United States Senate
WASHINGTON, DC 20510

October 31, 2018

Attention: **Docket ID No. EPA-HQ-OAR-2017-0355**
Replacement of Clean Power Plan

Re: **Comments on the Environmental Protection Agency's proposed Affordable Clean Energy Rule and Related Rulemaking**

I. Introduction

On August 21, 2018, the Environmental Protection Agency (EPA) proposed what it dubbed the Affordable Clean Energy (ACE) rule[1] to replace the Clean Power Plan (CPP) promulgated in 2015 by the Obama administration. This replacement proposal follows EPA's October 10, 2017 proposal to rescind the CPP. We filed a comment on EPA's proposed rescission of the CPP.[2]

In our comment on the CPP rescission proposal, we argued that the proposed rule was impermissibly tainted by (now former) EPA Administrator Scott Pruitt's involvement because he possessed an inalterably closed mind with respect to the CPP and section 111 of the Clean Air Act (CAA) in particular, and climate change in general. The evidence for Pruitt's inalterably closed mind with respect CPP rulemaking is overwhelming. It falls into three categories: (1) his deep and wide financial ties to the fossil fuel industry, which is ferociously opposed to the CPP; (2) his status as a previous petitioner suing the EPA to block the CPP; and (3) his numerous statements denouncing the CPP, questioning the ability to regulate carbon emissions under the CAA as the CPP proposes to do and is required by the U.S. Supreme Court ruling in *Massachusetts v. EPA*, and casting doubt on climate science.

We further argued that given that the proposed rescission of the CPP is functionally indistinguishable from litigation seeking to invalidate the CPP in which Pruitt was himself a petitioner, part 2635 of the Code of Federal Regulations, subpart E governing impartiality in performing official duties should apply.[3] Pruitt's extensive involvement as Oklahoma Attorney

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[1] Emissions Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, Federal Register Vol. 83, No. 170 (Aug. 31, 2018), https://www.gpo.gov/fdsys/pkg/FR-2018-08-31/pdf/2018-18755.pdf

[2] Sheldon Whitehouse, et al., Comments on EPA Administrator Scott Pruitt's improper involvement in Clean Power Plan-related rulemaking (Feb. 7, 2018), https://www.whitehouse.senate.gov/news/release/senators-call-for-scott-pruitt-to-recuse-himself-from-all-clean-power-plan-related-rulemaking-

[3] Code of Federal Regulations section 2635.501, https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=06f812f26e7ed9f364bb87944757b912&rgn=div5&view=text&node=5:3.0.10.10.9&idno=5#sp5.3.2635.e

General in CPP litigation means that he cannot be impartial in CPP-related rulemaking and therefore should have recused himself.

Pruitt's tawdry tenure leading EPA ended when he resigned on July 6, 2018, one business day before the proposed ACE rule was received by the Office of Information and Regulatory Affairs (OIRA) for review.[4] The proposed ACE rule was necessarily developed under Pruitt's tenure, so our earlier arguments with respect to Pruitt's inalterably closed mind and his violation of impartiality rules apply with equal force to the instant ACE rulemaking.

In addition, we argue in this comment that the proposed ACE rule is arbitrary and capricious because EPA leadership is captured by the fossil fuel industry and did not seriously consider options other than heat rate improvements (HRI) as the best system of emission reduction (BSER) for existing coal-fired power plants.

Lastly, we argue the proposed ACE rule is effectively an adoption of industry proposals that would do little to reduce greenhouse gas (GHG) emissions, but instead preserves the lifespan of existing coal-fired power plants and discourages any future rulemaking to require GHG emissions reductions at oil- and gas-fired power plants – which again, is required of the EPA under the Clean Air Act. As such, the proposed ACE rule qualifies as an effective delegation of EPA rulemaking authority to the fossil fuel industry that has captured it.

II. Facts

A. Pruitt Has Raised Significant Political Money from Companies with a Direct Stake in the Outcome of this Rulemaking

Pruitt's political career has been underwritten by the energy industry, the industry most affected by the CPP. 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).[5] 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.[6]

In addition to contributions directly tied to the energy industry, Pruitt also received considerable financial support from industries closely linked to the energy industry: "legal services and

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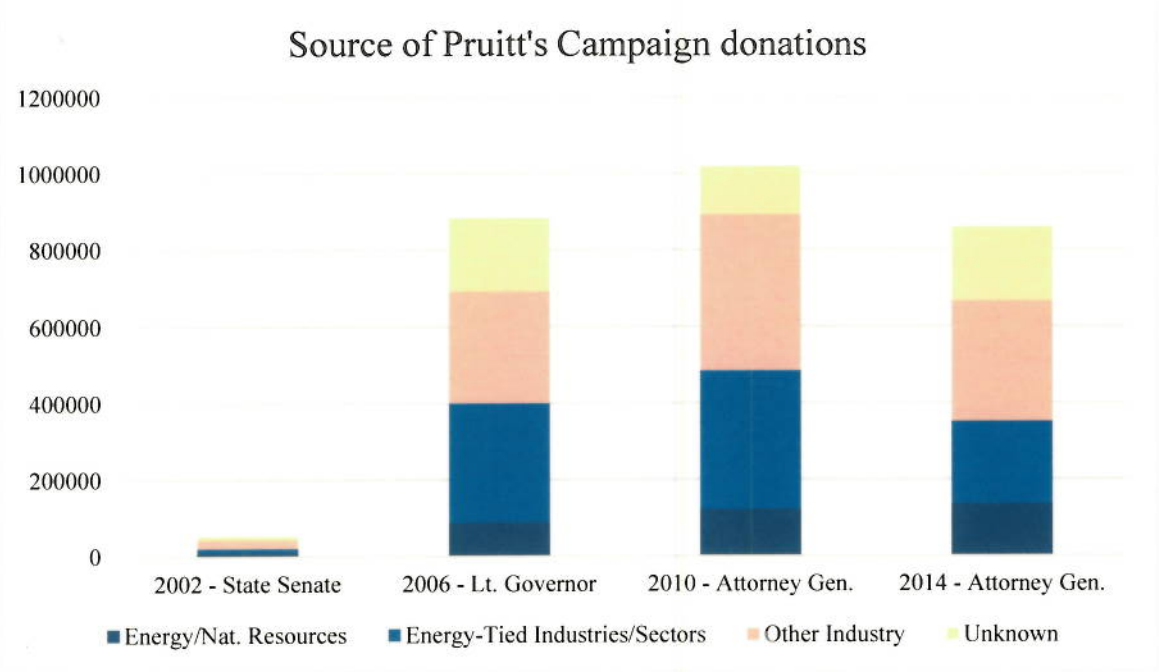
[4] RIN No. 2060-AT67, Office of Information and Regulatory Affairs, available at https://www.reginfo.gov/public/Forward?SearchTarget=RegReview&textfield=2060-AT67

[5] 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.

[6] Calder Burgam, "Energy Interests Power Pruitt," Follow the Money (Jan. 17, 2017), https://www.followthemoney.org/research/blog/energy-interests-power-pruitt/

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.[7]



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 the forthcoming CPP. Pruitt was among the key strategists involved in this early planning.[8] Pruitt's leadership role opposing the CPP provided the energy industry with a compelling reason to further shower money on one of its best and most promising

[7] Follow the Money, https://www.followthemoney.org/entity-details?eid=6583668

[8] 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

soldiers in the industry's war against any emissions reducing policies that might also reduce industry profits. From industry's perspective, money spent on Pruitt – even a Pruitt running unopposed – was money well spent.

And industry support for Pruitt went beyond direct contributions to his campaigns.[9] 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.[10] The U.S. Chamber of Commerce, long a deep-pocketed foe of action on climate change[11], was RSLC's largest donor, donating almost $4 million to the group. Devon Energy, an Oklahoma-based energy company, contributed $350,000 and was a top ten donor to the RSLC in 2010.[12]

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 2016 election cycle, almost 20 percent of which came from energy interests.[13] Liberty 2.0, a super PAC created by Pruitt's supporters,[14] raised approximately $450,000 during the 2016 election cycle, over a third of which came from energy interests.[15] Of its nine largest donors, four are in the energy industry including the second largest donor, Murray Energy, which gave $50,000.[16]

During this period, Pruitt also 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, the Chamber was by far the largest donor to RAGA's 527, giving the organization over $4 million. Koch Industries (almost $500,000), the American Coalition for Clean Coal Electricity (more than $300,000), Murray Energy ($250,000), the American Fuel and Petrochemical Manufacturers

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[9] 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. This limit drove larger contributions to outside spending groups organized under section 527 and 501(c)(4) of the Internal Revenue Code.

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

[11] Alyssa Katz, "The Influence Machine: The U.S. Chamber of Commerce and the Corporate Capture of American Life," pgs. 111 – 127, Spiegel & Grau (2015)

[12] Open Secrets, https://www.opensecrets.org/527s/527cmtedetail_contribs.php?ein=050532524&cycle=2010

[13] Open Secrets, https://www.opensecrets.org/pacs/lookup2.php?strID=C00572198&cycle=2016

[14] 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

[15] Open Secrets, https://www.opensecrets.org/pacs/lookup2.php?cycle=2016&strID=C00572917

[16] Open Secrets, https://www.opensecrets.org/pacs/pacgave2.php?cycle=2016&cmte=C00572917

(almost $200,000), and Devon Energy ($125,000) were all among the largest donors to RAGA's 527 during this period.[17]

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 donations from fossil fuel interests,[18] funded a campaign in support of his confirmation.[19] This campaign included ads targeting Democratic senators and a ConfirmPruitt.com website.[20]

B. Pruitt's Official Actions Have Been in Lock-Step with his Political Donors' Interests

As Oklahoma Attorney General and EPA Administrator, Pruitt used his official position to execute the agenda of his industry political patrons, on the CPP and other environmental issues. Given this history, there is no doubt that the proposed ACE rule reflects industry's wishes.

As Attorney General of Oklahoma, Scott Pruitt sued the EPA 14 times.[21] Four of these lawsuits sought to block the CPP. Pruitt was so eager to prove his fealty to the energy industry funding his political career that the first three of his lawsuits against the CPP were filed before the final rule had been published. All were dismissed as premature. In his fourth suit, rather than join a joint lawsuit filed by 24 state attorneys general, Pruitt filed his own.[22]

A week before Pruitt and other state attorneys general filed their lawsuits, Murray Energy and the Southern Company (both of which filed separate lawsuits seeking to block the CPP) paid to attend a RAGA summit where they met with Pruitt.[23] At this same summit, Pruitt appeared on a panel entitled "The Dangerous Consequences of the Clean Power Plan & Other EPA Rules."

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[17] Open Secrets, https://www.opensecrets.org/527s/527cmtedetail_contribs.php?cycle=2014&ein=464501717

[18] Open Secrets, https://www.opensecrets.org/pacs/pacgave2.php?cmte=C00542902&cycle=2014

[19] 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

[20] An archived version of this website is available at http://web.archive.org/web/20170217193132/http://confirmpruitt.com/

[21] "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

[22] Paul Monies, "Oklahoma's attorney general files quick challenge to EPA carbon rule," *NewsOK* (Oct. 24, 2015), http://newsok.com/article/5455443

[23] 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

With him on this panel were representatives from Murray Energy and the American Coalition for Clean Coal Electricity,[24] yet another petitioner in litigation against the CPP.

Multiple companies and trade associations also filed petitions against the CPP. Six had donated to Pruitt and/or to outside groups involved with him: the American Coalition for Clean Coal Electricity (at least $329,650), the American Fuel and Petrochemical Manufacturers (at least $187,650), Murray Energy (at least $300,000), 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 the CPP. 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 this subject, sent it to Pruitt's office, which then cut and pasted it onto official state government stationary with only a few word changes and sent it to Washington over Pruitt's signature.[25]

Documents uncovered from public records requests to the Oklahoma Attorney General's Office also showed that Pruitt worked on behalf of the American Fuel and Petrochemical Manufacturers, a major donor and CPP petitioner. That group 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."[26] Pruitt followed the group's suggestion and sued.[27]

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; sixteen are petitioners in litigation against the CPP. During this same period of time, Pruitt met with almost no environmental groups.[28]

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[24] 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

[25] 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

[26] 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

[27] *Id.*

[28] "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, Duke Energy, the Edison Electric Institute (a trade group representing utilities), the National Rural Electric Cooperative Association, BP, Chevron, the American Petroleum Institute (a trade group representing oil & gas companies), the National Stripper Well Association (a trade group representing small oil and gas

The relationships he established through his political activities as Attorney General continued to pay off for his donors once Pruitt became EPA Administrator.[29] 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.[30] 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.[31] These decisions are estimated to save oil and gas companies – many of them donors to Scott Pruitt and/or outside spending groups affiliated with him – millions of dollars.[32]

C. Pruitt's Public Statements Have Been in Lock-Step with his Political Donors' Interests

Suing to block the CPP is not the only way in which Pruitt, in his capacity as Oklahoma Attorney General, expressed his profound opposition to the rule. In April 2014, he released a plan in which he argued against the policy ideas that undergirded the then-yet-to-be-finalized CPP.[33] In this plan, he argued that the CAA gave the EPA at best limited authority to regulate power plant GHG emissions.[34] Pruitt's plan proposed that the states be left to determine legally enforceable

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companies), the Oklahoma Independent Petroleum Association, the Domestic Energy Producers Alliance (a trade group representing oil & gas companies), the American Gas Association, FirstEnergy, Consol Energy, Associated Electric Cooperative, the National Association of Royalties Owners, the National Mining Association, Big Rivers Electric Corporation, Kansas Electric Power Cooperative, South Texas Electric Cooperative, Central Missouri Electric Cooperative, Hoosier Energy Rural Electric Cooperative, Seminole Electric Cooperative, Deseret Power Electric Cooperative, Arizona G&T Cooperatives, Central Electric Power Cooperative, Georgia Transmission Corporation, Sho-Me Power Electric Cooperative, N.W. Electric Power Cooperative, Kentucky Association of Electric Cooperatives, North Dakota Association of Rural Electric Cooperatives, Minnkota Power Cooperative, North Central Electric Cooperative, Central Power Electric Cooperative, Basin Electric Cooperative, the Southern Company, Alliance Resource Partners, ExxonMobil, American Fuel & Petrochemical Manufacturers, the Portland Cement Association, Royal Dutch Shell, and Contura Energy.

[29] 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

[30] 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

[31] *Id.*

[32] *Id.*

[33] E. Scott Pruitt, The Oklahoma Attorney General's Plan (April 2014), https://assets.documentcloud.org/documents/3444765/Scott-Pruitt-Clean-Air-Act-States-Rights.pdf

[34] *Id.* at 3-4.

GHG emissions standards on a plant-by-plant basis.[35] His plan would also have allowed states to consider the remaining useful life of existing sources and to exclude certain plants from performance standards based on this criterion and would not have triggered New Source Review (NSR) for changes made to comply with mandated performance standards.[36] These elements are all strikingly similar to the ACE rule proposal and its accompanying proposal to loosen rules governing NSR.

Tellingly, Pruitt's 2014 Oklahoma plan also framed its opposition to the CPP by claiming that the policies undergirding it would eventually be used to "target and eliminate natural gas-fired generation."[37] This framing suggests that while the CPP would have reduced the use of coal to generate electricity and might have actually increased the use of natural gas, Pruitt's political patrons in the oil and gas industry understood that the drive to reduce GHG emissions and the policies contained in the CPP could eventually disadvantage their industry as well.

Pruitt followed this preemptive shot across EPA's bow with an avalanche of statements criticizing the finalized CPP and vowing to see it blocked in court. He appeared before both the Senate[38] and the House[39] to denounce the CPP. In his Senate testimony, Pruitt stated that, "in reality, the Clean Power Plan is nothing more than an attempt by the EPA to expand federal agency power at the expense of state energy and power generation." In his testimony before the House, Pruitt went so far as to label the CPP an "audacious assertion of authority" by the EPA that was "more far-reaching than any previous effort by the agency."[40]

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[35] *Id.* at 11-12.
[36] *Id.*
[37] *Id.* at 1.
[38] Scott Pruitt Testimony on EPA Clean Power Plan before Senate Environment and Public Works Clean Air Subcommittee, CSPAN, https://www.c-span.org/video/?c4536747/scott-pruitt-testimony-epa-clean-power-plan-epw-sub
[39] House Environment Subcommittee Hearing – Impact of EPA's Clean Power Plan on States, https://science.house.gov/sites/republicans.science.house.gov/files/documents/HHRG-114-SY18-WState-SPruitt-20160526.pdf
[40] E. Scott Pruitt, Testimony before the House Committee on Science, Space and Technology Subcommittee on Environment (May 26, 2016), https://science.house.gov/sites/republicans.science.house.gov/files/documents/HHRG-114-SY18-WState-SPruitt-20160526.pdf

Pruitt has attacked the CPP in the press and social media. He told *Reuters* that the CPP was a form of federal "coercion and commandeering."[41] His old Oklahoma Attorney General Instagram[42] account shows him attacking the CPP to audiences including a group of electric cooperatives,

agscottpruitt Follow

agscottpruitt I got a chance to talk w/ @OAECoops about the serious harm the EPA's unlawful Clean Power Plan will cause. Thanks for the invitation.

Load more comments

clemfandango420 Traitor

science_curious #fifthcolumn

c3pno Since you are a threat for the US citizens you are on the Unionists' death list.

spm1082 "Clean Energy" and "harm" cannot exist in the same sentence. It's called an oxymoron. Let me tell you some words that can coexist with "harm": coal, oil, petroleum, fracking, pipeline, mining, hydrocarbons, CO2, CO, CH4, an underfunded EPA, climate change, greenhouse effect, Scott Pruitt, etc. Based off that statement I think you have the

38 likes

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a talk radio host,

agscottpruitt Follow

agscottpruitt Radio interviews this morning with Sen Inhofe before the #EPW hearing on the #EPA's unlawful Clean Power Plan

ashleymertenss You guys are destroying everything @obamawhitehouse fought for. Shameful.

reedinthewind Quit denying science. We need to lead on fighting climate change

dylan.catherina How does it feel to be a puppet for big oil? Hope they are paying you enough for you to buy a spaceship off this rock once you and Drumpf destroy it.

landscape_lurker Keep lying into the mic you fucking science denying pile of filth, you are the fucking swamp

aeuranga, mckenna_pruitt and nswanson_mn like this

Log in to like or comment.

[41] Nichola Groom & Valerie Volcovici, "Most states on track to meet emissions targets they call burden," *Reuters* (Sept. 18, 2016), https://www.reuters.com/article/us-usa-climatechange-lawsuit-insight/most-states-on-track-to-meet-emissions-targets-they-call-burden-idUSKCN11O0E1

[42] https://www.instagram.com/agscottpruitt/

and generally attacking EPA to CPP petitioners American Fuel and Petrochemical Manufacturers.

Pruitt's Attorney General Instagram account also buttresses what is known about Pruitt's 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.[43] 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."[44] Consistent with this affinity for climate denial, his Instagram account shows him

[43] Global Warming Skeptic Organizations, Union of Concerned Scientists, https://www.ucsusa.org/global-warming/solutions/fight-misinformation/global-warming-skeptic.html#.WmeTIainG70; Texas Public Policy Foundation, DeSmog Blog, https://www.desmogblog.com/texas-public-policy-foundation

[44] 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

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).

Pruitt's climate denial isn't just a thing of the past, however. 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."[45]

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. 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."[46] 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."[47] Of course, the

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[45] 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
[46] Scott Pruitt at 2014 ALEC Annual Meeting, https://www.youtube.com/watch?v=K12PCuBjFgI
[47] 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

Supreme Court ruled otherwise in *Massachusetts v. EPA*[48], holding that the EPA may regulate carbon emissions as a pollutant under the CAA.

D. The Fossil Fuel Industry Capture of EPA Extends Beyond Pruitt

While Pruitt's ties to the fossil fuel industry were perhaps the most widely reported due to his former position atop EPA, he is far from the only member of the EPA leadership team to have deep professional and/or financial ties to the industry. Under President Trump, EPA has been stocked with officials close to the fossil fuel industry.

Bill Wehrum, the Assistant Administrator for EPA's Office of Air and Radiation (the office in which the proposed ACE 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 the Utility Air Regulatory Group (UARG), Duke Energy, Dominion Resources, the American Petroleum Institute (API), American Fuel and Petrochemical Manufacturers, Chevron, ExxonMobil, Koch Companies, Koch Industries, and Phillips 66, among other energy concerns.[49] Like Pruitt, Wehrum apparently doesn't believe that the CAA was intended to regulate GHG emissions, *Massachusetts v. EPA* notwithstanding.[50] And in an apparent violation of the Trump ethics pledge[51] he was required to sign, Wehrum met with UARG and several electric utilities to discuss replacing the CPP just weeks after he assumed his duties as Assistant Administrator.[52]

EPA Acting Administrator Andrew Wheeler, who replaced Pruitt atop EPA, was a longtime lobbyist for energy interests.[53] Most notably, Wheeler represented Murray Energy, whose CEO, Bob Murray, put the repeal of the CPP at the top of the "Action Plan" he circulated to Vice President Mike Pence, Pruitt, Secretary of Energy Rick Perry, and others.[54] Wheeler even accompanied Murray to lobby Perry on this action plan.[55]

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[48] *Massachusetts v. EPA*, 549 U.S. 497 (2007)
[49] *See* Appendix I
[50] Q&A With Hunton & Williams' Bill Wehrum, *Law360* (May 6, 2013), https://www.law360.com/articles/427231/q-a-with-hunton-williams-bill-wehrum
[51] 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
[52] 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
[53] 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-administrator-has-long-lobbying-record-on-issues-before-the-agency/2018/07/05/a591cd40-6a6b-11e8-bea7-c8eb28bc52b1_story.html?utm_term=.02987956d928
[54] 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
[55] 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

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

Beyond Wehrum and Wheeler, who will oversee the CPP rescission and replacement rulemakings now that Pruitt is gone, EPA leadership is stocked with officials closely tied to the fossil fuel industry. For example, 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,[56] while the head of EPA's Office of Research and Development, David Dunlap is a former executive at Koch Industries.[57] 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.[58]

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[56] 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

[57] 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

[58] 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

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.[59]

E. Industry Asked EPA for a CPP Replacement Plan Strikingly Similar to the Proposed ACE Rule

Having announced its proposal to rescind the CPP in accordance with industry's wishes in October 2017, EPA next solicited input on what should replace it. This solicitation took the form of a December 28, 2017 advanced notice of proposed rulemaking.[60] Numerous industry groups submitted recommendations. EPA adopted essentially all of them.

For example, CPP petitioner the U.S. Chamber of Commerce recommended that the CPP replacement plan be limited to GHG emissions reductions that can be accomplished at the plant level, that BSER be limited to efficiency improvements, that states should set the standard of performance, that the standards as well as compliance mechanisms should be flexible, and that NSR should not be triggered by modifications made to achieve efficiency improvements.[61]

CPP petitioner and former Wehrum client UARG submitted a comment making essentially the same points as the U.S. Chamber of Commerce, and also added that it opposed designating carbon capture and sequestration (CCS) as BSER for coal-fired power plants.[62] Notably, this comment was authored by Wehrum's former colleagues at the law firm of Hunton & Williams.[63] CPP petitioner American Council for Clean Coal Electricity[64] and the National Association of Manufacturers[65] also submitted comments making similar arguments.

III. Legal Argument

The proposed ACE rule to replace the CPP and an accompanying provision to weaken NSR requirements are illegal for four reasons. First, they are irreparably tainted due to the fact that

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[59] 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

[60] State Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generation Units, Federal Register Vol. 82, No. 248 (Dec. 28, 2017), pg. 61507, https://www.gpo.gov/fdsys/pkg/FR-2017-12-28/pdf/2017-27793.pdf

[61] U.S. Chamber of Commerce, et al. comment on docket no. EPA-HQ-OAR-2017-0545, https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0545-0199

[62] Utility Air Regulatory Group comment on docket no. EPA-HQ-OAR-2017-0545, https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0545-0275

[63] *Id.*

[64] American Council for Clean Coal Electricity comment on docket no. EPA-HQ-OAR-2017-0545, https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0545-0236

[65] National Association of Manufacturers comment on docket no. EPA-HQ-OAR-2017-0545, https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0545-0223

they were developed under the tenure of former EPA Administrator Pruitt, who possessed an inalterably closed mind with respect to the CPP. Second, they are tainted by the fact that Pruitt's involvement in their development violated his duty of impartiality under the Ethics in Government Act. Third, they are arbitrary and capricious as they are not the product of reasoned decision-making. And fourth, they constitute an illegal delegation of regulatory authority to private interests, in this case the fossil fuel industry.

A. The Proposed ACE Rule is Tainted by Pruitt's Inalterably Closed Mind

Pruitt may no longer be running EPA, but the proposed ACE rule was developed under his tenure. Indeed, it was received by OIRA the next business day after Pruitt left EPA.[66] Any analysis of the legality of this proposed rule must therefore consider Pruitt's role in developing it.

Those interested in a rulemaking "have a right to a fair and open proceeding; that right includes access to an impartial decisionmaker."[67] A regulator should be disqualified from a rulemaking "when there has been a clear and convincing showing that the [regulator] has an unalterably closed mind on matters critical to the disposition of the proceeding."[68]

Pruitt's years long, industry-funded campaign against the CPP is clear and convincing evidence of an inalterably closed mind. His deep industry ties and history of doing industry's bidding combined with his own legal combat against the CPP, his 2014 plan to replace the CPP, and his rich record of making highly critical statements about the CPP and the CAA's statutory authority to regulate carbon emissions make a clear and convincing showing of his inalterably closed mind on these subjects.

Pruitt's history of engaging in climate denial and consorting with people and groups that promote climate denial also demonstrates his mind was closed during the CPP rulemaking process. The purpose of the CPP is to reduce carbon emissions in order to help combat climate change, so if Pruitt doesn't accept the overwhelming scientific consensus that human-caused carbon emissions are driving climate change, then he cannot approach the CPP rescission and replacement rulemaking process with anything but an inalterably closed mind, incapable of reasonably interpreting the overwhelming scientific expertise on this subject.

The public has "a right to a fair and open proceeding; that right includes access to an impartial decisionmaker."[69] Allowing the regulatory process to be guided by those who are incapable of adjusting their positions in the face of evidence and arguments amassed during the rulemaking process would make that statutory process irrelevant. Regulators must be able to look at the evidence and arguments objectively if they are to issue regulations that serve our nation's best

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[66] RIN No. 2060-AT67, Office of Information and Regulatory Affairs, available at https://www.reginfo.gov/public/Forward?SearchTarget=RegReview&textfield=2060-AT67

[67] *Association of National Advertisers v. FTC*, 627 F.2d 1151, 1174 (D.C. Cir. 1979); see also *Lead Industries Association v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980)

[68] *Ass'n of Nat'l Advertisers, Inc.*, 627 F.2d at 1170.

[69] *Id.* at 1174.

interests. It is abundantly clear that as EPA Administrator, Pruitt was incapable of doing this. Rather than adjust his position in the face of overwhelming scientific, technological, and economic evidence, Pruitt clung to his position that the CPP had to be rescinded and replaced with a *de minimis* regulatory scheme that would do little to reduce GHG emissions from power plants. His involvement in the CPP rulemaking process makes a mockery of the regulatory process and any CPP-related rulemaking in which he was involved should be withdrawn.

B. Pruitt's Participation in the CPP-Related Rulemaking Violated His Duty of Impartiality under the Ethics in Government Act

Pruitt's participation in CPP-related rulemaking also contravenes part 2635 of the Code of Federal Regulations, subpart E[70] governing impartiality in performing official duties.[71] These rules apply to official duties a government official may undertake regarding a "particular matter."[72] According to the Office of Government Ethics, a rulemaking is not generally considered a "particular matter" and therefore normally falls outside the purview of these rules.[73] However, in the instant case, where the CPP litigation and CPP rulemaking cover the same subject matter and legal issues and involve the same parties, the CPP rulemaking should be treated as a particular matter to which impartiality requirements apply.

Pruitt has already acknowledged the ethical problems associated with his continued involvement in court cases to which he was a party as Oklahoma Attorney General. In a memorandum he drafted laying out his ethics obligations as EPA Administrator, he agreed not to participate in any active cases in which Oklahoma was a party, petitioner, or intervenor.[74] The terms of this memorandum required that Pruitt not involve himself in the ongoing litigation over the CPP. Pruitt's ethics memo states that he will not participate in any active cases in which Oklahoma is involved in order "to avoid even the appearance of any impropriety under federal ethics or professional responsibility obligations."[75]

Given the particular facts of this case, Pruitt's participation in CPP-related rulemaking creates the same appearance of impropriety that necessitated his recusal from CPP litigation. But for the venues in which the arguments are being presented, everything else is the same.

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[70] Code of Federal Regulations section 2635.501, https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=06f812f26e7ed9f364bb87944757b912&rgn=div5&view=text&node=5:3.0.10.10.9&idno=5#sp5.3.2635.e

[71] Office of Government Ethics Memorandum of October 4, 2006, https://www.oge.gov/Web/OGE.nsf/All+Advisories/C10C6B23AC67F74685257E96005FBDD7/%24FILE/do-06-02_9.pdf?open

[72] *Id.*

[73] *Id.*

[74] E. Scott Pruitt, Memorandum: My Ethics Obligations (May 4, 2017), pg. 2, https://www.eenews.net/assets/2017/05/05/document_pm_06.pdf

[75] *Id.* at 3.

Consider the parties involved. Six of the industry petitioners in the CPP litigation donated more than $7,000,000 to Pruitt and his affiliated political action committees. Sixteen of the industry petitioners in CPP litigation met with Pruitt in just his first several weeks as EPA Administrator when he was still determining what course of action to take with respect to the CPP. Many of the CPP petitioners submitted comments urging the sort of *de minimis*, flexible replacement plan Pruitt himself championed as Oklahoma Attorney General and that he has now proposed as the ACE rule.

In short, the tremendous overlap between the legal arguments, interests, and parties involved in both the CPP litigation and the CPP-related rulemaking process as to render the two virtually indistinguishable as a matter of federal ethics. No neutral observer could seriously believe that someone as deeply involved as Pruitt in the CPP litigation could act impartially when it came to any sort of rulemaking related to the CPP. The Pruitt-initiated rulemaking to rescind and replace the CPP clearly exists to accomplish what the Pruitt-led litigation against the CPP did not accomplish and what his industry patrons desire: to see the serious GHG emissions reductions embodied in the CPP replaced with a fig leaf plan that would allow all parties to pay lip service to the imperative of reducing GHG emissions without actually doing so.

C. The Proposed ACE Rule and Accompanying Regulations are Arbitrary and Capricious

The Administrative Procedure Act[76] permits courts to set aside agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[77] 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 implausible that it could not be ascribed to a difference in view or the product of agency expertise.'"[78]

Courts have also held that a rule is arbitrary and capricious if the promulgating agency did not "genuinely engage in reasoned decision making"[79] or if it did not "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[80]

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[76] 5 USC §500 *et seq.*

[77] 5 USC §706(2)(a)

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

[79] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970)

[80] *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)

While judicial review of agency actions is usually "exceedingly deferential,"[81] 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."[82]

Additionally, courts have 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."[83] "An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past."[84]

This heightened level of scrutiny calls on a court to "intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making."[85] These concerns are epidemic for the proposed ACE rule.

A full review of the technical deficiencies of the proposed rule is beyond the scope of this comment. But even a basic review shows that in an effort to achieve a result sought by the fossil

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

[82] *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)

[83] *FCC v. Fox Television Stations*, 566 U.S. 502, 515 – 16 (2009)

[84] *Id.* at 537 (Kennedy, J., concurring).

[85] *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."

fuel industry, EPA engaged in a sham decision-making process lacking any rational connection between the facts and the choices made.

First, EPA admits that replacing the CPP with the proposed ACE rule would result in up to 1,400 premature deaths per year from exposure to increased levels of fine particulate matter (PM 2.5) and up to 230 premature deaths per year from exposure to increased ozone levels.[86] In addition, replacing the CPP with the proposed ACE rule would result in up to 96,000 additional cases of exacerbated asthma per year, up to 48,000 lost work days per year, and up to 140,000 school absence days per year.[87]

Second, EPA concedes that replacing the CPP with the proposed ACE rule would result in considerably higher carbon emissions. By 2030, EPA estimates that replacing the CPP with the proposed ACE rule would result in an increase of up to 61 million short tons to carbon dioxide emissions per year in 2030.[88] It would also result in increases up to 53,000 short tons of sulfur dioxide emissions and 39,000 short tons of nitrogen oxides emissions per year in 2030; sulfur dioxide and nitrogen oxides are air pollutants that cause smog and acid rain.

Moreover, EPA and the Trump administration appear to have intentionally underestimated the costs associated with the additional carbon pollution that would be generated by the proposed ACE rule. In the regulatory impact analysis accompanying the proposed ACE rule, EPA uses two estimates of the social cost of carbon (SCC) to calculate the lost benefits associated with replacing the CPP. Its estimates of $1/metric ton and $7/metric ton (in 2016 dollars)[89] are considerably less than the Obama administration's central case estimate of roughly $49/metric ton (in 2016 dollars).[90] The SCC estimates used by EPA in its regulatory impact analysis are

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[86] Regulatory Impact Analysis for the Proposed Emissions Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, pg. 4-33, U.S. Environmental Protection Agency (August 2018), https://www.epa.gov/sites/production/files/2018-08/documents/utilities_ria_proposed_ace_2018-08.pdf

[87] *Id.*

[88] Emissions Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, Federal Register Vol. 83, No. 170 (Aug. 31, 2018), pg. 44784, https://www.gpo.gov/fdsys/pkg/FR-2018-08-31/pdf/2018-18755.pdf

[89] Regulatory Impact Analysis for the Proposed Emissions Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, pg. 4-4, U.S. Environmental Protection Agency (August 2018), https://www.epa.gov/sites/production/files/2018-08/documents/utilities_ria_proposed_ace_2018-08.pdf

[90] Technical Support Document: Technical Update of the Social Cost of Carbon Regulatory Impact Analysis Under Executive Order 12866, pg. 25, Interagency Working Group on Social Cost of Greenhouse Gases (Aug. 2016), https://www.epa.gov/sites/production/files/2016-12/documents/sc_co2_tsd_august_2016.pdf

also orders of magnitude less than other recent estimates of the SCC. For example, a recent survey of experts in the field yielded a mean SCC estimate of almost $300/metric ton.[91] And recent peer-reviewed research has yielded SCC estimates of over $400/metric ton on a global scale and almost $50/metric ton in the U.S. alone.[92]

The Trump administration's underestimation of the benefits associated with GHG reductions isn't just limited to cherry picking an artificially low SCC. Several paragraphs discussing the health and welfare impacts of climate change were deleted from the regulatory impact analysis of the proposed ACE rule sometime after it was submitted to OIRA for review; it is unclear who deleted them.[93]

Third, and perhaps most tellingly, EPA does not seriously consider any alternatives to heat rate improvements (HRI) for BSER. The proposed ACE rule devotes but two short paragraphs to considering CCS as an alternative to HRI for BSER.[94] It is similarly dismissive other potential candidates for BSER, including fuel co-firing, natural gas co-firing, and biomass co-firing.[95]

In its dismissal of CCS as BSER, the proposed ACE rule relies on the Obama administration's 2015 determination in the CPP that CCS was more expensive than other options.[96] This takes the Obama administration's finding out of context and uses it for a purpose never intended. The CPP did not designate CCS (or any other *plant-specific* emissions reduction technology) as BSER because it recognized that given the integrated nature of the electricity system, the most cost efficient BSER was at the system level not the plant level. In other words, the CPP was based on the premise that it would often be cheaper for utilities to shift generation to renewables and/or to natural gas combined cycle plants in order to achieve the same emissions reductions that might be achieved with CCS or other plant-specific emissions reduction technologies.[97] Nevertheless, the Obama administration concluded that CCS was "technically feasible and within price ranges that the EPA has found to be cost effective in the context of other GHG rules."[98] The proposed ACE rule, on the other hand, chooses to limit BSER to plant-specific

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[91] Robert Pindyck, "The Social Cost of Carbon Revisited," pg. 28, National Bureau of Economic Research (Nov. 2016), http://web.mit.edu/rpindyck/www/Papers/SCCRevisitedNov2016.pdf
[92] Katherine Ricke, et al., "Country-level social cost of carbon," *Nature Climate Change* 8 (Sept. 2018), pgs. 895 – 900, https://www.nature.com/articles/s41558-018-0282-y#ref-CR3
[93] Trump Administration Removes Scientific Information about Climate Change in Proposed Rollback of Clean Power Plan, Environmental Defense Fund (Sept. 4, 2018), https://www.edf.org/media/trump-administration-removes-scientific-information-about-climate-change-proposed-rollback
[94] *Id.* at 44761-2.
[95] *Id.* at 44762.
[96] *Id.* at 44761.
[97] *Id.* at 64727-8.
[98] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Federal Register Vol. 80, No. 205 (Oct. 23, 2015), pg. 64727, https://www.gpo.gov/fdsys/pkg/FR-2015-10-23/pdf/2015-22842.pdf

emissions reduction technologies. Its reliance on the CPP's 2015 finding with respect to CCS and BSER is therefore entirely misplaced.

The proposed rule also ignores the many technological and economic developments that have taken place with respect to CCS over the intervening three years since the CPP was promulgated. As of 2017, there were 17 large-scale CCS facilities in operation around the world; four more are scheduled to come online in 2018.[99] In January 2017, the first U.S. coal-fired power plant retrofitted with CCS technology came online.[100] The revenues generated from the carbon dioxide emissions captured at this plant are expected to pay for the CCS retrofit within 10 years.[101]

What's more, as additional CCS projects come online, costs are falling. Future capital and operations costs may fall by as much as 30 percent.[102] And while costs are falling, revenue opportunities 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 enhanced oil recovery (from $10/metric ton to $35/metric ton)[103] In short, the economics of CCS have improved significantly since 2015 when they were already cost effective according to the CPP.

Conclusory statements unsupported by technical expertise and analysis such as EPA's dismissal of CCS and other plant-specific emissions reductions technologies as BSER are not entitled to deference. Courts have held that conclusory statements may instead imply that an agency is "committed to its position regardless of any facts to the contrary."[104]

The reasonable – and obvious – conclusion to the above record is that EPA did not in fact care about the facts as it developed the proposed ACE rule. It cared about the results that fossil fuel industry wanted: the CPP repealed and replaced with a rule requiring only de minimis GHG emissions reductions achieved through minor technological tinkering. The factual record laid out in this comment details the sort of "danger signals" the courts have found to warrant "hard look" review. Potentially improper contacts between regulators and regulated industries,[105] "abrupt shifts in policy,"[106] and "undue bias towards particular private interests"[107] are all present

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[99] The Global Status of CCS:2017, pg. 5, Global CCS Institute (Nov. 13, 2017), https://www.globalccsinstitute.com/status

[100] *Id.* at 50-51.

[101] *Id.*

[102] *Id.* at 19.

[103] Bipartisan Budget Act of 2018 §41119, https://www.congress.gov/bill/115th-congress/house-bill/1892/text#toc-HF987967F1C6F4363A813BEA0FBE69427

[104] *Chem. Mfrs. Ass'n v. EPA*, 28 F.3d 1259, 1265 (D.C. Cir. 1994)

[105] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 844-5 (D.C. Cir. 1970)

[106] *United Church of Christ v. FCC*, 707 F.2d 1413, 1425 (D.C. Cir. 1983)

[107] *NRDC v. SEC*, 606 F.2d 1031, 1050 (D.C. Cir. 1979)

in this tawdry tale of industry capture. Based on this record, no court could plausibly conclude that EPA "genuinely engaged in reasoned decision making"[108] nor conclude that EPA could "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[109] The proposed rule is therefore arbitrary and capricious and should be withdrawn.

D. The Proposed ACE Rule and Accompanying Regulations are an Illegal Delegation of EPA Rulemaking Authority to a Regulated Industry

Just as an agency rulemaking will be set aside if a court determines that it was arbitrary and capricious, an agency rulemaking should be invalidated if a court finds that the agency delegated its rulemaking authority to one or more private interests, because Congress "cannot delegate regulatory authority to a private entity."[110] "Although objections to delegations are "typically presented in the context of a transfer of legislative authority from the Congress to agencies, [...] the difficulties sparked by such allocations are even more prevalent in the context of agency delegations to private individuals."[111]

While it is clear that an agency may not *explicitly* delegate its rulemaking authority to private interests, an agency that *implicitly* delegates its rulemaking authority to private interests raises the same concerns. An agency is effectively captured by the private interests it regulates when its "'regulation is . . . directed away from the public interest and toward the interest of the regulated industry' by 'intent and action' of industries and their allies."[112]

As described above, the proposed ACE rule was the product of a process that was effectively delegated to industry, with EPA serving as little more than a rubber stamp on a proposal that mirrors comments of numerous industry groups. Everything industry asked for – limiting GHG emissions reductions to those that can be accomplished at the plant level, designating minor efficiency improvements as BSER, excluding CCS and its much larger emissions reductions as BSER, letting states set the standard of performance, providing for flexible standards and compliance mechanisms, and providing that NSR not be triggered by modifications made to achieve efficiency improvements – industry got.

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[108] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970)
[109] *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)
[110] *Ass'n of American Railroads v. USDOT*, 721 F.3d 666, 670 (D.C. Cir. 2013) rev'd on other grounds
[111] *Id.*, quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC,* 737 F.2d 1095, 1143 (DC Cir. 1984).
[112] Lindsey Dillon, *et al.*, "The Environmental Protection Agency in the Early Trump Administration: Prelude to Regulatory Capture," *American Journal of Public Health* (April 2018), https://ajph.aphapublications.org/doi/10.2105/AJPH.2018.304360, quoting, Daniel Carpenter, editor, *Preventing Regulatory Capture: Special Interest Influence and How to Limit It*, pg. 73, Cambridge University Press (2014)

In addition to the fact that the proposed ACE rule adopts industry's recommendations while ignoring the public interest and minimizing the benefits of reduced GHG emissions, there is also abundant evidence that EPA essentially took direction from the fossil fuel industry with respect to CPP-related rulemaking. The fossil fuel industry had open access to EPA and senior EPA officials overseeing this rulemaking were consulting with them on it. These same senior EPA officials were closely tied to the fossil fuel industry and had a long history of hostility towards rules designed to reduce greenhouse gas emissions including the CPP, particularly on behalf of industry donors who bankrolled their political careers or industry clients they represented as lawyers or lobbyists prior to joining the Trump administration.

We are not the only ones to conclude that the Trump EPA has been captured by industry. A recently published article in the *American Journal of Public Health* finds that EPA is exhibiting many signs of regulatory capture.[113] 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."
- "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."[114]

The extreme and well-documented regulatory capture of the Trump EPA is evidence that it has effectively delegated its authority to the industries that have captured it, in particular, the fossil fuel industry. There is no substantive difference between an agency explicitly telling a company or industry to write a rule for it, and an agency telling a company or industry that it will write whatever rule the company or industry wants. Like Scott 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.

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[113] Lindsey Dillon, *et al.*, "The Environmental Protection Agency in the Early Trump Administration: Prelude to Regulatory Capture," *American Journal of Public Health* (April 2018)
[114] *Id.*

For the foregoing reasons, we, the undersigned United States Senators, respectfully urge EPA to withdraw this proposed rule.

Sincerely,

Sheldon Whitehouse
United States Senator

Edward J. Markey
United States Senator

Appendix I

MEMORANDUM

SUBJECT: Recusal Statement

FROM: William L. Wehrum
Assistant Administrator

9-17-18

TO: Andrew R. Wheeler
Acting Administrator

I have previously consulted with the Office of General Counsel/Ethics (OGC/Ethics) and been advised about my ethics obligations. This memorandum formally notifies you of my continuing obligations to recuse myself from participating personally and substantially in certain matters in which I have a financial interest, or a personal or business relationship. I also understand that I have obligations pursuant to Executive Order 13770 and the Trump Ethics Pledge that I signed, as well as my own bar obligations.

FINANCIAL CONFLICTS OF INTEREST

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

I have consulted with OGC/Ethics and been advised that I do not currently have any financial conflicts of interest but will remain vigilant and notify OGC/Ethics immediately should my financial situation change.

OBLIGATIONS UNDER EXECUTIVE ORDER 13770

Pursuant to Section 1, Paragraph 6 of the Executive Order, I understand that I am prohibited from participating in any particular matter involving specific parties in which my former employer, **Hunton & Williams LLP** (now Hunton Andrews Kurth LLP), or any former client to whom I provided legal services during the past two years, is a party or represents a party. I understand that my recusal lasts for two years from the date that I joined federal service.

I have been advised by OGC/Ethics that, for the purposes of this pledge obligation, the term "particular matters involving specific parties" is broadened to include any meetings or other communication relating to the performance of my official duties, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties. I am further advised that the term "open to all interested parties" means five or more parties.

RECUSAL LIST In effect until November 12, 2019	
FORMER EMPLOYER: Hunton & Williams LLP (now Hunton Andrews Kurth LLP)	
FORMER CLIENTS:[1]	
Agrium Inc.; Agrium U.S. Inc.; Nu-West Industries, Inc. American Forest & Paper Association American Fuel & Petrochemical Manufacturers American Petroleum Institute B10 Litigation Coalition Brick Industry Association CEMEX USA, Inc. Champion Power Equipment, Inc. Chemical Safety Advocacy Group (CSAG) Chevron Corporation Diageo Dominion Resources Services, Inc. Duke Energy Corporation Enbridge, Inc. Evonik Corporation[2] ExxonMobil Corporation Flint Hills Resources, LP GPA Midstream Association (formally known as Gas Processors Association)	General Electric Company Georgia-Pacific LLC Kinder Morgan, Inc. Koch Companies Public Sector, LLC Koch Industries, Inc. Lehigh Hanson, Inc. Lowe's Companies, Inc. National Stone, Sand and Gravel Association Pfizer Inc. Phillips 66 Company Portland Cement Association Prinoth Ltd. Salt River Project Spectra Energy Corp. Sunflower Electric Power Corporation, Inc. Tile Council of North America Utility Air Regulatory Group Utility Water Act Group Whitaker Greer Company

[1] Two confidential clients are not listed. Both clients have a written confidentiality agreement expressly prohibiting disclosure.

[2] Includes but not limited to an ongoing settlement negotiation.

ATTORNEY BAR OBLIGATIONS

Pursuant to my obligations under my bar rules, I recognize that I am obliged to protect the confidences of my former clients. I also understand that I cannot participate in any matter that is the same as or substantially related to the same specific party matter that I participated in personally and substantially while in private practice, unless my bar provides for and I first obtain informed consent and notify OGC/Ethics. Attached is a list of cases I am recused from given my participation at Hunton Andrews Kurth LLP.

SCREENING ARRANGEMENT

In order to ensure that I do not participate in matters relating to any of the entities listed above or matters identified in the Attachment, I will instruct Josh Lewis, Chief of Staff, and Mandy Gunasekara, Principal Deputy Assistant Administrator, to assist in screening EPA matters directed to my attention that involve those entities. All inquiries and comments involving the entities or matters on my recusal list should be directed to Josh and Mandy without my knowledge or involvement until after my recusal period ends.

If Josh or Mandy determine that a particular matter will directly involve any of the entities or matters listed on my "specific party" recusal list, then they will refer it for action or assignment to another, without my knowledge or involvement. In the event that they are unsure whether an issue is a particular matter from which I am recused, then they will consult with OGC/Ethics for a determination. I will provide a copy of this memorandum to my principal subordinates with a copy to Justina Fugh, Senior Counsel for Ethics.

UPDATE AS NECESSARY

In consultation with OGC/Ethics, I will revise and update my recusal statement whenever warranted by changed circumstances, including changes in my financial interests, changes in my personal or business relationships, or any changes to my EPA duties. In the event of any changes to my recusal or screening arrangement, I will provide a copy of the revised recusal statement to OGC/Ethics.

Attachment

cc: Matthew Z. Leopold, General Counsel
Ryan Jackson, Chief of Staff
Mandy Gunesakara, Deputy Assistant Administrator
Clint Woods, Deputy Assistant Administrator
Elizabeth Shaw, Deputy Assistant Administrator
David Harlow, Senior Counsel
Josh Lewis, Chief of Staff
Kevin Minoli, Designated Agency Ethics Official
Justina Fugh, Senior Counsel for Ethics

William L. Wehrum RECUSAL LIST – ATTORNEY BAR OBLIGATIONS	
CASE NAME:	CITATION:
American Petroleum Institute v. EPA	No. 08-1277 (D.C. Cir.)
Environmental Integrity Project v. EPA	No. 08-1281 (D.C. Cir.) (consolidated with No. 08-1277)
Kinder Morgan CO2 Co., LP v. EPA	No. 09-1332 (D.C. Cir.)
Gas Processors Association v. EPA	No. 11-1023 (D.C. Cir.)
American Petroleum Institute, *et al.* v. EPA	No. 11-1309 (D.C. Cir.)
National Rural Electric Coop. v. EPA	No. 12-1208 (D.C. Cir.) (consolidated with No. 12-1163)
National Rural Electric Coop. v. EPA	No. 12-1352 (D.C. Cir.) (consolidated with No. 12-1346)
American Petroleum Institute v. EPA	No. 12-1405 (D.C. Cir.)
Gas Processors Association v. EPA	No. 12-1406 (D.C. Cir.) (consolidated with No. 12-1405)
American Petroleum Institute, *et al.* v. EPA	No. 12-1442 (D.C. Cir.)
American Petroleum Institute v. EPA	No. 13-1063 (D.C. Cir.) (consolidated with No. 11-1309)
American Petroleum Institute v. EPA	No. 13-1108 (D.C. Cir.)
Conservation Law Foundation, *et al.* v. EPA	No. 13-1233 (D.C. Cir.)
Sierra Club, *et al.* v. EPA	No. 13-1256 (D.C. Cir.) (consolidated with No. 16-1021)
American Petroleum Institute v. EPA	No. 13-1289 (D.C. Cir.) (consolidated with No. 13-1108)
PSEG Power LLC, *et al.* v. EPA	No. 14-1199 (D.C. Cir.) (consolidated with No. 13-1233)
Georgia-Pacific LLC v. EPA	No. 14-1267 (D.C. Cir.)
Gas Processors Association v. EPA	No. 15-1021 (D.C. Cir.) (consolidated with No. 15-1020)
American Petroleum Institute v. EPA	No. 15-1044 (D.C. Cir.) (consolidated with No. 13-1108)
American Petroleum Institute v. EPA	No. 15-1197 (D.C. Cir.)
Gas Processors Association v. EPA	No. 15-1473 (D.C. Cir.)
Sierra Club, *et al.* v. EPA, *et al.*	No. 15-1487 (D.C. Cir.)
Brick Industry Association v. EPA	No. 15-1492 (D.C. Cir.) (consolidated with No. 15-1487)
Sierra Club, *et al.* v. EPA, *et al.*	No. 16-1021 (D.C. Cir.)
American Fuel & Petrochemical, *et al.* v. EPA	No. 16-1033 (D.C. Cir.)
Air Alliance Houston, *et al.* v. EPA, *et al.*	No. 16-1035 (D.C. Cir.) (consolidated with No. 16-1033)
Brick Industry Association v. EPA	No. 16-1179 (D.C. Cir.) (consolidated with No. 15-1487)

American Petroleum Institute v. EPA	No. 16-1270 (D.C. Cir.) (consolidated with No. 13-1108)
American Petroleum Institute v. EPA	No. 16-1271 (D.C. Cir.)
American Petroleum Institute v. EPA	No. 16-1345 (D.C. Cir.) (consolidated with No. 16-1344)
Natural Resources Defense Council v. EPA	No. 16-1425 (D.C. Cir.)
Utility Air Regulatory Group v. EPA	No. 17-1088 (D.C. Cir.) (consolidated with No. 17-1085)