's mandate for CCS at coal-fired power plants. The request, in part, was attributed to an October 31, 2013, email by a Department of Energy official to SAB officials that stated certain studies did not undergo peer review.[257]

> EPA shuts down attempt by independent Science Advisory Board to evaluate science justifying EPA's use of carbon capture and storage technology has been adequately peer reviewed.

By November 19, 2013, EPA officials were internally discussing the SAB workgroup's request. One EPA official referred to an article on the request and said, "Not good folks . . . we need to get together ASAP to see how best to approach this issue."[258] On November 20, 2013, Goo, who had closely worked on the proposed rule, seemingly expressed unfamiliarity with the concern, saying in one email "Hunh. I will have to check this out on the NETL end."[259] By November 24, 2013, Perciasepe expressed concern over the article stating, "[t]hey clearly have the 'memo' from the SAB work group."

Despite broad statutory authority[260] allowing the SAB to review most major regulations, SAB generally conducts reviews of science as requested by EPA. While the SAB decided that it would not undertake review of the science supporting the new source proposal, it sought to communicate important points related to such a review in a January 29, 2014, letter to Administrator McCarthy:

> SAB defers to EPA's legal view, communicated to the SAB by staff from EPA's Office of Air and Radiation, that the portion of the rulemaking addressing coal-fired power plants focuses on carbon capture and that the regulatory mechanisms for addressing potential risks associated with carbon sequestration are not within the scope of the Clean Air Act. . . Research and information from the EPA, Department of Energy, and other sources related

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[254] See, 79 FR 1430 (January 8, 2014); 79 FR 1352 (January 8, 2014).

[255] See, 79 FR 10750 (February 26, 2014).

[256] November 20, 2013 email from M. Goo to A. Barron, subject: Fw: FWD: SAB Urged to Review Adequacy of EPA's basis for NSPS CCS Mandate.

[257] Email from C. Mazza to J.DeMocker, subject: FW: SAB Urged To Review Adequacy of EPA's Basis for NSPS CCS Mandate.

[258] Email from C. Mazza to J.DeMocker, subject: FW: SAB Urged To Review Adequacy of EPA's Basis for NSPS CCS Mandate.

[259] November 20, 2013 email from M. Goo to A. Barron, subject: Fw: FWD: SAB Urged to Review Adequacy of EPA's Basis for NSPS CCS Mandate.

[260] Environmental Research, Development, and Demonstration Authorization Act, (42 U.S.C. 4365).

> to carbon sequestration merit scientific review by the National Research Council or the SAB. Indeed, the Board notes that Section 704 of the Energy Independence and Security Act of 2007 directly calls for the National Research Council to review such research conducted by the Department of Energy and that this review has not yet occurred. The SAB asks the EPA to explore options for conducting such a review in a timely manner.[261]

Critically, the SAB's decision reversed the SAB workgroup's November 2013 recommendation. Based on a second memorandum from the SAB Workgroup on January 7, 2014, it is clear that the decision was based not on a resolution of the underlying peer review question, but rather on a policy decision made by EPA. As stated in the memorandum, "EPA has made a policy decision that this action only applies to carbon emissions and the capture of carbon emissions, and thus does not directly address carbon sequestration."[262] The SAB workgroup's memo concluded that based largely on this narrowing of the subject matter, all supporting scientific documents have been adequately peer reviewed in accordance with EPA's peer review policies. That position was then formally adopted by the chartered SAB.

Reports of the January 21, 2014, chartered SAB meeting suggest that many of the SAB members felt constrained, if not strong-armed into the decision to back down from review. According to press reports of the meeting, several SAB members protested the constraints and wanted to make it clear that, had they been allowed to review CCS, they might come to a different conclusion.[263] This again highlights how the EPA's technical analysis was constrained due to EPA's rushed rulemaking process.

EPA Blame Game over Publication Dates

At the same time EPA faced challenges to the new source rule from Capitol Hill and EPA's science advisors, the Agency appears to have sat on publication of the proposed rule. Although EPA signed and posted the rule on its website on September 20, 2013, per President Obama's directive, the official copy of the rule was not published in the Federal Register until January 8, 2014. Only after publication in the Federal Register does the public comment period begin and the Clean Air Act's one year deadline for issuing a final rule gets triggered.

Despite the impending publication, at the time of EPA's public "release," environmental groups touted it as a step in right direction for Obama's legacy. For instance, it was reported that, "Paul Billings of the American Lung Association said the fact that EPA met today's deadline for the new power plant rule indicates that the existing source rule is likely to be out on schedule – a key to having it in place before Obama leaves office in January 2017."[264]

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[261] January 29, 2014, letter from SAB Chair Dr. David Allen to Gina McCarthy.
[262] Memorandum from James R. Mihelcic, Chair, SAB Work Group on EPA Planned Actions for SAB Consideration of the Underlying Science, January 7, 2014, p 2
[263] "SAB Decides Not To Review Utility NSPS, Despite Sequestration Concerns" Inside EPA, January 22, 2014
[264] "EPA's new carbon rule sparks battle over CCS, with legal challenges likely," by Jean Chemnick, Energy and Environment News, September 20, 2013.

However, it was only a matter of time before a delay in publication was noticed. The delay caught the attention of the Office of Management Budget staff, who wrote to a senior air policy office that, "[L]ots of folks are confused as to why the rule hasn't yet been published in the FR. Are there particular reasons for this?"[265] Environmentalists also questioned the delay and NRDC's Doniger and a former Sierra Club official even suggested EPA may using the time to address the EPAct issue,[266] but also suggested the delay was due to the government shutdown.[267] Administrator McCarthy also claimed the rule was transmitted to the Office of the Federal Register for publication on the date it was signed, September 20, 2013, and the delay in publication may have been due to the government shutdown in November 2013.[268]

> Senator, I will assure you that as soon as that proposal was released, we had submitted it to the Federal Register office. The delay was solely the backup in the Federal Register office, and we frequently asked when it was going to come out and how quickly, because it was available on our web page. We wanted to start the formal public process.
>
> - *Gina McCarthy*

At a January 16, 2014, EPW Committee hearing, Senator Inhofe questioned McCarthy about the delay. In response, McCarthy said:

> Senator, I will assure you that as soon as that proposal was released, we had submitted it to the Federal Register office. The delay was solely the backup in the Federal Register office, and we frequently asked when it was going to come out and how quickly, because it was available on our web page. We wanted to start the formal public process.[269]

Subsequently, Senator Inhofe penned a letter to the Office of Federal Register (OFR) asking for details regarding EPA's submission.[270] The OFR responded[271] that EPA, in fact, did not submit the rule to the OFR until November 25, 2013 – two months after McCarthy signed the proposal and EPA posted it online – in direct conflict with McCarthy's testimony before the EPW committee. Interestingly, in press reports following this revelation, "EPA declined Monday to account for the

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[265] November 19, 2013 email from N. Frey to K. Culligan, et al., subject: RE: NSPS..
[266] "New power plant rule hasn't been published in Federal Register -- but does it matter?" by Jean Chemnick, Energy and Environment News, December 13, 2013; available at: http://www.eenews.net/greenwire/stories/1059991854.
[267] See, "NRDC's Doniger discusses future of EPA's existing source standard," Energy and Environment News, October 3, 2013; available at: www.eenews.net/eenewspm/stories/1059988329/.
[268] "New power plant rule hasn't been published in Federal Register -- but does it matter?" by Jean Chemnick, Energy and Environment News, December 13, 2013; available at: http://www.eenews.net/greenwire/stories/1059991854.
[269] Review of the President's Climate Action Plan: Hearing Before the S. Comm. on Env't & Pub. Works, 113th Cong (2014) (statement of Hon. Gina McCarthy, Adm'r, U.S. Envtl. Prot. Agency).
[270] Letter from Hon. James M. Inhofe, Ranking Member, Subcomm. on Oversight of the S. Comm. on Env't & Pub. Works, to Hon. Charley Barth, Dir., Office of the Fed. Register (Feb. 12, 2014), available at http://www.inhofe.senate.gov/download/?id=dce3ba54-b1c9-4393-b83b-c65ad113ded8&download=1.
[271] Letter from Hon. Charley Barth, Dir., Office of Fed. Register, to Hon. James M. Inhofe, Ranking Member, Subcomm. on Oversight of the S. Comm. on Env't & Pub. Works (Feb. 18, 2014), *available at* http://www.inhofe.senate.gov/download/?id=dce3ba54-b1c9-4393-b83b-c65ad113ded8&download=1.

discrepancy between the power plant rule's Nov. 25 submission date and McCarthy's congressional testimony."[272]

EPA's delay in publishing the proposal was problematic for several reasons. As prescribed the Administrative Procedure Act, a rule generally cannot become effective unless published in the Federal Register.[273] In addition, EPA is required under section 111(b)(1)(B) of the Clean Air Act to finalize a new source performance standard within one year of proposal. As such, if the proposed rule was published in the Federal Register nearer to the September 20, 2013 signature date, EPA would have been required to publish the final rule before the November 2014 midterm election. As it was, the delay allowed EPA to push the final rulemaking until after the election.

EPA Gets Assistance from NRDC, Others to Bolster Existing Source Proposal

The ink was barely dry on the proposed new source rule when attention within EPA and environmental activist groups turned back to the existing power plant rule. For example, on the same day that the new power plant rule was proposed, September 20, 2013, EDF wrote to both EPA's Goffman and Schmidt providing additional analysis of EPA's authority to use section 111(d) of the Clean Air Act to regulate carbon dioxide (CO2) from existing power plants.[274]

On September 23, 2013, EPA released a paper entitled, "Considerations in the Design of a Program to Reduce Carbon Pollution from Existing Power Plants," to solicit public comment on how EPA could regulate existing power plants under section 111(d).[275] EPA also hosted public listening sessions on an existing source rule through early November 2013, but environmental activist groups flooded them to suggest public support was widespread and lopsided. Sierra Club lobbyist Coequyt touted the groups' work in a self-congratulatory email to senior EPA policy makers:

> Attached you will find a summary from each of the sites along with photos, our numbers breakdown and media clips. Though industry made a strong play at two of the early venues, we succeeded in outnumbering them and carrying the day at the balance of the sessions. Friday's events in Chicago were a monster success.[276]

As for NRDC, the group continued to gin up documents to support the rule.[277] Doniger, in particular, continued to pepper EPA officials with requests to meet or to talk on the phone.[278] Indeed, Doniger

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[272] "Documents contradict EPA on climate-rule delay," Erica Martinson, Politico, April 29, 2014; available at: http://www.politico.com/story/2014/04/epa-climate-rule-delay-documents-106141.html. Senator Inhofe wrote a letter further questioning the delayed publication to McCarthy on April 8, 2014, and a similar letter to McCabe on May 2, 2014.

[273] 5 U.S.C. 553(d).

[274] September 20, 2013 email from V. Patton to J. Goffman, subject: Setting the record straight: EPA has ample authority to protect us from carbon pollution; September 20, 2013 email from V. Patton to L. Schmidt, subject: Setting the record straight: EPA has ample authority to protect us from carbon pollution.

[275] Available at: http://www2.epa.gov/sites/production/files/2013-09/documents/20130923statequestions.pdf.

[276] November 22, 2013 email from J. Coequyt to J. McCabe, et al., subject: Re: EPA Listening Sessions – Sierra Club Write-Up—the numbers, narrative and clips.

[277] October 17, 2013 email from D. Doniger to J. Goffman, subject: Welcome back – check-in call?; October 18, 2013 email from D. Goldston to R. Patel (CEQ), subject: NRDC poll on the shutdown and EPA; October 19, 2013 email from D. Doniger to J. Goffman, subject: Re: Blog and Fact Sheet: Top 10 Qs & As on Carbon

had full access to the EPA, and documents obtained by the Committee demonstrate that even EPA officials noticed him maneuvering from one official or office to another. For example, an OGC attorney informed Goffman that Doniger was in the building after a private meeting with Schmidt to discuss the 111(d) rulemaking.[279] Goffman responded to the news, "She's playing with fire."[280] Goffman then let McCabe know about Doniger, commenting, "Not a good practice."[281]

McCarthy also wanted a meeting with NRDC and the other major environmental groups to discuss the existing power plant rule:

> I just got a call from the Administrator. She just got a call from Frances Beineke [sic], who is retiring from NRDC. Gina wants a meeting together on the 111(d) standards (let's chat about the title of the meeting before it gets on the books) with the 'Big Four' enviros – her, Fred Krupp, Gene Karpinsky and Michael Brune, before her China trip.[282]

In December 2013, EPA prepared its internal analytical blueprint to guide the development of its proposed rule for existing and modified power plants. Among the legal questions identified in this early guidance document were, "How should EPA best establish authority to regulate CO2 under 111(d) in light of conflicting cross-references concerning section 112?" and " How should EPA best establish authority for trading, such as emission rate averaging?"[283]

The new year brought more requests from Doniger and other environmental activists to meet with EPA officials about the power plant rulemakings.[284] EPA officials met or spoke by phone with

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Pollution Standards for Existing Power Plants; October 29, 2013 email from J. Goffman to D. Lashof, subject: RE: 111(d) legal FAQ..

[278] See, November 10, 2013 email from D. Doniger to J. Goffman, subject: Time to chat? ("Do you have time Monday to char [sic] for a few minutes, on things related to implementing the climate action plan?"); November 13, 2013 email from D. Doniger to J. Goffman, Any chance to chat?; November 11, 2013 email from D. Doniger to J. Goffman, subject: biomass ("We'd also like to touch on broader issues too, such as the treatment of biomass in the analysis and options for the 111(d) carbon standard for power plants."); November 21, 2013 email from D. Doniger to J. Goffman, subject: are you around next week? On December 6, 2013 EPA met with NRDC to discuss biomass, and later that day Goffman sent Doniger an email asking if he could "[]hat over the weekend?" See, December 6, 2013 email from J. Goffman to D. Doniger and P. Tsirigotis, subject: Chat over the weekend? The same day, Janet McCabe contacted another NRDC attorney, John Walke, asking "whether [he had] a few minutes for a phone call, either later today, or Monday, or even over the weekend if convenient." See, December 6, 2013 email from J. McCabe to J. Walke, subject: time for a call?

[279] December 18, 2013 email from P. Embrey to J. Goffman, subject: Fyi ("Doniger is in the building. He apparently just had a one-on-one with Lorie[Schmidt] on 111(d). [OGC staff attorneys] and I are apparently chopped liver.").

[280] December 18, 2013 email from J. Goffman to P. Embrey, subject: Re: Fyi ("And I'm the parsley. She's playing with fire.").

[281] December 18, 2013 email from J. Goffman to J. McCabe, subject: Fw: Fyi ("Not a good practice.").

[282] November 19, 2013 email from A. Ganesan to [scheduling], subject Big 4 Enviros. It is unclear why a senior staff member wanted to "chat about the title of the meeting before it gets on the books" and whether this was an attempt to evade transparency.

[283] December 2013, Detailed Analytic Blueprint Greenhouse Gas Reduction Standards for Existing, Modified and Reconstructed Electric Generating Units, at 14.

[284] In addition to NRDC, representatives from EDF and Clean Air Task Force also met with EPA officials in early 2014. See also, February 20, 2014 email from C. Schneider to J. McCabe, et al., subject: Briefing on CATF 111(d) proposal.

Doniger and others from NRDC at least six times in the first four months of 2014, not including email exchanges.[285]

But Doniger was not alone in his direct and seemingly unfettered access to EPA officials. For example, when EDF's Patton requested a meeting in early January 2014, Goffman told McCabe that other staff could handle the meeting and that McCabe should not feel compelled to personally meet with them considering the number of meetings that have already occurred:

> Vickie (and Megan) have gotten a generous amount of personal one-on-one attention from me – and, knowing Vickie's MO, I am sure from OGC and OAR as well. … [T]hey are (or certainly should be) already safely above the threshold of feeling that they have had ample access to us.[286]

NRDC also continued to feed detailed analysis to EPA staff on potential emission reductions across states in an existing source rule:

To: Goffman, Joseph[Goffman.Joseph@epa.gov]; Dunham, Sarah[Dunham.Sarah@epa.gov]; Harvey, Reid[Harvey.Reid@epa.gov]; Tsirigotis, Peter[Tsirigotis.Peter@epa.gov]; Culligan, Kevin[Culligan.Kevin@epa.gov]
Cc: Lashof, Dan[dlashof@nrdc.org]; Beauvais, Joel[Beauvais.Joel@epa.gov]
From: Murrow, Derek
Sent: Tue 3/11/2014 2:34:02 AM
Subject: State Elec. Sector Emissions and Standard Setting Tool
State CO2 Emissions Data v1 external.xlsb

The attached file is a spreadsheet tool that allows you to examine electric sector generation and emissions trends and how setting carbon standards or targets might play out across states. We plan to make this available to the public (available on our web site in the next few days), but wanted to share it with you more quickly.

This is not intended to recommend CO2 emissions outcomes or be a forecasting tool, but to consider emissions standards in relation to historic emissions trends, and depending on how EPA structures a carbon standard under Sec. 111(d), examine how a standard might compare across states and over time.

Subsequently, even as late as March 2014, EPA staff were discussing including an approach advocated for by NRDC as part of the existing source rule, as shown in an internal EPA email:

[285] January 6, 2014 email from D. Doniger to J. Goffman, subject: A few minutes to chat?; January 9, 2014 calendar entry for meeting with NRDC to discuss sustainable FERC projects; February 7, 2013 email from D. Doniger to J. Goffman, subject: next meeting; February 9, 2014 email from D. Murrow to J. Goffman, et al., subject: RE: Contact Us Comment: Carbon Pollution Standards Website; March 13, 2014 calendar entry for EPA and NRDC meeting; March 20, 2014 calendar entry for meeting between EPA and NRDC; April 14, 2014 calendar entry for meeting between J. Goffman to D. Doniger.

[286] January 12, 2014 email from J. Goffman to J. McCabe, subject: [EDF] Meeting re: Carbon Pollution Standards for Existing Power Plants ("I was just suggesting you not feel any pressure to take this your self … Vickie (and Megan) have gotten a generous amount of personal one-on-one attention from me – and, knowing Vickie's MO, I am sure from OGC and OAR as well. … [T]hey are (or certainly should be) already safely above the threshold of feeling that they have had ample access to us.")

> After talking to Peter and Joe, we all concluded that it would be more challenging to go from implementing measures to emissions standards or standards of performance between proposal and final, than it would be to go in the opposite direction. … I can think of three basic ways that measures that are not on EGUs such as DSM and RE could interact: 1. A state has a program where all of the reductions are assured through direct measures on sources, but complimentary measures such as EE and RE are used to drive down coasts [sic] and/or make the direct emission measures feasible. … 2. A Clean Energy Standard (or NRDC) like approach where the full obligation is on the source, but it can be met at least in part through credits for EE and RE. … 3. A portfolio approach where the full obligation is not on the EGU.[287] (emphasis added)

EPA transmitted a draft of the existing source rule to the OMB on March 31, 2014. Some commenters speculated that the draft rule seemed more similar to an ANPR than a traditional proposed rule given the array of policy options subject to public comment and that the policy-making was being driven by the President's arbitrary June 1, 2014, deadline.[288]

After seeing the article, Deputy Administrator Perciasepe commented, "Seems like fairly normal speculation at this point. We need to keep our heads down and focus, while everyone around us spins away."[289] The following day, Perciasepe, was quoted as telling the audience at a White House forum on solar energy that the June 1, 2014, deadline may slip to the end of that month.[290] EPA quickly released a statement clarifying that Perciasepe "misspoke when talking about the 111(d) timing." Goffman forwarded the news statement to Doniger the same day.[291]

Along with the impending existing source proposal deadline, NRDC continued to submit technical guidance to EPA. As of May 5, 2014, Doniger contacted Goffman about scheduling a briefing to present NRDC's jobs/electric bills analysis, explaining:

> Joe, NRDC is planning to release a set of analyses on the job increases and electric bill decreases nationally and in 15 states associated with the updated NRDC proposal for power plant carbon pollution standards under section 111(d). These will go public 5/15 (5/13 for one state). We would like to offer you or your designees a briefing on these new analyses before that, if you would like. Please let me know if you or others would be interested in this briefing, and when.[292]

As expected, Goffman followed up with Doniger to schedule the briefing.[293]

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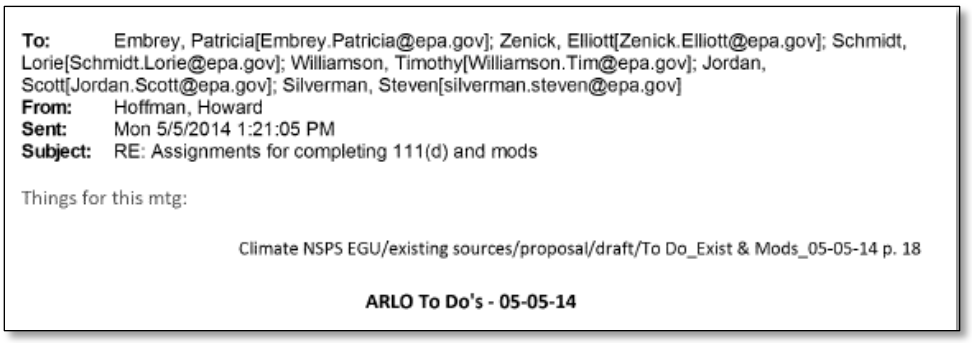
[287] March 19, 2014, email from Culligan to Boswell, subject: still more on emission standards vs implementing measures.
[288] "EPA Said To Float Broad Range Of Options In Draft Power Plant GHG Rule," by Dawn Reeves and Lee Logan, Inside EPA, April 15, 2014; available at: http://insideepa.com/inside-epa/epa-said-float-broad-range-options-draft-power-plant-ghg-rule.
[289] April 16, 2014 email from R. Perciasepe to G. McCarthy et al., subject: Re: Inside EPA article about draft 111(d) rule.
[290] "Release of rule for existing plants may slip, will include ideas to promote renewables," by Nick Juliano, Energy and Environment News, April 17, 2014; available at: http://www.eenews.net/eenewspm/stories/1059998096.
[291] April 17, 2014 email from J. Goffman to D. Doniger, subject: Fw: EPA: Greenhouse gas rule for existing power plants is on schedule.
[292] May 5, 2014, email from D. Doniger to J. Goffman, subject: Briefing on NRDC jobs/electric bills analysis.
[293] May 5, 2014, email from J. Goffman to D. Doniger, subject: Re: Briefing on NRDC jobs/electric bill analysis ("Thanks for reaching out, David. Cynthia can set something for at least some of us here.").

In one stark example, EPA's McCabe directed EPA officials to include NRDC considerations for energy efficiency in a technical support document. Specifically, in response to a joint Association of Home Appliance Manufacturers-NRDC letter on the existing source rule, McCabe wrote EPA officials asking "do we having in our TSDs or other materials on demand-side/EE that makes reference to this kind of program?"[294] to which one official replies "This is discussed broadly in the State Plan Considerations TSD, although it doesn't list appliance recycling explicitly as an example."[295] McCabe then states, "If there were a way to mention appliance recycling explicitly, that would be great,"[296] to which the official replies "Ok, will do."[297]

Indeed, days before the proposal for existing sources was due, Goffman emailed Doniger assuring him "have we ever not briefed you . . . [a]nd for that matter, the range of critical stakeholders, before the roll-out of a major, or even medium-sized rule? I will answer your question once I know what it is from the many chiefs in this tribe. Stay tuned."[298]

Legal Support Needed for Dual Regulation Scheme

Less than a month before the June 1, 2014, deadline EPA attorneys were still crafting the legal support for several major aspects of the existing source rule that was undergoing review at OMB.



To: Embrey, Patricia[Embrey.Patricia@epa.gov]; Zenick, Elliott[Zenick.Elliott@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Williamson, Timothy[Williamson.Tim@epa.gov]; Jordan, Scott[Jordan.Scott@epa.gov]; Silverman, Steven[silverman.steven@epa.gov]
From: Hoffman, Howard
Sent: Mon 5/5/2014 1:21:05 PM
Subject: RE: Assignments for completing 111(d) and mods

Things for this mtg:

Climate NSPS EGU/existing sources/proposal/draft/To Do_Exist & Mods_05-05-14 p. 18

ARLO To Do's - 05-05-14

As discussed earlier, Doniger published a blog post on NRDC's website in November 2013 arguing that section 112(n)(1) of the Clean Air Act did not preclude EPA regulation power plants under section 111(d). Thus, it was not a surprise that in developing their legal rationale for the proposed rule, EPA attorneys looked to NRDC for guidance:

[294] May 23, 2014, email from J. McCabe to Gunning, subject: FW: AHEM-NRDC Joint Letter regarding 111(d) Proposed Rule.
[295] May 23, 2014, email from Harvey to McCabe, subject: Re: AHEM-NRDC Joint Letter regarding 111(d) Proposed Rule.
[296] May 23, 2014, email from J. McCabe, subject subject: Re: AHEM-NRDC Joint Letter regarding 111(d) Proposed Rule
[297] May 23, 2014, email from Harvey to McCabe, subject: Re: AHEM-NRDC Joint Letter regarding 111(d) Proposed Rule.
[298] May 27, 2014, email from J. Goffman to D. Doniger, subject: have we ever not briefed you.

Conflicting Amendments

- NRDC blog
- Need to figure out our argument in light of the legislative history of the 1990 CAAA - - note that the 2005 112(n)(1) preamble discussed the leg. hist. at length, but had a different purpose, and structured the argument differently, than what we want to say now.

One of the central legal issues underpinning the existing source rule is whether EPA is legally barred from regulating existing power plants under section 111(d) because they are already regulating mercury emissions from power plants under section 112.[299] The dispute stems from when Congress amended the Clean Air Act in 1990. The Senate version of the 1990 amendments included a small conforming amendment in section 111(d)(1)(A)(i) to update a cross reference to the newly amended section 112(b), which lists the specific pollutants subject to regulation under that section. The change was listed in a separate section titled "Miscellaneous Provision" and not among the other amendments to section 111.

In contrast, the amendments later passed by the House of Representatives to section 111(d)(1)(A)(i) substantially broaden its applicability to all source categories regulated under section 112, not just to specific pollutants listed under section 112(b). The House and Senate amendments underwent conference to reconcile the different versions, and in the Conference Committee report, the Senate managers agreed, in discussing amendments to section 111(d), to "recede" to the version adopted by the House. However, the conferenced version of the 1990s amendments that was adopted by both the House and Senate and signed by the President into law contained both versions of the amendment to section 111(d)(1)(A)(i). When the amendments were codified, the House amendment was selected as the operative language and it appears at 42 U.S.C. section 7411(d)(1)(A)(i).

In conjunction with its existing source proposal, EPA released a legal memo on its authority to regulate power plant emissions simultaneously under section 112 and 111(d).[300] EPA argues in the memorandum that the Statutes at Large – which contains both amendments – is controlling and that the discrepancy between the House and Senate versions of the section 112 exclusion found in section 111(d) is ambiguous and entitles the Agency to discretion. Notably, the EPA memorandum also cites, at footnote 54, the writings of both NRDC's Doniger and EDF's Ceronsky and Tomas Carbonell. The issue has already generated considerable debate in Congress,[301] academia,[302] and

[299] National Emission Standards for Hazardous Air Pollutants From Coal and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 FR 9304 (February 16, 2012).

[300] Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Utility Generating Units; available at: http://www2.epa.gov/sites/production/files/2014-06/documents/20140602-legal-memorandum.pdf.

[301] U.S. Senate Environment and Public Works Hearing on Legal Implications of the Clean Power Plan, May 5, 2015; available at: http://www.epw.senate.gov/public/index.cfm/hearings?ID=a95b230f-daa2-b789-7d42-be37b1eb9930.

[302] See, "Why EPA's Climate Plan Is Unconstitutional," by Laurence Tribe, Professor, Harvard Law School, March 20, 2015; available at: http://today.law.harvard.edu/why-epa-climate-plan-is-unconstitutional/.

the courts[303] – and will likely be subject to additional scrutiny by the courts when the existing source rule is finalized and litigated.

Wait is Over for EPA Power Plant Rule

As it prepared the proposed existing source rule for release to the public, EPA arranged a conference call the afternoon of Sunday, June 1, 2014, to brief its allies in the environmental community. Doniger went so far as to contact EPA to ensure his colleague Lashof was included, even though he had recently joined billionaire Tom Steyer's NextGen Climate.[304] The invitee list was a who's who of the environmental movement – with representatives of NRDC, Sierra Club, EDF, American Lung Association, Blue Engine Media, NextGen Climate, and League of Conservation Voters asked to participate.

On June 2, 2014, EPA publicly released its proposal for regulating carbon emissions from existing sources.[305] Using 2012 CO2 emissions as a baseline, the proposal would set an interim timeline starting in 2020 and a final timeline in 2030 - by which the State's must meet certain emission rate targets in order to reduce U.S. greenhouse gas emissions by 30 percent compared to 2005 levels.

The EPA calculated each State's emissions reduction goal based on four "building blocks":

> Building Block 1: EPA assumes all fossil fuel power plants can be run more efficiently, with an average heat-rate improvement of 6 percent at coal plants.
>
> Building Block 2: EPA assumes states can use more low-emitting power sources by switching coal, oil or gas-fired plants to natural gas combined cycle plants and running them at a 70 percent capacity factor.
>
> Building Block 3: EPA assumes states can use more zero- and low-emitting power sources by building additional renewable and nuclear power generation while maintaining the current nuclear generation.
>
> Building Block 4: EPA assumes states and utilities can reduce the use of electricity through energy efficiency programs by an average of 1.5 percent annually.

Under the proposal, States would be expected to develop implementation plans on their own or in cooperation with other states. If a state did not submit a plan or a submitted plan does not meet EPA's standards for approval, the agency would issue a Federal Implementation Plan (FIP).

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[303] See, Brief of Petitioners, State of West Virginia, et al. v. U.S. Environmental Protection Agency, No. 14-1146 (D.C. Cir.), at 7; available at: http://www.ago.wv.gov/publicresources/epa/Documents/BriefForPetitioner-As-Filed.pdf.

[304] May 30, 2014 email from D. Doniger to K. Knapp, subject: RE: Conference call on Sunday, June 1 regarding 111(d) proposal.

[305] "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," (also referred to as the Clean Power Plan), Proposed Rule, U.S. Environmental Protection Agency, 79 FR 34830 (June 18, 2014). EPA also issued a proposed rule for modified power plants on June 2, 2014. See, "Carbon Pollution Standards for Modified and Reconstructed Stationary Sources: Electric Utility Generating Units," Proposed Rule, U.S. Environmental Protection Agency, 79 FR 34960, June 18, 2014).

In praising the proposed rule, NRDC's Beinecke made sure to characterize the power plant emissions as "carbon pollution" and not "greenhouse gases" and that the rule was needed to "safeguard our health and protects future generations from unchecked climate change."[306] Environmental activist groups such as NRDC have attempted to create a narrative that the public as a whole supports the Obama Administration's climate agenda. One way groups have garnered the appearance of such support is through mass comment campaigns during the public comment period for a rulemaking. Typically, these groups will generate prewritten comments and urge its members and subscribers through mass emails and social media to separately submit the prewritten comments to the rulemaking docket. For example, NRDC sent five different messages to their members with prewritten comments on the existing source proposal, which generated more than 250,000 comments in favor of the proposed rule.[307]

As discussed previously in this report, NRDC advised the Obama Administration that the public would be more receptive to and supportive of rules regulating greenhouse gas emissions if the public dialogue shifted to protecting public health and away from trying to slow climate change.

Like the other environmental activist organizations intimately involved in developing EPA's carbon rules, the American Lung Association (ALA) was invited to participate in meetings hosted by EPA to coordinate public messaging in advance of the release of the power plant proposal. The ALA drafted a prewritten comment for its members to send, which made dubious connections to support the existing source rule, "Scientists warn that the buildup of carbon pollution will create warmer temperatures, which will increase the risk of dangerous smog levels. More smog means less childhood asthma attacks and complications for those with lung disease."[308] It is no coincidence, then, that EPA started using the terminology "carbon pollution" when discussing carbon dioxide emissions. In fact, the Administration selected the ALA to co-host a public briefing with President Obama on the day the existing source rule was released to the public.[309]

[306] See, http://switchboard.nrdc.org/blogs/fbeinecke/epa_announces_new_limits_on_ca.html.
[307] See, http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2013-0602-23499.
[308] https://secure3.convio.net/ala/site/Advocacy?cmd=display&page=UserAction&id=6421
[309] See, American Lung Association Press Release, May 30, 3014; available at: http://www.lung.org/press-room/press-releases/healthy-air/Obama-ALA-Carbon-Pollution-Briefing-Statement.html.

Conclusion

As this Report documents, the U.S. Environmental Protection Agency's (EPA) willingness to enter into a commonplace "sue-and-settle" agreement with allied environmental activists backfired tremendously at the expense of the American people. From the time of the original settlement, EPA was on a course to impose unprecedented regulations on the electric power sector on a wholly unrealistic timeframe. These regulations proved so legally and technically challenging and raised such significant policy and political questions that the Obama Administration knew early on that it could not live up to its settlement agreement commitments.

Even so, the Agency did not relent and moved forward with the proposed rules despite questions about their future defensibility. Despite legal challenges to the proposed rules, and likely considerably more now that they are finalized, it appears EPA has unfortunately taken the same position articulated by Administrator McCarthy in response to the June 29, 2015, Supreme Court decision in *Michigan v. EPA* on EPA's mercury rule. She shrugged off concerns about the mercury rule, indicating that by the time a court would vacate the rule, it will be too late because the regulated community will already have spent billions of dollars to comply with an illegal rule.

In addition to detailing overt "sue-and-settle" tactics, this Report extensively reveals how environmental activist groups, including the Natural Resources Defense Council (NRDC), and EPA inappropriately coordinated a public message on climate. With the 2012 election looming and a second term not yet secured for President Obama, the Administration went out of its way to mislead the American public about the timing and scope of these rules – stating repeatedly that it had "no plans" to regulate existing power plants even though it had been working behind the scenes with its environmental allies to do just that.

Only after his reelection did President Obama intervene to set in motion EPA action that would fulfill his original climate campaign promises before leaving office. All along the way, environmentalists proved to be not only big cheerleaders for President Obama and EPA, but groups such as NRDC were basically an extension of the Agency, providing policy advice, data and modeling, legal counsel, and even talking points. From cap-and-trade's defeat in Congress in 2010, to the President's Climate Action Plan in 2013, to Congressional oversight requests, NRDC activists and EPA worked hand-in-hand to present a united front on executive climate action to the American people.

This Report is based on the Committee's oversight into these rules and the role NRDC played in developing the proposed rules, which rebuts much of the Obama Administration's narrative about how these rules were developed. Although not a comprehensive history of the rulemaking process, this Report documents previously unknown details about the relationship between EPA and environmental activist groups and the "sue-and-settle" process that led to these rules. The Committee's oversight initially focused on the role played by NRDC, but it has become increasingly clear during the course of this oversight that NRDC was not alone in having unprecedented access to agency decision-makers. The Committee's oversight will continue with the finalization and implementation of these rules.