

March 18, 2019

**Attention: Docket ID No. EPA-HQ-OAR-2013-0495**

**Re: Comments on the Environmental Protection Agency’s Review of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units**

**I. Introduction**

On October 23, 2015, the Environmental Protection Agency (EPA), promulgated a rule under the Clean Air Act (CAA)<sup>1</sup> setting standards of performance for new, modified, and reconstructed electric utility generating units (EGUs).<sup>2</sup> This rule would have established carbon capture and sequestration (CCS) as the best system of emission reduction (BSER) for new coal-fired power plants.<sup>3</sup>

Multiple fossil fuel companies, fossil fuel-connected trade associations, and front groups funded by fossil fuel interests then sued to block this rule. As will be discussed below, many of these entities have financial or professional relationships with Trump administration political appointees at EPA who oversaw the instant rulemaking.

On March 28, 2017, President Trump issued Executive Order 13783, which directed all executive agencies including EPA to “immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.”<sup>4</sup> E.O. 13783 specifically targeted EPA’s “‘Clean Power Plan’ and [r]elated [r]ules and Agency [a]ctions” including the 2015 rule.<sup>5</sup>

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<sup>1</sup> 42 U.S.C. §7401 *et seq.*

<sup>2</sup> Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, Federal Register Vol. 80, No. 205 (Oct. 23, 2015), pg. 64510, <https://www.govinfo.gov/content/pkg/FR-2015-10-23/pdf/2015-22837.pdf>

<sup>3</sup> *Id.* at 64512

<sup>4</sup> E.O. 13783 of March 28, 2017 Promoting Energy Independence and Economic Growth, Federal Register Vol. 82, No. 61 (March 31, 2017), pg. 16093, <https://www.govinfo.gov/content/pkg/FR-2017-03-31/pdf/2017-06576.pdf>

<sup>5</sup> *Id.* at 16095

On April 28, 2017, the United States Court of Appeals for the District of Columbia granted EPA's motion to hold the various cases challenging the 2015 rule in abeyance while the Agency considered revising it in light of E.O. 13783.<sup>6</sup>

On December 20, 2018, EPA promulgated a new proposed rule.<sup>7</sup> The proposed rule finds that partial CCS is not the BSER for new coal-fired power plants and instead recommends that the most efficient demonstrated steam cycle be adopted as the BSER.<sup>8</sup>

In this comment, I argue that the proposed rule is arbitrary and capricious because it is not the product of reasoned decision making. There are at least four factors that demonstrate this:

1. The proposed rule is the product of an EPA that has been captured by the fossil fuel industry. EPA political leadership who oversaw this rule – including but not limited to EPA Administrator Andrew Wheeler;<sup>9</sup> Assistant EPA Administrator Bill Wehrum, who is in charge of EPA's Office of Air and Radiation, in whose jurisdiction this rule falls; and former EPA Administrator Scott Pruitt – all had significant political and/or professional connections to the companies and groups challenging the 2015 rule. In addition, all are politically and/or professionally tied to the fossil fuel industry which is hostile to efforts such as the 2015 rule to reduce carbon pollution.
2. The proposed rule is an abrupt regulatory U-turn that ignores significant developments with respect to the affordability and feasibility of CCS technology.
3. The proposed rule makes no effort to calculate the foregone benefits of reduced carbon pollution from new coal-fired EGUs equipped with partial CCS as opposed to new coal-fired EGUs using the most efficient demonstrated steam cycle.
4. The proposed rule's purported rationale, E.O. 13783, conflicts with the proposed rule's finding that it is unlikely that any new coal-fired EGUs will be built *with or without the 2015 rule*. E.O. 13783 directs the Agency to “appropriately suspend, revise, or rescind those [regulations] that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest.” EPA's determination that it is unlikely that any new coal-fired EGUs will be built irrespective of the 2015 rule necessarily entails a conclusion that the 2015 rule did not “unduly burden the development of domestic energy resources.”

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<sup>6</sup> April 28, 2017 Order, *North Dakota v. EPA*, Case No. 15-1381 (D.C. Cir.), [http://wordpress2.ei.columbia.edu/climate-change-litigation/files/case-documents/2017/20170428\\_docket-15-1381\\_order.pdf](http://wordpress2.ei.columbia.edu/climate-change-litigation/files/case-documents/2017/20170428_docket-15-1381_order.pdf)

<sup>7</sup> Review of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, Federal Register Vol. 83, No. 244 (Dec. 20, 2018), pg. 65424, <https://www.govinfo.gov/content/pkg/FR-2018-12-20/pdf/2018-27052.pdf>

<sup>8</sup> *Id.*

<sup>9</sup> Wheeler was first Deputy EPA Administrator and then Acting EPA Administrator during the development of the proposed rule.



For all of these reasons, the rule should be withdrawn.

## II. Facts

### A. **The Fossil Fuel Industry Has Led the Charge Against the 2015 Rule**

After EPA promulgated the 2015 rule, Murray Energy,<sup>10</sup> Energy & Environment Legal Institute,<sup>11</sup> the U.S. Chamber of Commerce leading a coalition of trade associations including the National Association of Manufactures (NAM) and the American Fuel & Petrochemical Manufacturers (AFPM),<sup>12</sup> Peabody Energy,<sup>13</sup> the American Coalition for Clean Coal Electricity (ACCCE),<sup>14</sup> the National Mining Association (NMA),<sup>15</sup> the Utility Air Regulatory Group (UARG),<sup>16</sup> several subsidiaries of the Southern Company,<sup>17</sup> and several states including Oklahoma<sup>18</sup> all challenged the rule in court.

Petitioner Murray Energy is a coal company.

Petitioner Energy & Environment Legal Institute is a non-profit group that has significant financial ties to the fossil fuel industry. It has received funding from foundations associated fossil fuel industry billionaires Charles and David Koch as well as from Koch-linked Donors

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<sup>10</sup> Petition for Judicial Review, *Murray Energy Corp. v. EPA*, Case No. 15-1396 (D.C. Cir.), [http://wordpress2.ei.columbia.edu/climate-change-litigation/files/case-documents/2015/20151030\\_docket-15-1396\\_petition-for-review-1.pdf](http://wordpress2.ei.columbia.edu/climate-change-litigation/files/case-documents/2015/20151030_docket-15-1396_petition-for-review-1.pdf)

<sup>11</sup> Petition Statement of Issues to be Raised, *Energy & Environment Legal Institute v. EPA*, Case No. 15-1397 (D.C. Cir.), [http://wordpress2.ei.columbia.edu/climate-change-litigation/files/case-documents/2015/20151202\\_docket-15-1397\\_statement-of-issues.pdf](http://wordpress2.ei.columbia.edu/climate-change-litigation/files/case-documents/2015/20151202_docket-15-1397_statement-of-issues.pdf)

<sup>12</sup> Petition for Review, *Chamber of Commerce of the United States of America v. EPA*, Case No. 15-1469 (D.C. Cir.), [http://wordpress2.ei.columbia.edu/climate-change-litigation/files/case-documents/2015/20151218\\_docket-15-1469\\_order-denying-petition-for-review.pdf](http://wordpress2.ei.columbia.edu/climate-change-litigation/files/case-documents/2015/20151218_docket-15-1469_order-denying-petition-for-review.pdf)

<sup>13</sup> Petition for Review, *Peabody Energy Corp. v. EPA*, Case. No. 15-1438 (D.C. Cir.), [http://wordpress2.ei.columbia.edu/climate-change-litigation/files/case-documents/2015/20151203\\_docket-15-1438\\_petition-for-review.pdf](http://wordpress2.ei.columbia.edu/climate-change-litigation/files/case-documents/2015/20151203_docket-15-1438_petition-for-review.pdf)

<sup>14</sup> Petition for Review, *American Coalition for Clean Coal Electricity v. EPA*, Case No. 15-1481 (D.C. Cir.), [http://wordpress2.ei.columbia.edu/climate-change-litigation/files/case-documents/2015/20151222\\_docket-15-1481\\_petition-for-review.pdf](http://wordpress2.ei.columbia.edu/climate-change-litigation/files/case-documents/2015/20151222_docket-15-1481_petition-for-review.pdf)

<sup>15</sup> Petition for Review, *National Mining Association v. EPA*, Case No. 15-1456 (D.C. Cir.), [http://wordpress2.ei.columbia.edu/climate-change-litigation/files/case-documents/2015/20151215\\_docket-15-1456\\_petition-for-review.pdf](http://wordpress2.ei.columbia.edu/climate-change-litigation/files/case-documents/2015/20151215_docket-15-1456_petition-for-review.pdf)

<sup>16</sup> Petition for Review, *Utility Air Regulatory Group v. EPA*, Case. No. 15-1448 (D.C. Cir.), [http://wordpress2.ei.columbia.edu/climate-change-litigation/files/case-documents/2015/20151214\\_docket-15-1448\\_petition-for-review.pdf](http://wordpress2.ei.columbia.edu/climate-change-litigation/files/case-documents/2015/20151214_docket-15-1448_petition-for-review.pdf)

<sup>17</sup> Petition for Review, *Alabama Power Co. v. EPA*, Case No. 15-1468 (D.C. Cir.), [http://wordpress2.ei.columbia.edu/climate-change-litigation/files/case-documents/2015/20151218\\_docket-15-1468\\_petition-for-review-1.pdf](http://wordpress2.ei.columbia.edu/climate-change-litigation/files/case-documents/2015/20151218_docket-15-1468_petition-for-review-1.pdf)

<sup>18</sup> Petition for Review, *West Virginia v. EPA*, Case No. 15-1399 (D.C. Cir.), [http://wordpress2.ei.columbia.edu/climate-change-litigation/files/case-documents/2015/20151109\\_docket-15-1399\\_petition-for-review-1.pdf](http://wordpress2.ei.columbia.edu/climate-change-litigation/files/case-documents/2015/20151109_docket-15-1399_petition-for-review-1.pdf)

Trust.<sup>19</sup> It has also received funding from Arch Coal.<sup>20</sup> The Koch brothers are at the heart of a deeply funded network of groups that spread doubt about climate science and oppose climate action.<sup>21</sup>

Petitioners U.S. Chamber of Commerce,<sup>22</sup> NAM,<sup>23</sup> and AFPM<sup>24</sup> are all trade associations that count numerous fossil fuel companies among their members. All have also been active opposing efforts to limit carbon pollution.

Petitioner Peabody Energy is a coal company.

Petitioner ACCCE is a group made up of coal and electric utility companies.<sup>25</sup>

Petitioner NMA is a trade association that counts coal companies among its members.<sup>26</sup>

Petitioner UARG is group made up of electric utility companies.<sup>27</sup>

## **B. EPA Administrator Andrew Wheeler is Captured by Fossil Fuel Interests Opposed to the 2015 Rule**

Under President Trump, EPA has been stocked with officials close to the fossil fuel industry. This pattern began with former Administrator Pruitt and continued with current Administrator Wheeler, who replaced Pruitt atop EPA. Prior to being nominated by President Trump, Wheeler was a longtime lobbyist for energy interests.<sup>28</sup> Most notably, Wheeler represented Murray

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<sup>19</sup> Energy & Environment Legal Institute, DeSmog, <https://www.desmogblog.com/energy-environment-legal-institute> (viewed on March 11, 2019)

<sup>20</sup> Nick Surgey, "Bankruptcy Filing Shows Arch Coal Funding for Climate Denial Legal Group," PRWatch (Feb. 24, 2016), <https://www.webcitation.org/6g2WgGyuN> (viewed on March 11, 2019)

<sup>21</sup> Koch Industries: Secretly Funding the Climate Denial Machine, Greenpeace, <https://www.greenpeace.org/usa/global-warming/climate-deniers/koch-industries/>

<sup>22</sup> The Chamber of Commerce does not make its membership list public, and is not transparent about its funding, but I take its Board of Directors to be representative. <https://www.uschamber.com/about/board-of-directors>

<sup>23</sup> National Association of Manufacturers membership list available at <https://www.nam.org/Alliances/Allied-Associations-Group/Members/>

<sup>24</sup> American Fuel and Petrochemical Manufacturers membership list available at <https://www.afpm.org/membership-directory/>

<sup>25</sup> American Coalition for Clean Coal Electricity membership list available at <http://www.americaspower.org/about-accece/members/>

<sup>26</sup> National Mining Association membership list available at <https://nma.org/about-nma/member-list/>

<sup>27</sup> Annalee Armstrong, "Power companies wield influence through anonymous group," *S&P Global*, July 19, 2016 available at <https://www.snl.com/web/client?auth=inherit#news/article?id=37072675&ccid=A-37072675-13095>

<sup>28</sup> Steven Mufson, "Scott Pruitt's likely successor has a long lobbying history on issues before the EPA," *The Washington Post* (July 5, 2018), <https://www.washingtonpost.com/business/economy/epas-acting->



Energy, whose CEO, Bob Murray, put saving coal-fired EGUs at the top of the “Action Plan” he circulated to Vice President Mike Pence, Pruitt, Secretary of Energy Rick Perry, and others.<sup>29</sup> Wheeler even accompanied Murray to lobby Perry on this action plan<sup>30</sup> and arranged for Murray to meet with Pruitt on the same subject.<sup>31</sup>



*Caption: Perry (head of the table) meets with Murray (third from right) and Wheeler (far right)*

Murray Energy has been outspoken in its opposition to the 2015 rule. In addition to challenging the 2015 rule in court, Murray Energy also submitted comments as part of the proposed rulemaking. These comments applaud EPA for its analysis rejecting partial CCS as the BSR for coal-fired EGUs, but argue that EPA should go further and challenge the endangerment finding for coal-fired EGUs that allows EPA to regulate their greenhouse gas (GHG) emissions under the CAA.<sup>32</sup> Notably, the proposed rule points out that various stakeholders have made this

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[administrator-has-long-lobbying-record-on-issues-before-the-agency/2018/07/05/a591cd40-6a6b-11e8-bea7-c8eb28bc52b1\\_story.html?utm\\_term=.02987956d928](https://www.nytimes.com/2018/07/05/a591cd40-6a6b-11e8-bea7-c8eb28bc52b1_story.html?utm_term=.02987956d928)

<sup>29</sup> Action Plan for the Administration of President Donald J. Trump, Bob Murray (March 1, 2017), <https://www.nytimes.com/interactive/2018/01/09/climate/document-Murray-Energy-Action-Plan.html>

<sup>30</sup> Kate Aronoff, “Exclusive Photos Contradict Murray Energy CEO’s Claim He Had “Nothing To Do with” Rick Perry’s Coal Bailout, *In These Times* (Dec. 6, 2017), [http://inthesetimes.com/features/murray\\_energy\\_trump\\_doe\\_coal\\_industry\\_grid\\_plan.html](http://inthesetimes.com/features/murray_energy_trump_doe_coal_industry_grid_plan.html)

<sup>31</sup> See, Appendix II

<sup>32</sup> Comment submitted by Michael O. McKown, Senior Vice President, Law and Administration, Murray Energy Corporation,

argument and invites further comment on the issue, suggesting that EPA is considering reviewing the endangerment finding for coal-fired EGUs and potentially other source categories as Murray Energy has requested it do.<sup>33</sup>

### C. Assistant EPA Administrator Bill Wehrum is Captured by Fossil Fuel Interests Opposed to the 2015 Rule

Bill Wehrum, the Assistant Administrator for EPA's Office of Air and Radiation (the office in which the proposed rule was developed), is a longtime lawyer for the fossil fuel industry. He has repeatedly sued EPA to block clean air rules, and has represented UARG and AFPM, both of which sued to block the 2015 rule. He has also represented Duke Energy, Dominion Resources, the American Petroleum Institute (API), Chevron, ExxonMobil, Koch Companies, Koch Industries, and Phillips 66, among other energy interests.<sup>34</sup>

More troubling still, Wehrum apparently doesn't believe that the CAA was intended to regulate GHG emissions, *Massachusetts v. EPA* notwithstanding.<sup>35</sup> And in an apparent violation of the Trump ethics pledge<sup>36</sup> he was required to sign, Wehrum met with UARG and several electric utilities on a separate rulemaking relating to GHG emissions from the electric power sector just weeks after he assumed his duties as Assistant Administrator.<sup>37</sup>

Wehrum's history of skirting ethics rules to engage with former clients isn't limited to UARG. Wehrum was apparently also involved in a decision to shift EPA policy with respect to whether or not the Agency would review companies' projections about how much modifications to plants might increase emissions of air pollutants. EPA's policy shift most directly and immediately benefited DTE, an electric utility and client of Wehrum's former law firm.<sup>38</sup>

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<https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=postedDate&po=0&s=%22murray%2Benergy%22&dct=PS&D=EPA-HQ-OAR-2013-0495> (viewed on March 11, 2019)

<sup>33</sup> Review of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, Federal Register Vol. 83, No. 244 (Dec. 20, 2018), pg. 65432, <https://www.govinfo.gov/content/pkg/FR-2018-12-20/pdf/2018-27052.pdf>

<sup>34</sup> See Appendix I

<sup>35</sup> Q&A With Hunton & Williams' Bill Wehrum, *Law360* (May 6, 2013),

<https://www.law360.com/articles/427231/q-a-with-hunton-williams-bill-wehrum>

<sup>36</sup> Oct. 10, 2018 Letter from Sen. Sheldon Whitehouse to President Donald Trump,

<https://www.whitehouse.senate.gov/imo/media/doc/Wehrum%20Letter%20to%20President%20Trump.pdf>

<sup>37</sup> Clean Air Act: Update on Stationary Source Regulations, William Wehrum (Dec. 7, 2017),

<https://www.documentcloud.org/documents/4776445-EPA-s-William-Wehrum-and-the-Effort-to-Move.html#document/p190/a448289>

<sup>38</sup> Juliet Eilperin, "EPA regulator skirts the line between former clients and current job," *The Washington Post* (Feb. 25, 2019), <https://www.washingtonpost.com/national/health-science/epa-regulator-skirts-the->



#### **D. Former EPA Administrator Scott Pruitt was Captured by Fossil Fuel Interests Opposed to the 2015 Rule**

Work on the new rule began under former Administrator Pruitt, whose political career has been underwritten by the energy industry, the industry most affected by the 2015 rule. In his four campaigns for elected office in 2002, 2006, 2010, and 2014, Pruitt collected more than \$350,000 from corporations and individuals in the energy and natural resources sector, or 13 percent of total campaign contributions he received (and 15 percent of campaign contributions that can be tied to a particular industrial or other sector).<sup>39</sup> By way of comparison, campaign contributions made by the energy and natural resources industry averaged just three percent of total contributions made to state attorney general candidates across the country since 2000.<sup>40</sup>

In addition to contributions directly tied to the energy industry, Pruitt received considerable financial support from industries closely linked to the energy industry: “legal services and lobbying” that advocate for the energy industry and “general business” and “construction” that service the energy sector. Pruitt’s campaigns also received donations from political action committees (PACs) and issue advocacy groups that were at least partially funded by the energy industry.<sup>41</sup>

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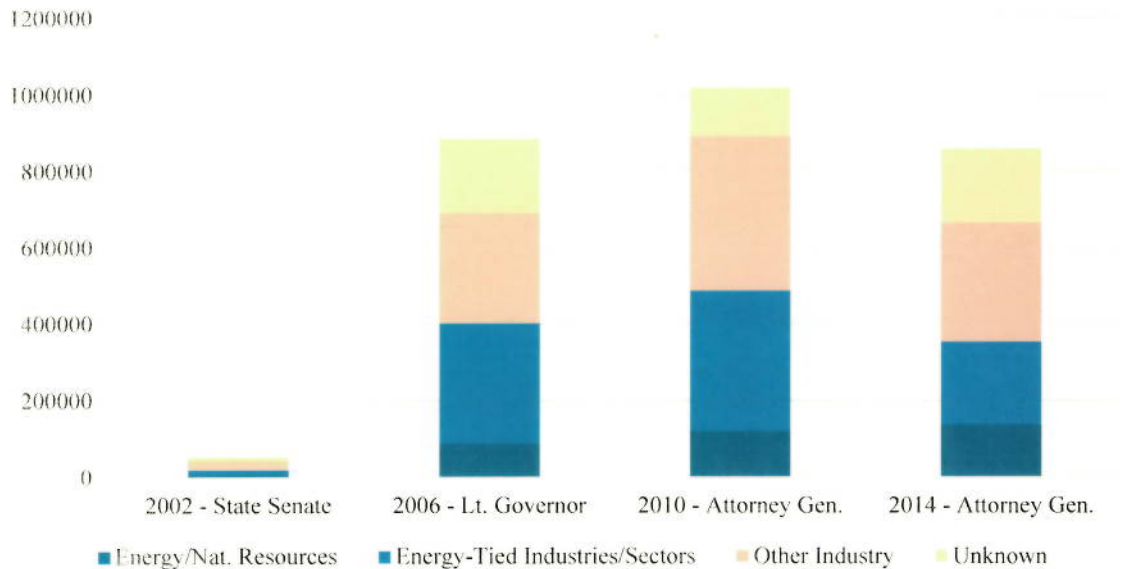
[line-between-former-clients-and-current-job/2019/02/24/b826b5fa-3767-11e9-a400-e481bf264fdc\\_story.html?utm\\_term=.9c1946409336](https://www.followthemoney.org/entity-details?eid=6583668)

<sup>39</sup> Follow the Money, <https://www.followthemoney.org/entity-details?eid=6583668>. Note that the total Pruitt’s campaign received is actually \$2,813,197 because a total of \$229,984 listed as donated to his 2014 re-election campaign of OK AG was carried forward from previous campaigns.

<sup>40</sup> Calder Burgam, “Energy Interests Power Pruitt,” Follow the Money (Jan. 17, 2017), <https://www.followthemoney.org/research/blog/energy-interests-power-pruitt/>

<sup>41</sup> Follow the Money, <https://www.followthemoney.org/entity-details?eid=6583668>

## Source of Pruitt's Campaign donations



Including all of these categories, the energy sector and industries and groups associated with it gave over \$1,250,000 to Pruitt's campaigns, 44 percent of the total and 55 percent of total donations that can be tied to a particular industrial or other sector.

Tellingly, contributions from the energy industry to Pruitt's 2014 re-election campaign actually increased by 13 percent compared to 2010 contributions, despite the fact that in 2014, Pruitt ran unopposed in both the primary and general elections. Contributions from almost every other sector fell in 2014, as might normally be expected when a candidate is running without opposition.

The energy industry's increasing support of Pruitt coincided with its growing apprehension about EPA's plans to reduce carbon emissions in the power sector. In early 2014, the energy industry, its corporate lawyers, Republican strategists, and the U.S. Chamber of Commerce had already begun plotting strategy to oppose forthcoming rules to limit carbon pollution such as the 2015 rule. Pruitt was among the key strategists involved in this early planning.<sup>42</sup> Pruitt's leadership piloting the opposition to these forthcoming rules provided the energy industry with a compelling reason to further shower money on one of its best and most promising operatives. From industry's perspective, money spent on Pruitt – even a Pruitt running unopposed – was money well spent.

<sup>42</sup> Coral Davenport and Julie Hirschfeld Davis, "Move to Fight Obama's Climate Plan Started Early," *The New York Times* (Aug. 3, 2015), [https://www.nytimes.com/2015/08/04/us/obama-unveils-plan-to-sharply-limit-greenhouse-gas-emissions.html?\\_r=0](https://www.nytimes.com/2015/08/04/us/obama-unveils-plan-to-sharply-limit-greenhouse-gas-emissions.html?_r=0)



And industry support for Pruitt went beyond direct contributions to his campaigns.<sup>43</sup> In Pruitt's 2010 campaign for attorney general, an outside group by the name of the Republican State Leadership Committee (RSLC) spent \$150,000 on his behalf.<sup>44</sup> The U.S. Chamber of Commerce, long a deep-pocketed foe of action on climate change,<sup>45</sup> was RSLC's largest donor, donating almost \$4 million to the group.

Pruitt wasn't only on the receiving end of spending by outside groups. He and his supporters created PACs to expand his influence and provide other avenues for him to direct fossil fuel and industry money to like-minded politicians. Run by Pruitt, the Oklahoma Strong Leadership PAC raised roughly \$400,000 during the 2016 election cycle, almost 20 percent of which came from energy interests.<sup>46</sup> Liberty 2.0, a super PAC created by Pruitt's supporters,<sup>47</sup> raised approximately \$450,000 during the 2016 election cycle, over a third of which came from energy interests.<sup>48</sup> Of its nine largest donors, four are in the energy industry including the second largest donor, Murray Energy, which gave \$50,000.<sup>49</sup>

During this period, Pruitt served as a chairman of the Republican Attorney Generals Association (RAGA) and was on its executive committee. Under Pruitt's leadership, RAGA raised an enormous amount of money for its 527 outside spending organization from the U.S. Chamber of Commerce and the energy industry. During the 2014 and 2016 election cycles, several petitioners seeking to overturn the 2015 rule were among RAGA's largest donors. The U.S. Chamber of Commerce was by far the largest donor to RAGA's 527, giving the organization over \$4 million. Koch Industries gave almost \$500,000, ACCCE gave more than \$300,000, Murray Energy gave \$250,000, NMA gave more than \$200,000, and AFPM gave almost \$200,000.<sup>50</sup>

Pruitt's deep ties to the energy industry did not simply dissolve once he left Oklahoma to run the EPA. During his nomination process, the America Rising super PAC, which has received large

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<sup>43</sup> Prior to 2015, Oklahoma limited contributions to candidates for state office to \$5,000. See, State Limits on Contributions to Candidates, National Conference of State Legislatures,

[http://www.ncsl.org/Portals/1/documents/legismgt/Limits\\_to\\_Candidates\\_2012-2014.pdf](http://www.ncsl.org/Portals/1/documents/legismgt/Limits_to_Candidates_2012-2014.pdf). This limit drove larger contributions to outside spending groups organized under section 527 and 501(c)(4) of the Internal Revenue Code.

<sup>44</sup> Paul Monies, "Outside groups make ad push in final days of campaigns," *The Oklahoman* (Oct. 31, 2010), <http://newsok.com/article/3509737>.

<sup>45</sup> Alyssa Katz, "The Influence Machine: The U.S. Chamber of Commerce and the Corporate Capture of American Life," pgs. 111 – 127, Spiegel & Grau (2015)

<sup>46</sup> Open Secrets, <https://www.opensecrets.org/pacs/lookup2.php?strID=C00572198&cycle=2016>

<sup>47</sup> Alex Guillén, "Energy executives, secret nonprofit raise money to back Pruitt," *Politico* (Jan. 6, 2017) <https://www.politico.com/story/2017/01/scott-pruitt-epa-nonprofit-backers-233306>

<sup>48</sup> Open Secrets, <https://www.opensecrets.org/pacs/lookup2.php?cycle=2016&strID=C00572917>

<sup>49</sup> Open Secrets, <https://www.opensecrets.org/pacs/pacgave2.php?cycle=2016&cmte=C00572917>

<sup>50</sup> Open Secrets,

[https://www.opensecrets.org/527s/527cmtedetail\\_contribs.php?cycle=2014&ein=464501717](https://www.opensecrets.org/527s/527cmtedetail_contribs.php?cycle=2014&ein=464501717)



donations from fossil fuel interests,<sup>51</sup> funded a campaign in support of his confirmation.<sup>52</sup> This campaign included ads targeting Democratic senators and a ConfirmPruitt.com website.<sup>53</sup>

But Pruitt didn't just raise money from the fossil fuel industry. As Oklahoma Attorney General and EPA Administrator, Pruitt used his official position to execute the agenda of his industry political patrons, and this was particularly true with respect to rulemakings related to carbon pollution such as the proposed rule.

As Attorney General of Oklahoma, Scott Pruitt sued the EPA 14 times, including to block the 2015 rule at issue here.<sup>54</sup>

Murray Energy and the Southern Company (both of which filed separate lawsuits seeking to block the 2015 rule) paid to attend a RAGA summit where they met with Pruitt.<sup>55</sup> At this same summit, Pruitt appeared on a panel entitled "The Dangerous Consequences of the Clean Power Plan & Other EPA Rules." With him on this panel were representatives from Murray Energy and the ACCCE,<sup>56</sup> yet another petitioner in litigation against the 2015 rule.

Of the multiple companies and trade associations that also filed petitions against the 2015, seven had donated to Pruitt and/or to outside groups involved with him: ACCCE (at least \$329,650), AFPM (at least \$187,650), Murray Energy (at least \$300,000), NMA (at least \$220,750), Peabody Energy (at least \$13,750), the Southern Company (at least \$250), and the U.S. Chamber of Commerce (at least \$6,658,546).

Pruitt's fealty to the energy industry was not limited to attacks on regulations limiting carbon pollution from EGUs. Pulitzer Prize-winning reporting by the *New York Times* in 2014 uncovered that Attorney General Pruitt used official letterhead to press the case of Devon Energy, one of his biggest donors, before EPA. Devon claimed the EPA was overestimating the amount of air pollution caused by natural gas drilling. The company's lawyers drafted a letter on

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<sup>51</sup> Open Secrets, <https://www.opensecrets.org/pacs/pacgave2.php?cmte=C00542902&cycle=2014>

<sup>52</sup> Eliana Johnson, "Conservatives target red-state Democrats to speed Trump's nominations," *Politico* (Dec. 21, 2016), <https://www.politico.com/story/2016/12/trump-nominations-red-state-democrats-232890>

<sup>53</sup> An archived version of this website is available at

<http://web.archive.org/web/20170217193132/http://confirmpruitt.com/>

<sup>54</sup> "Pruitt v. EPA: 14 Challenges of EPA Rules by the Oklahoma Attorney General," *The New York Times* (Jan. 14, 2017), <https://www.nytimes.com/interactive/2017/01/14/us/politics/document-Pruitt-v-EPA-a-Compilation-of-Oklahoma-14.html>

<sup>55</sup> Jennifer Dlouhy, "Battered Coal Companies Courted State AGs to Fight Climate Rules," *Bloomberg* (Sept. 7, 2016), <https://www.bloomberg.com/news/articles/2016-09-07/battered-coal-companies-courted-state-ags-to-fight-climate-rules>

<sup>56</sup> Ashley Braun, "To Fight Clean Power Plan, Fossil Fuel Companies Paid for Private Meetings with Republican State Prosecutors," *DeSmog* (Sept. 7, 2016), <https://www.desmogblog.com/2016/09/07/fight-clean-power-plan-fossil-fuel-companies-paid-private-meetings-republican-state-prosecutors>



this subject, sent it to Pruitt's office, which then cut and pasted it onto official state government stationery virtually unchanged and sent it to Washington with Pruitt's signature.<sup>57</sup>

Documents uncovered from public records requests to the Oklahoma Attorney General's Office also showed that Pruitt worked on behalf of AFPM, a major donor and petitioner against the 2015 rule. AFPM gave Pruitt template language for a petition and urged him to sue the federal government over the Renewable Fuel Standard. The trade association noted that "this argument is more credible coming from a state."<sup>58</sup> Pruitt followed the group's suggestion and sued.<sup>59</sup>

Although he was barred from political fundraising during his time as EPA Administrator by the Hatch Act, Pruitt maintained his contacts with industry during this time. In just his first several weeks on the job, Pruitt met with more than 40 energy interests; at least six are petitioners in litigation against the 2015 rule. During this same period of time, Pruitt met with almost no environmental groups.<sup>60</sup>

The relationships he established through his political activities as Attorney General continued to pay off for his donors once Pruitt became EPA Administrator.<sup>61</sup> Within weeks of Pruitt's assuming control of EPA, the agency withdrew its request that oil and gas companies provide it with detailed information regarding methane emissions at facilities they operate.<sup>62</sup> A few weeks after that, EPA announced that it was postponing the implementation of a rule that would have required oil and gas companies to retrofit equipment in order to prevent leaks of methane and other dangerous gases.<sup>63</sup> These decisions are estimated to save oil and gas companies – many of

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<sup>57</sup> Eric Lipton, "Energy Firms in Secretive Alliance with Attorneys General," *The New York Times* (Dec. 6, 2014), <https://www.nytimes.com/2014/12/07/us/politics/energy-firms-in-secretive-alliance-with-attorneys-general.html>

<sup>58</sup> Oklahoma AG Releases 7,564 Pages in Response to CMD Request, Center for Media and Democracy (Feb. 22, 2017), <https://www.exposedbycmd.org/Scott-Pruitt-Missing-Emails>

<sup>59</sup> *Id.*

<sup>60</sup> "Who is E.P.A. Administrator Scott Pruitt Meeting With? A Detailed Schedule," *The New York Times* (Oct. 3, 2017), <https://www.nytimes.com/interactive/2017/10/03/us/politics/document-pruitt-sked-and-mccarthy-sked.html>. These included: the National Association of Manufacturers, the National Rural Electric Cooperative Association, the National Mining Association, the Southern Company, AFPM, and the Portland Cement Association.

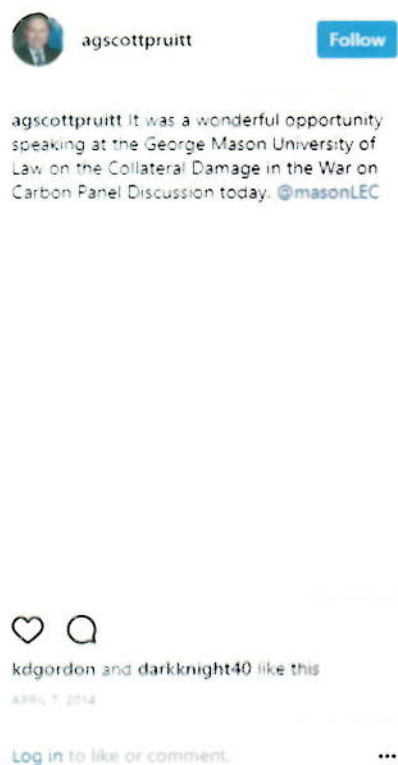
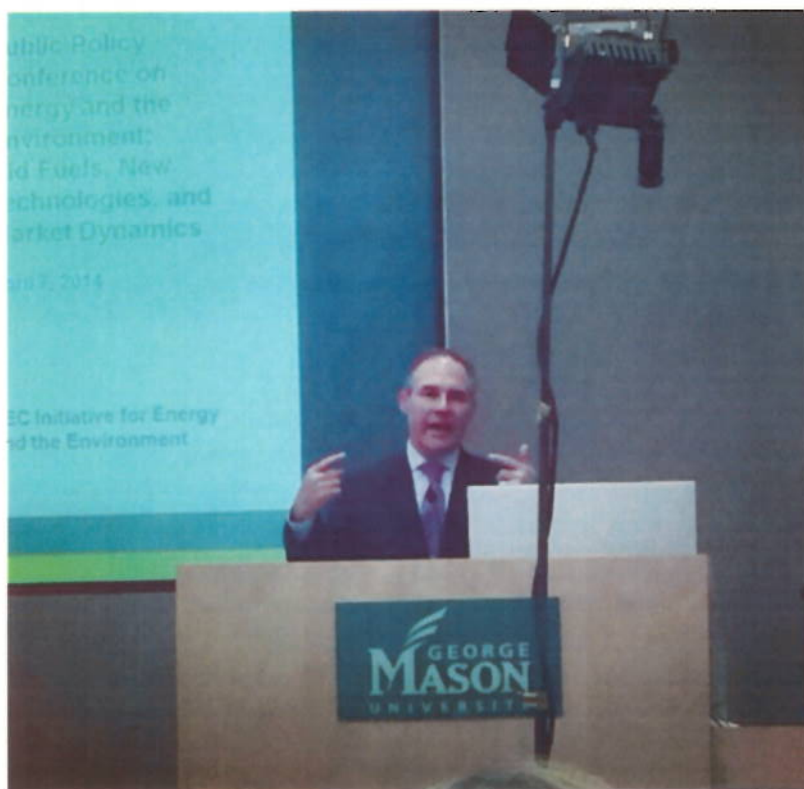
<sup>61</sup> It is important to note that movement through the revolving door is not linear, but circular. While Pruitt was able to be of service to his fossil fuel industry patrons during his stint as EPA Administrator, the fossil fuel industry has apparently now become of service to Pruitt as it has been reported that Pruitt is in talks to work for a major coal mining company, Alliance Resource Partners. See, Lisa Friedman, Hiroko Tabuchi, and Eric Lipton, "Scott Pruitt, Former E.P.A. Chief, Is in Talks for His Next Job: Coal Consultant," *The New York Times* (Sept. 12, 2018), <https://www.nytimes.com/2018/09/12/climate/pruitt-coal-consulting.html>

<sup>62</sup> Hiroko Tabuchi and Eric Lipton, "How Rollbacks at Scott Pruitt's E.P.A. are a Boon to Oil and Gas," *The New York Times* (May 20, 2017), [https://www.nytimes.com/2017/05/20/business/energy-environment/devon-energy.html?\\_r=0](https://www.nytimes.com/2017/05/20/business/energy-environment/devon-energy.html?_r=0)

<sup>63</sup> *Id.*

them donors to Scott Pruitt and/or outside spending groups affiliated with him – millions of dollars.<sup>64</sup>

As both Oklahoma Attorney General and EPA Administrator, Pruitt demonstrated an affinity for groups that deny climate science and don't believe in regulating carbon emissions. Pruitt is known as a frequent guest at conferences organized by climate-denying groups like the Heritage Foundation and the Texas Public Policy Foundation. Of course, these climate-denying groups also receive much of their funding from the energy industry and those tied to it.<sup>65</sup> At these conferences, Pruitt often joined guest lineups featuring prominent climate deniers and industry-funded scientists, some of whom gave presentations purporting to make “the moral case for fossil fuels.”<sup>66</sup> Consistent with this affinity for climate denial, his Instagram account shows him participating in a panel entitled “the War on Carbon” at the Koch-funded George Mason University School of Law (since renamed the Antonin Scalia School of Law).



<sup>64</sup> *Id.*

<sup>65</sup> Global Warming Skeptic Organizations, Union of Concerned Scientists, <https://www.ucsusa.org/global-warming/solutions/fight-misinformation/global-warming-skeptic.html#.WmeTlainG70>; Texas Public Policy Foundation, DeSmog Blog, <https://www.desmogblog.com/texas-public-policy-foundation>

<sup>66</sup> EPA Administrator Pruitt to Join Crossroads, Texas Public Policy Foundation (Nov. 30, 2017), [https://www.texaspolicy.com/press\\_release/detail/media-advisory-update-epa-administrator-pruitt-to-join-crossroads](https://www.texaspolicy.com/press_release/detail/media-advisory-update-epa-administrator-pruitt-to-join-crossroads)



As recently as March 2017, then EPA Administrator Pruitt denied that carbon dioxide emissions were a primary contributor to global warming, stating “I think that measuring with precision human activity on the climate is something very challenging to do and there’s tremendous disagreement about the degree of impact, so, no, I would not agree that [carbon dioxide] is a primary contributor to the global warming that we see.”<sup>67</sup>

In addition to denying the science of climate change, Pruitt has also repeatedly called into question the EPA’s authority to regulate carbon emissions under the CAA as the 2015 rule does. For example, at a 2014 conference hosted by the climate denying American Legislative Exchange Council (ALEC), then-Oklahoma Attorney General Pruitt stated, “We have an EPA that is engaged in rulemaking, proposed rulemaking, that seeks to exert itself in a way that the [CAA] doesn’t authorize at all.”<sup>68</sup> He has also argued that the CAA was never intended to regulate carbon emissions and was instead “set up to address local and regional air pollutants.”<sup>69</sup> Of course, the Supreme Court had in 2007 ruled otherwise in *Massachusetts v. EPA*<sup>70</sup>, holding that the EPA may regulate carbon emissions as a pollutant under the CAA.

After his departure from EPA, Pruitt spun back through the revolving door into a fossil fuel energy position with a coal baron.

#### **E. The Fossil Fuel Industry Capture of EPA Extends Beyond Wheeler, Wehrum, and Pruitt**

EPA leadership is stocked with officials closely tied to the fossil fuel industry. In fact, Pruitt reached out to the fossil fuel industry to help staff EPA. Weeks after becoming EPA Administrator, he reportedly made a “plea” to top executives at API to help him identify oil industry leaders he could hire as regional EPA Administrators.<sup>71</sup> EPA Office of Enforcement and Compliance Assurance (OECA) Deputy Assistant Administrator Patrick Traylor is a former lobbyist and lawyer for energy interests Dominion Energy, Koch Industries, and TransCanada,<sup>72</sup> while the head of EPA’s Office of Research and Development, David Dunlap is a former

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<sup>67</sup> Coral Davenport, EPA Chief Doubts Consensus View of Climate Change, *The New York Times* (March 9, 2017), [https://www.nytimes.com/2017/03/09/us/politics/epa-scott-pruitt-global-warming.html?\\_r=0](https://www.nytimes.com/2017/03/09/us/politics/epa-scott-pruitt-global-warming.html?_r=0)

<sup>68</sup> Scott Pruitt at 2014 ALEC Annual Meeting, <https://www.youtube.com/watch?v=K12PCuBjFgl>

<sup>69</sup> Transcript of Reuters Interview with EPA Administrator Scott Pruitt, Reuters (July 11, 2017), <https://www.reuters.com/article/us-usa-epa-pruitt-text/transcript-of-reuters-interview-with-epa-administrator-scott-pruitt-idUSKBN19X01Z>

<sup>70</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007)

<sup>71</sup> Zahra Hirji, “EPA Chief Scott Pruitt Encouraged Oil Executives To Apply For Top Agency Jobs,” *Buzzfeed News* (June 25, 2018), [https://www.buzzfeed.com/zahrahiR.J.i/scott-pruitt-recruited-oil-executives-trump-hotel?utm\\_term=.jozV4jpZr3#.dvMR3kjomO](https://www.buzzfeed.com/zahrahiR.J.i/scott-pruitt-recruited-oil-executives-trump-hotel?utm_term=.jozV4jpZr3#.dvMR3kjomO)

<sup>72</sup> Kevin Bogardus, Corbin Hiar, and Arianna Skibell, “Enforcement pick shugs off conflict-of-interest concerns,” *E&E News* (July 13, 2017), <https://www.eenews.net/stories/1060057347>

executive at Koch Industries.<sup>73</sup> David Schnare, who worked on the Trump administration’s transition team at EPA, previously worked at the Energy & Environment Legal Institute, one of the petitioners against the 2015 rule.<sup>74</sup> Pruitt also sought to fill EPA’s Science Advisory Board (SAB) with individuals recommended by fossil fuel interests; among the many industry-connected people he chose for the SAB was Larry Monroe, a retired executive at CPP petitioner Southern Company.<sup>75</sup>

### **III. Legal Argument**

The proposed rule is arbitrary and capricious for at least four reasons. First, the proposed rule is the fruit of an EPA whose political leadership has been captured by the fossil fuel industry, including by many of the petitioners against the 2015 rule that the proposed rule rolls back. Second, it is an abrupt regulatory U-turn that ignores developments since 2015 that demonstrate that CCS technology for coal-fired EGUs has become *more* affordable. Third, it makes no effort to calculate the foregone benefits of reduced carbon pollution from new coal-fired EGUs equipped with partial CCS as opposed to new coal-fired EGUs using the most efficient demonstrated steam cycle. And fourth, the proposed rule concedes that rolling back the 2015 rule will have no effect on the demand for new coal-fired EGUs, thereby implicitly conceding that the rollback is unwarranted under the terms of E.O. 13783.

#### **A. The Proposed Rule is Arbitrary and Capricious Because it is the Fruit of a Captured Agency**

The Administrative Procedure Act<sup>76</sup> permits courts to set aside agency actions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>77</sup> In determining whether an agency action was “arbitrary and capricious, the courts look to several factors, whether: “(1) the agency ‘relied on factors which Congress has not intended it to consider,’ (2) the agency ‘failed to consider an important aspect of the problem,’ (3) the agency explained its decision in a way ‘that runs counter to the evidence,’ or (4) the action ‘is so

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<sup>73</sup> Miranda Green, “Ex-Koch engineer to lead EPA office on scientific research,” *The Hill* (Oct. 2, 2018), <https://thehill.com/policy/energy-environment/409532-ex-koch-engineer-to-lead-epa-office-on-scientific-research>

<sup>74</sup> Timothy Cama, “Trump appointee steps down at EPA,” *The Hill* (March 16, 2017), <https://thehill.com/policy/energy-environment/324381-trump-appointee-steps-down-at-epa>

<sup>75</sup> Sean Riley and Kevin Bogardus, “Boards add industry and state officials, drop scientists,” *E&E News* (Nov. 3, 2017), <https://www.eenews.net/greenwire/2017/11/03/stories/1060065619>

<sup>76</sup> 5 USC §500 *et seq.*

<sup>77</sup> 5 USC §706(2)(a)



implausible that it could not be ascribed to a difference in view or the product of agency expertise.”<sup>78</sup>

Courts have also held that a rule is arbitrary and capricious if the promulgating agency did not “genuinely engage in reasoned decision-making”<sup>79</sup> or if it did not “articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”<sup>80</sup>

While judicial review of agency actions is usually “exceedingly deferential,”<sup>81</sup> when, given the totality of the circumstances, the agency appears not to have engaged in reasoned decision-making, a rule should be invalidated.

“The scope of review under the “arbitrary and capricious” standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a “rational connection between the facts found and the choice made.” In reviewing that explanation, we must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”<sup>82</sup>

Courts have found that a heightened level of scrutiny for agency actions is appropriate “if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a ‘hard look’ at the salient problems, and has not genuinely engaged in reasoned decision-making.”<sup>83</sup> The factual record laid out in this comment details precisely the sort of “danger signals” the courts have found to warrant “hard look” review. Potentially improper

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<sup>78</sup> *Mendoza v. Secretary, Department of Homeland Security*, 851 F.3d 1348, 1353 (11<sup>th</sup> Cir. 2017) (quoting *Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1264 (11<sup>th</sup> Cir. 2009))

<sup>79</sup> *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970)

<sup>80</sup> *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 US 29, 43 (1983), quoting *Burlington Truck Lines, Inc. v. United States*, 371 U. S. 156, 168 (1962)

<sup>81</sup> See, e.g., *Fund for Animals v. Rice*, 85 F.3d 535, 541 (11<sup>th</sup> Cir. 1996)

<sup>82</sup> *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 US 29, 43 (1983), quoting *Burlington Truck Lines, Inc. v. United States*, 371 U. S. 156, 168 (1962) and *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, *supra*, at 419 U. S. 285. See also, *Massachusetts v. EPA* (constraining EPA’s discretion and subjecting the agency’s deferral of a decision to hard look review)

<sup>83</sup> *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 844-5 (D.C. Cir. 1970). In *Greater Boston Television Corp.*, the biggest “danger signal” that caused the court to give an agency’s actions a “hard look” was the fact that the chair of the Federal Communications Commission (FCC) had had potentially improper contacts with an executive at one of companies competing for a broadcast license to be attributed by the agency. Other “danger signals” that courts have held to trigger heightened scrutiny of agency actions include “abrupt shifts in policy” and “where the agency has demonstrated undue bias towards particular private interests.”

contacts between regulators and regulated industries<sup>84</sup> and “undue bias towards particular private interests”<sup>85</sup> are present in this tawdry tale of industry capture.

The proposed rule was developed under three Trump administration political appointees who are all financially and/or professionally tied to the industry that has prioritized rolling back the 2015 rule as the proposed rule would do. Former Administrator Pruitt and outside political spending groups affiliated with him raised millions of dollars from the fossil fuel industry in general and millions specifically from groups and companies that sued to block the 2015 rule. He also had numerous meetings with petitioners in litigation against the 2015 rule.

Assistant Administrator Wehrum counts two of the petitioners against the 2015 rule, UARG and AFPM, among his former clients. He also has a history of meeting with former clients including UARG in spite of ethics rules forbidding the practice as well as apparently intervening in matters to the benefit of clients of his former law firm. As if all that weren't bad enough, Wehrum, like Pruitt, has expressed hostility to regulating GHG emissions under the CAA, a position shared by industry. The 2015 rule, of course, regulates GHG emissions under the CAA.

Administrator Wheeler counts one of the most vocal opponents of the 2015 rule, Murray Energy, among his former clients. Not only did Murray Energy sue to block the 2015 rule, it has also filed comments challenging EPA's endangerment finding with respect to GHG emissions from new coal-fired EGUs. The proposed rule seeks input on this specific question, suggesting that EPA is entertaining Murray Energy's suggestion to revisit the endangerment finding for this source category.

I am not the only one to conclude that the Trump EPA has been captured by industry. An article in the *American Journal of Public Health* finds that EPA is exhibiting many signs of regulatory capture.<sup>86</sup> The authors of this article examined EPA actions from December 2016 through June 2017 and they interviewed 45 current and retired EPA employees. Among their findings pointing to regulatory capture:

- “Appointees have deep ties with industries.”
- “Significant policy changes at the EPA favor businesses and industry, while probably incurring considerable health and environmental consequences.”
- “Pruitt has regularly championed the interests of regulated industries, while rarely affirming environmental and health protections.”

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<sup>84</sup> *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 844-5 (D.C. Cir. 1970)

<sup>85</sup> *NRDC v. SEC*, 606 F.2d 1031, 1050 (D.C. Cir. 1979)

<sup>86</sup> Lindsey Dillon, *et al.*, “The Environmental Protection Agency in the Early Trump Administration: Prelude to Regulatory Capture,” *American Journal of Public Health* (April 2018)



- “Pruitt dismissed many members of the EPA’s Science Advisory Board and its Board of Scientific Counselors, created a new rule preventing EPA-funded scientists from serving on those boards, and—for the first time in agency history—allowed lobbyists on scientific advisory boards.”
- “Pruitt’s own meetings and schedule... are almost exclusively with company and trade organizations and rarely with environmental, public health, or citizen groups.”<sup>87</sup>

The extreme and extremely well-documented regulatory capture of the Trump EPA provides “danger signals” evidencing that its rulemakings are not exercises in reasoned decision making, but rather are sham, check the box, procedural exercises designed to produce the results preferred by the industries that have captured EPA, in particular the fossil fuel industry. Like Pruitt’s Devon Energy letter, the substance is all industry, whatever the letterhead, and the public interest is ignored. That is not lawful under well-established principles of administrative law.

### **B. The Proposed Rule is Arbitrary and Capricious Because it is an Abrupt Regulatory U-turn that Ignores the Evidence**

Courts have also found that it is appropriate to more closely scrutinize regulatory decisions that constitute an abrupt change in course. If an agency makes such a regulatory U-turn, it must “provide a more detailed justification than would suffice for a new policy [...] when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy. [...] It would be arbitrary and capricious to ignore such matters.”<sup>88</sup> “An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past.”<sup>89</sup> “[A]brupt shifts in policy” have been found also to be the sort of “danger signals” that warrant “hard look” review.<sup>90</sup>

The proposed rule constitutes exactly the sort of regulatory U-turn that should trigger “hard look” review. It calls for replacing partial CCS with the most efficient demonstrated steam cycle as the BSER for new coal-fired EGUs, and states that “[t]he primary reason [for redefining the BSER] is the high costs and limited geographic availability of CCS.”<sup>91</sup> This rationale flies in the face of both the facts and the law.

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<sup>87</sup> *Id.*

<sup>88</sup> *FCC v. Fox Television Stations*, 566 U.S. 502, 515 – 16 (2009)

<sup>89</sup> *Id.* at 537 (Kennedy, J., concurring).

<sup>90</sup> *United Church of Christ v. FCC*, 707 F.2d 1413, 1425 (D.C. Cir. 1983)

<sup>91</sup> Review of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, Federal Register Vol. 83, No. 244 (Dec. 20, 2018), pg. 65426, <https://www.govinfo.gov/content/pkg/FR-2018-12-20/pdf/2018-27052.pdf>

EPA's new rule ignores the many technological and economic developments that have taken place with respect to CCS since the 2015 rule was promulgated. As of 2017, there were 17 large-scale CCS facilities in operation around the world; four more were scheduled to come online in 2018.<sup>92</sup> In January 2017, the first U.S. coal-fired power plant retrofitted with CCS technology came online.<sup>93</sup> The carbon dioxide emissions captured at this plant are being sequestered as part of an enhanced oil recovery (EOR) operation; it is expected that the EOR revenues will pay for the CCS retrofit within 10 years.<sup>94</sup>

As additional CCS projects come online, costs are falling. In 2017, it was estimated that future capital and operations costs would fall by as much as 30 percent.<sup>95</sup> In 2018, the operators of Boundary Dam, a coal-fired EGU equipped with CCS, estimated that a future CCS-equipped coal-fired EGU would have a 67 percent capital cost reduction compared with Boundary Dam due to lessons learned from the first project.<sup>96</sup>

While CCS costs are falling, federal tax incentives to adopt CCS technology have grown more attractive. The Bipartisan Budget Act of 2018 increased the 45Q tax credit for sequestering carbon dioxide via saline storage by 150 percent (from \$20/metric ton to \$50/metric ton) and by 250 percent for EOR (from \$10/metric ton to \$35/metric ton).<sup>97</sup> In sum, the economics of CCS have improved significantly since 2015 when they were already cost effective according to the 2015 rule. Even Republican senators have vouched for the importance of the CCS market, and the importance of the 45Q rule to accelerate it. Senator John Barrasso, Chairman of the Senate Environment and Public Works Committee, said “[w]ith CCUS and direct-air capture, not only can we cut our emissions while maintaining high-paying coal, gas, oil, and manufacturing jobs, but we can also capture emissions emitted abroad and use them in value-added products.”<sup>98</sup>

EPA admits that it did not consider the impact of the 45Q tax credit,<sup>99</sup> and makes no mention of various estimates showing that CCS technology has grown less expensive since 2015. It also admits that estimates of the geographic availability of geologic formations suitable to

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<sup>92</sup> The Global Status of CCS:2017, pg. 5, Global CCS Institute (Nov. 13, 2017),

<https://www.globalccsinstitute.com/status>

<sup>93</sup> *Id.* at 50-1

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 19

<sup>96</sup> “The Shand CCS Feasibility Study,” International CCS Knowledge Center (Nov. 2018), pg. 77,

[https://ccsknowledge.com/pub/documents/publications/Shand%20CCS%20Feasibility%20Study%20Public%20Full%20Report\\_NOV2018.pdf](https://ccsknowledge.com/pub/documents/publications/Shand%20CCS%20Feasibility%20Study%20Public%20Full%20Report_NOV2018.pdf)

<sup>97</sup> Bipartisan Budget Act of 2018 §41119, <https://www.congress.gov/bill/115th-congress/house-bill/1892/text#toc-HF987967F1C6F4363A813BEA0FBE69427>

<sup>98</sup> Remarks on Senate Floor, March 13, 2019

<sup>99</sup> Review of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, Federal Register Vol. 83, No. 244 (Dec. 20, 2018), pg. 65440, <https://www.govinfo.gov/content/pkg/FR-2018-12-20/pdf/2018-27052.pdf>



sequestering carbon emissions have changed little since 2015,<sup>100</sup> which undercuts its claim that limited geographic availability was one of the main reasons for its decision to reject partial CCS as the BSER for coal-fired EGUs.

With respect to the CAA, courts have held that factors EPA should consider when making a BSER determination include whether the system is technically feasible, whether its costs are reasonable, the emissions reductions it would generate, and whether the standard would promote the development and deployment of advanced technology.<sup>101</sup> A system chosen as the BSER does not have to “be in actual routine use somewhere.”<sup>102</sup> Courts have also upheld systems that entail significant costs, viewing them as consistent with Congress’ view that “the costs of applying best practicable control technology be considered by the owner of a large new source of pollution as a normal and proper expense of doing business.”<sup>103</sup>

In the instant rulemaking, EPA seems to have ignored all of these factors, particularly that CCS technology is technically feasible and that the standard should promote the development and deployment of advanced technology such as CCS. It has also ignored the significant emissions reductions generated by CCS. Instead, EPA focuses on cost, but it overlooks the significant evidence that CCS has become significantly cheaper than it was in 2015. Moreover, EPA virtually ignores the climate change consequences and hazards that might be forestalled by a more robust rule.

EPA’s factually inaccurate discussion of the allegedly prohibitive cost of CCS is not entitled to deference, particularly not when it serves as a pretext for a regulatory U-turn such as this one.<sup>104</sup> Courts have held that conclusory statements belied by the facts may instead signify that an agency is “committed to its position regardless of any facts to the contrary.”<sup>105</sup>

### **C. The Proposed Rule is Arbitrary and Capricious Because it Makes No Effort to Calculate the Foregone Benefits of Reduced CO2 Emissions**

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<sup>100</sup> *Id.* at 65441

<sup>101</sup> *Sierra Club v. Costle*, 657 F.2d 298, 326, 347 (D.C. Cir. 1981)

<sup>102</sup> *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 391 (D.C. Cir. 1973)

<sup>103</sup> *Essex Chemical Corp. v. Ruckelshaus*, 486 F.2d 427, 440 (D.C. Cir. 1973)

<sup>104</sup> It should be noted that the 2015 rule explicitly considered and rejected the proposed rule’s choice of the most efficient demonstrated steam cycle as BSER. *See*, Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, Federal Register Vol. 80, No. 205 (Oct. 23, 2015), pg. 64594, <https://www.govinfo.gov/content/pkg/FR-2015-10-23/pdf/2015-22837.pdf>. The proposed rule therefore could not be a more “abrupt shift in policy” of the kind the courts find suspect.

<sup>105</sup> *Chem. Mfrs. Ass’n v. EPA*, 28 F.3d 1259, 1265 (D.C. Cir. 1994)

EPA made no effort to calculate the foregone benefits of reduced carbon pollution because it states that, as there will be “at most, few new” coal-fired EGUs, the “proposed rule will not result in any significant carbon dioxide (CO<sub>2</sub>) emissions changes or costs.”<sup>106</sup> However, at the same time, EPA cautions that this is just a prediction, thereby admitting that there is some possibility that new coal-fired EGUs could be built.<sup>107</sup> If such a possibility exists, then it is incumbent upon EPA to calculate the harms caused by additional carbon pollution.

The proposed rule nevertheless sets an emissions standard of 1900 or 2000 lbs. CO<sub>2</sub>/MWh-gross (depending on the size of the plant)<sup>108</sup> for new coal-fired EGUs, which is 36 to 43 percent higher than the standard in the 2015 rule.<sup>109</sup> Coal-fired EGUs emit a tremendous amount of CO<sub>2</sub>, so should any new plants be built, the proposed rule will result in significantly more carbon pollution than the 2015 rule. The fact that EPA makes no effort to quantify this potential harm speaks volumes about its total lack of interest in regulating GHG emissions under the CAA. Both Pruitt and Wehrum have made clear that they aren’t interested in doing so, and the proposed rule confirms this.

#### **D. The Proposed Rule is Arbitrary and Capricious Because It is not Supported by the Terms of the Executive Order that Purports to Justify It**

EPA relies on Executive Order 13783 as the justification for this rulemaking.<sup>110</sup> The E.O. directed all executive agencies including EPA to “immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic

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<sup>106</sup> Review of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, Federal Register Vol. 83, No. 244 (Dec. 20, 2018), pg. 65427, <https://www.govinfo.gov/content/pkg/FR-2018-12-20/pdf/2018-27052.pdf>

<sup>107</sup> *Id.* A scenario involving the construction of new coal-fired EGUs could come to pass should one of the Trump Administration’s various plans to subsidize coal-fired plants be implemented. Moreover, the fact that many fossil fuel companies and groups representing fossil fuel interests sued to block the 2015 rule suggests that the fossil fuel industry envisions circumstances in which new coal-fired EGUs will be built.

<sup>108</sup> Review of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, Federal Register Vol. 83, No. 244 (Dec. 20, 2018), pg. 65427, <https://www.govinfo.gov/content/pkg/FR-2018-12-20/pdf/2018-27052.pdf>

<sup>109</sup> Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, Federal Register Vol. 80, No. 205 (Oct. 23, 2015), pg. 64512, <https://www.govinfo.gov/content/pkg/FR-2015-10-23/pdf/2015-22837.pdf>

<sup>110</sup> Review of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, Federal Register Vol. 83, No. 244 (Dec. 20, 2018), pg. 65429, <https://www.govinfo.gov/content/pkg/FR-2018-12-20/pdf/2018-27052.pdf>



energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.”<sup>111</sup>

However, the proposed rule concludes that it is unlikely that any new coal-fired EGUs will be built either under the 2015 rule or under the proposed rule.<sup>112</sup> In light of this conclusion, it cannot be said that the 2015 rule in any way “unduly burden[s] the development of domestic energy resources.” Under the plain terms of E.O. 13783, it would therefore be inappropriate to revise the 2015 rule as EPA has done in the instant proposal.

EPA is caught between a rock and a hard place. Clearly, industry wants to roll back the determination of CCS as BSER for new coal-fired EGUs, suggesting that industry believes new plants may be built. But if EPA’s proposal acknowledged the possibility that new coal-fired EGUs might be built, then it would have had to account for the massive increase in emissions from such plants should they not be required to use partial CCS as the BSER. So instead of acknowledging this possibility and calculating the significant foregone benefits of reduced carbon pollution, EPA’s solution was to simply conclude that it is unlikely that any new plants will be built and therefore there will be no additional carbon pollution. The problem with EPA’s chosen path is that it runs afoul of the terms of the E.O. purporting to justify the entire rollback in the first place.

In short, in order to arrive at the result the fossil fuel industry wanted – a repeal of the determination that partial CCS was the BSER for new coal-fired EGUs – EPA had a dilemma. It could admit that such a rule might result in considerable foregone benefits in the form of reductions in carbon pollution, and run the risk that such an admission would sink the rule as arbitrary and capricious. Or it had to pretend that there was no reason to calculate the value of the foregone benefits because there would be no new plants, and sink the rule as inconsistent with the E.O. Unfortunately for EPA – but fortunately for the public interest – it was damned if it did and damned if it didn’t. The limitations on EPA due to industry capture and control rendered either industry-acceptable path arbitrary and capricious and an impermissible exercise of its power.

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<sup>111</sup> E.O. 13783 of March 28, 2017 Promoting Energy Independence and Economic Growth, Federal Register Vol. 82, No. 61 (March 31, 2017), pg. 16093, <https://www.govinfo.gov/content/pkg/FR-2017-03-31/pdf/2017-06576.pdf>

<sup>112</sup> Review of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, Federal Register Vol. 83, No. 244 (Dec. 20, 2018), pg. 65427, <https://www.govinfo.gov/content/pkg/FR-2018-12-20/pdf/2018-27052.pdf>

#### IV. Conclusion

The reasonable – and obvious – conclusion to the above record is that EPA did not in fact care about the facts or the law as it developed the proposed rule. It cared only about the results that the fossil fuel industry wanted: the 2015 rule replaced with a rule requiring only minimal reductions in carbon pollution from new coal-fired EGUs. The record explodes with “danger signals.” Based on this record, no court could plausibly conclude that EPA “genuinely engaged in reasoned decision making”<sup>113</sup> nor could it conclude that EPA could “articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”<sup>114</sup> The proposed rule is therefore arbitrary and capricious and should be withdrawn.

Sincerely,



Sheldon Whitehouse  
United States Senator

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<sup>113</sup> *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970)

<sup>114</sup> *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 US 29, 43 (1983), quoting *Burlington Truck Lines, Inc. v. United States*, 371 U. S. 156, 168 (1962)