

ONE HUNDRED TENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
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May 19, 2008

To: Members of the Committee on Oversight and Government Reform
Fr: Republican Committee Staff
Re: Memo on California Waiver Decision – Preliminary Assessment

I. EXECUTIVE SUMMARY

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

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

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

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

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

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

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

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

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

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

II. BACKGROUND

1. Investigation timeline

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

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

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

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

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

¹ Greenhouse gases (GHG emissions) include water vapor, carbon dioxide, methane, nitrous oxide, ozone and hydrofluorocarbons, however, the most commonly discussed GHG is carbon dioxide.

² Letter from Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency, to Arnold Schwarzenegger, Governor, State of California (Dec. 19, 2007) [hereinafter *Dec. 19, 2007 Johnson Letter*] (on file with Minority Committee staff).

³ Letter from Henry A. Waxman, Chairman, House Oversight and Government Reform Committee to Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency (Dec. 14, 2007) [hereinafter *Dec. 14, 2007 Waxman Letter*] (on file with Minority Committee staff).

⁴ *Id.*

⁵ *Id.*

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

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

2. Investigation Methodology

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

III. REGULATORY FRAMEWORK

1. Congressional action on climate change elusive.

Lack of legislative action during 110th Congress. Climate change has been a topic of interest of Congress for over three decades with at least 250 hearings on the topic having been conducted since 1975.⁸ Nonetheless, currently no comprehensive federal regulatory framework exists to address the concerns associated with climate change. In the 110th Congress, interest has continued to increase, likely attributable to the increasing body of science pointing towards support for the connection between GHGs and natural phenomena related to climate change and the increased public awareness of and attention to climate change.

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

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

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

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

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

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

2. GHG regulation under Clean Air Act

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

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

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

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

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

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

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

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

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

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

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

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

¹¹ CAA § 209(b)(1)

¹² *Id.*

¹³ *Id.* (referring to CAA § 202(a))

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

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

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

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

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

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

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

¹⁶ *Id.*

¹⁷ *Id.*

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

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

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

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

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

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

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

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

²⁰ *Id.* at 1451-52

²¹ *Id.*

²² *Id.* at 1463

²³ *See generally Id.* The Court also held that petitioners had standing to challenge EPA’s denial of their rulemaking petition since at least one petitioner state properly asserted a concrete injury from the potential further loss of its coastal land, much of which was owned by the state, from rising sea levels caused by climate change.

²⁴ Memorandum from Jonathan Z. Cannon, EPA General Counsel, to Carol M. Browner, EPA Administrator, *EPA’s Authority to Regulate Pollutants Emitted by Electric Power Generation Sources* (Apr. 10, 1998).

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

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

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

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

²⁵ *Is CO₂ A Pollutant and Does EPA Have the Power to Regulate It?: Hearing Before the Subcomm. on National Environmental Growth, Natural Resources and Regulatory Affairs of the House Comm. on Gov't Reform and the Subcomm. on Energy and Environment of the House Comm. on Science*, 106th Cong. 11 (1999) (testimony of Gary Guzy, EPA General Counsel).

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

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

²⁸ *Id.*

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

IV. CALIFORNIA'S WAIVER REQUEST

1. California adopted regulations, requested waiver

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

On September 24, 2004, CARB adopted regulations requiring gradual reductions in fleet average GHGs until they reach approximately 30% below the emissions of the 2002 fleet in 2016.³² California's focus on fleet averages rather than reductions for individual vehicles was intended to provide flexibility for automobile manufacturers.

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

2. EPA denied California's waiver request

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

³⁰ California Assembly Bill 1493, Vehicular Emissions, Greenhouse Gases (Jul. 22, 2002)

³¹ There are separate standards for passenger cars and light duty trucks under 3,750 lbs. than there is for vehicles weighing more than 3,750 lbs.

³² California Environmental Protection Agency Air Resources Board, Final Regulation Order - Amendments to Sections 1900 and 1961 and Adoption of New Sections 1961.1, Title 13, California Code of Regulations as Approved by the Office of Administrative Law (Sept. 24, 2004 hearing date) *available at* <http://www.arb.ca.gov/regact/grnhsgas/grnhsgas.htm> [last visited May 19, 2008]; California Environmental Protection Agency Air Resources Board, California Exhaust Emission Standards and Test Procedures for 2001 and Subsequent Model Passenger Cars, Light Trucks and Medium-Duty Vehicles as Approved by Office of Administrative Law (Sept. 24, 2004 hearing date) *available at* <http://www.arb.ca.gov/regact/grnhsgas/grnhsgas.htm> [last visited May 19, 2008].

³³ California Environmental Protection Agency Air Resources Board, Request for a Clean Air Act Section 209(b) Waiver of Preemption for California's Adopted and Amended New Motor Vehicle Regulations and Incorporated Test Procedures to Control Greenhouse Gas Emissions: Support Document (Dec. 21, 2005).

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

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

V. ANALYSIS OF EPA ADMINISTRATOR’S DENIAL

1. Basis of waiver requests generally

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

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

2. Basis for EPA’s decision

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

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

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

³⁶ Dec. 19, 2007 Johnson Letter.

³⁷ *CRS California Waiver Report 2008* at 8

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

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

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

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

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

³⁸ CAA § 209(b)(1) referring to CAA §202(a)

³⁹ *Mar. 6, 2008 Denial Notice*

⁴⁰ *Mar. 6, 2008 Denial Notice* at 12157

⁴¹ CRS California Waiver Report 2008 at 17-18

⁴² *Mar. 6, 2008 Denial Notice* at 12158

⁴³ *Mar. 6, 2008 Denial Notice* at 12158

⁴⁴ *Mar. 6, 2008 Denial Notice* at 12,156, 12,162

3. EPA found carbon dioxide of distinct nature

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

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

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

4. Comments received on the public record

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

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

⁴⁵ *Dec 19, 2007 Johnson Letter*

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

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

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

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

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

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

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

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

⁴⁷ House Committee on Oversight and Government Reform, *Committee Report: EPA's Denial of the California Waiver*, May 19, 2008, 1 [hereinafter *Majority Report*]

⁴⁸ Deposition of Jason Burnett, Associate Deputy Administrator, U.S. Environmental Protection Agency, in Washington, D.C. (May 15, 2007) [hereinafter *Burnett Deposition*] Draft Tr. at 59

⁴⁹ *Id.* at Draft Tr. at 123

⁵⁰ *Id.* at Draft Tr. at 60

⁵¹ *Id.* at Draft Tr. at 131

defensible?” Burnett responded, “I think that we eliminated from consideration options that were not legally defensible.”⁵²

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

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

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

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

⁵² *Id.* at Draft Tr. 136-37

⁵³ *See Majority Report* at 13

⁵⁴ *Id.* at 19

⁵⁵ *Id.* at 19

⁵⁶ *Id.* at 19

⁵⁷ *Id.* at 18

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

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

VII. INAPPROPRIATE ACTIVITIES BY EPA OFFICIALS

1. Introduction

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

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

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

⁵⁹ *Id.*

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

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

⁶² *Dec 20, 2007 Waxman Letter*

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

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

2. Nature of EPA officials' activities

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

It appears that Oge was actually the director of the EPA office that was "principally responsible" for EPA's analysis of California's waiver request and was the director while California's request was being considered⁶⁵ and Simon managed the EPA team preparing analysis of California's waiver request for Administrator Johnson.⁶⁶

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

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

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

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

⁶⁷ *Feb. 27, 2008 Article*

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

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

- The eyes of the world are on you and the marvelous institution you [Administrator Johnson] and [former Administrator Reilly] I have had the privilege of leading; clearly the stakes are huge, especially with respect to future climate work.
- But I think there must be a win-win here, and you should find it and seize it....for the sake of the environment and the integrity of the agency.
- Word is out about the option to grant the waiver for the first three years and then defer the subsequent years. I don’t have the details, but this sounds like the seed for a “grand bargain”, and would put you and the agency in the driver’s seat to craft a national solution: something that my automaker contacts and California both say they want.
- You have to find a way to get this done. If you cannot you will face a pretty big personal decision about whether you are able to stay in the job under those circumstances. This is a choice only you can make, but I ask you to think about the history and the future of the agency in making it. If you are asked to deny this waiver, I fear the credibility of the agency that we both love will be irreparably damaged.⁶⁹

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

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

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

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

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

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

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

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

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

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

⁷² *Id.*

⁷³ *Id.*

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

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

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

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

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

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

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

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

⁷⁷ TMD’s second letter.

⁷⁸ *Dec 20, 2007 Waxman Letter*

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

⁸⁰ *Apr. 9, 2008 Waxman Letter*

⁸¹ *Apr. 9, 2008 Waxman Letter*

⁸² *Apr. 9, 2008 Waxman Letter*

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

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

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

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

VIII. CONCLUSION

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

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

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

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