
No. 15-1398 (and consolidated cases)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

ENERGY & ENVIRONMENT LEGAL INSTITUTE,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

**On Petition for Review of Final Agency Action of the
United States Environmental Protection Agency
80 Fed. Reg. 64,662 (Oct. 23, 2015)**

**SUPPLEMENT TO BRIEF OF PETITIONERS ON PROCEDURAL AND
RECORD-BASED ISSUES**

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DATED: February 19, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioners state as follows:

A. Parties, Intervenors, and *Amici Curiae*

These cases involve the following parties:

Petitioners:

No. 15-1363: State of West Virginia; State of Texas; State of Alabama; State of Arizona Corporation Commission; State of Arkansas; State of Colorado; State of Florida; State of Georgia; State of Indiana; State of Kansas; Commonwealth of Kentucky; State of Louisiana; State of Louisiana Department of Environmental Quality; Attorney General Bill Schuette, People of Michigan; State of Missouri; State of Montana; State of Nebraska; State of New Jersey; State of North Carolina Department of Environmental Quality; State of Ohio; State of South Carolina; State of South Dakota; State of Utah; State of Wisconsin; and State of Wyoming.

No. 15-1364: State of Oklahoma ex rel. E. Scott Pruitt, in his official capacity as Attorney General of Oklahoma and Oklahoma Department of Environmental Quality.

No. 15-1365: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers.

No. 15-1366: Murray Energy Corporation.

No. 15-1367: National Mining Association.

No. 15-1368: American Coalition for Clean Coal Electricity.

No. 15-1370: Utility Air Regulatory Group and American Public Power Association.

No. 15-1371: Alabama Power Company; Georgia Power Company; Gulf Power Company; and Mississippi Power Company.

No. 15-1372: CO₂ Task Force of the Florida Electric Power Coordinating Group, Inc.

No. 15-1373: Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc.

No. 15-1374: Tri-State Generation and Transmission Association, Inc.

No. 15-1375: United Mine Workers of America.

No. 15-1376: National Rural Electric Cooperative Association; Arizona Electric Power Cooperative, Inc.; Associated Electric Cooperative, Inc.; Big Rivers Electric Corporation; Brazos Electric Power Cooperative, Inc.; Buckeye Power, Inc.; Central Montana Electric Power Cooperative; Central Power Electric Cooperative, Inc.; Corn Belt Power Cooperative; Dairyland Power Cooperative; Deseret Generation & Transmission Co-operative; East Kentucky Power Cooperative, Inc.; East River Electric Power Cooperative, Inc.; East Texas Electric Cooperative, Inc.; Georgia Transmission Corporation; Golden Spread Electrical Cooperative, Inc.; Hoosier Energy Rural Electric Cooperative, Inc.; Kansas Electric Power Cooperative, Inc.; Minnkota Power Cooperative, Inc.; North Carolina Electric Membership Corporation; Northeast Texas Electric Cooperative, Inc.; Northwest Iowa Power

Cooperative; Oglethorpe Power Corporation; PowerSouth Energy Cooperative; Prairie Power, Inc.; Rushmore Electric Power Cooperative, Inc.; Sam Rayburn G&T Electric Cooperative, Inc.; San Miguel Electric Cooperative, Inc.; Seminole Electric Cooperative, Inc.; South Mississippi Electric Power Association; South Texas Electric Cooperative, Inc.; Southern Illinois Power Cooperative; Sunflower Electric Power Corporation; Tex-La Electric Cooperative of Texas, Inc.; Upper Missouri G. & T. Electric Cooperative, Inc.; Wabash Valley Power Association, Inc.; Western Farmers Electric Cooperative; and Wolverine Power Supply Cooperative, Inc.

No. 15-1377: Westar Energy, Inc.

No. 15-1378: NorthWestern Corporation d/b/a NorthWestern Energy.

No. 15-1379: National Association of Home Builders (“NAHB”).

No. 15-1380: State of North Dakota.

No. 15-1382: Chamber of Commerce of the United States of America; National Association of Manufacturers; American Fuel & Petrochemical Manufacturers; National Federation of Independent Business; American Chemistry Council; American Coke and Coal Chemicals Institute; American Foundry Society; American Forest & Paper Association; American Iron & Steel Institute; American Wood Council; Brick Industry Association; Electricity Consumers Resource Council; Lignite Energy Council; National Lime Association; National Oilseed Processors Association; and Portland Cement Association.

No. 15-1383: Association of American Railroads.

No. 15-1386: Luminant Generation Company LLC; Oak Grove Management Company LLC; Big Brown Power Company LLC; Sandow Power Company LLC; Big Brown Lignite Company LLC; Luminant Mining Company LLC; and Luminant Big Brown Mining Company LLC.

No. 15-1393: Basin Electric Power Cooperative.

No. 15-1398: Energy & Environment Legal Institute.

No. 15-1409: Mississippi Department of Environmental Quality; State of Mississippi; and Mississippi Public Service Commission.

No. 15-1410: International Brotherhood of Electrical Workers, AFL-CIO.

No. 15-1413: Entergy Corporation.

No. 15-1418: LG&E and KU Energy LLC.

No. 15-1422: West Virginia Coal Association.

No. 15-1432: Newmont Nevada Energy Investment, LLC, and Newmont USA Limited.

No. 15-1442: The Kansas City Board of Public Utilities – Unified Government of Wyandotte County/Kansas City, Kansas.

No. 15-1451: The North American Coal Corporation; The Coteau Properties Company; Coyote Creek Mining Company, LLC; The Falkirk Mining Company; Mississippi Lignite Mining Company; North American Coal Royalty

Company; NODAK Energy Services, LLC; Otter Creek Mining Company, LLC; and The Sabine Mining Company.

No. 15-1459: Indiana Utility Group.

No. 15-1464: Louisiana Public Service Commission.

No. 15-1470: GenOn Mid-Atlantic, LLC; Indian River Power LLC; Louisiana Generating LLC; Midwest Generation, LLC; NRG Chalk Point LLC; NRG Power Midwest LP; NRG Rema LLC; NRG Texas Power LLC; NRG Wholesale Generation LP; and Vienna Power LLC.

No. 15-1472: Prairie State Generating Company, LLC.

No. 15-1474: Minnesota Power (an operating division of ALLETE, Inc.).

No. 15-1475: Denbury Onshore, LLC.

No. 15-1477: Energy-Intensive Manufacturers Working Group on Greenhouse Gas Regulation.

No. 15-1483: Local Government Coalition for Renewable Energy.

No. 15-1488: Competitive Enterprise Institute; Buckeye Institute for Public Policy Solutions; Independence Institute; Rio Grande Foundation; Sutherland Institute; Klaus J. Christoph; Samuel R. Damewood; Catherine C. Dellin; Joseph W. Luquire; Lisa R. Markham; Patrick T. Peterson; and Kristi Rosenquist.

Respondents:

Respondents are the United States Environmental Protection Agency (in Nos. 15-1364, 15-1365, 15-1367, 15-1368, 15-1370, 15-1373, 15-1374, 15-1375, 15-1376,

15-1380, 15-1383, 15-1398, 15-1410, 15-1418, 15-1442, 15-1472, 15-1474, 15-1475, 15-1483) and the United States Environmental Protection Agency and Gina McCarthy, Administrator (in Nos. 15-1363, 15-1366, 15-1371, 15-1372, 15-1377, 15-1378, 15-1379, 15-1382, 15-1386, 15-1393, 15-1409, 15-1413, 15-1422, 15-1432, 15-1451, 15-1459, 15-1464, 15-1470, 15-1477, 15-1488).

Intervenors and *Amici Curiae*:

Dixon Bros., Inc.; Gulf Coast Lignite Coalition; Joy Global Inc.; Nelson Brothers, Inc.; Norfolk Southern Corp.; Peabody Energy Corp.; and Western Explosive Systems Company are Petitioner-Intervenors.

Advanced Energy Economy; American Lung Association; American Wind Energy Association; Broward County, Florida; Calpine Corporation; Center for Biological Diversity; City of Austin d/b/a Austin Energy; City of Boulder; City of Chicago; City of Los Angeles, by and through its Department of Water and Power; City of New York; City of Philadelphia; City of Seattle, by and through its City Light Department; City of South Miami; Clean Air Council; Clean Wisconsin; Coal River Mountain Watch; Commonwealth of Massachusetts; Commonwealth of Virginia; Conservation Law Foundation; District of Columbia; Environmental Defense Fund; Kanawha Forest Coalition; Keepers of the Mountains Foundation; Mon Valley Clean Air Coalition; National Grid Generation, LLC; Natural Resources Defense Council; New York Power Authority; NextEra Energy, Inc.; Ohio Environmental Council; Ohio Valley Environmental Coalition; Pacific Gas and Electric Company; Sacramento

Municipal Utility District; Sierra Club; Solar Energy Industries Association; Southern California Edison Company; State of California by and through Governor Edmund G. Brown, Jr., and the California Air Resources Board, and Attorney General Kamala D. Harris; State of Connecticut; State of Delaware; State of Hawaii; State of Illinois; State of Iowa; State of Maine; State of Maryland; State of Minnesota by and through the Minnesota Pollution Control Agency; State of New Hampshire; State of New Mexico; State of New York; State of Oregon; State of Rhode Island; State of Vermont; State of Washington; and West Virginia Highlands Conservancy are Respondent-Intervenors.

Philip Zoebisch; Pedernales Electric Cooperative, Inc.; Municipal Electric Authority of Georgia; Pacific Legal Foundation; Texas Public Policy Foundation; Morning Star Packing Company; Merit Oil Company; Loggers Association of Northern California; and Norman R. “Skip” Brown are *amici curiae* in support of Petitioners.

Former EPA Administrators William D. Ruckelshaus and William K. Reilly; Institute for Policy Integrity at New York University School of Law; National League of Cities; U.S. Conference of Mayors; Baltimore, MD; Boulder County, CO; Coral Gables, FL; Grand Rapids, MI; Houston, TX; Jersey City, NJ; Los Angeles, CA; Minneapolis, MN; Pinecrest, FL; Portland, OR; Providence, RI; Salt Lake City, UT; San Francisco, CA; West Palm Beach, FL; American Thoracic Society; American Medical Association; American College of Preventive Medicine; American College of

Occupational and Environmental Medicine; and the Service Employees International Union are *amici curiae* in support of Respondents.

B. Rulings Under Review

These consolidated cases involve final agency action of the United States Environmental Protection Agency titled, “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units,” and published on October 23, 2015, at 80 Fed. Reg. 64,662.

C. Related Cases

These consolidated cases have not previously been before this Court or any other court. Counsel is aware of five related cases that, as of the time of filing, have appeared before this Court:

- (1) *In re Murray Energy Corporation*, No. 14-1112,
- (2) *Murray Energy Corporation v. EPA*, No. 14-1151 (consolidated with No. 14-1112),
- (3) *State of West Virginia v. EPA*, No. 14-1146,
- (4) *In re: State of West Virginia*, No. 15-1277, and
- (5) *In re Peabody Energy Corporation*, No. 15-1284 (consolidated with No. 15-1277).

Per the Court’s order of January 21, 2016, the following cases are consolidated and being held in abeyance pending potential administrative resolution of biogenic carbon dioxide emissions issues in the Final Rule: *National Alliance of Forest Owners v.*

EPA, No. 15-1478; *Biogenic CO2 Coalition v. EPA*, No. 15-1479; and *American Forest & Paper Association, Inc. and American Wood Council v. EPA*, No. 15-1485.

CORPORATE DISCLOSURE STATEMENT

Energy & Environment Legal Institute (“EELI”) is a non-profit, non-governmental corporate entity organized under the laws of the Commonwealth of Virginia. EELI does not have a parent corporation. No publicly held corporation owns 10% or more of EELI’s stock.

STATEMENT OF ISSUES¹

1. Whether in promulgating this rule, EPA violated section 307 of the Clean Air Act (“CAA” or “Act”), and violated the procedural due process rights of those affected by failing to place in the public docket during the notice and comment period documents showing substantial *ex parte* contacts which formed the basis of the agency action.

ARGUMENT

The Failure to Reveal *Ex Parte* Contacts During the Notice of Proposed Rule-Making Renders the Rule Invalid

The Rule is invalid because undisclosed *ex parte* communications with environmental groups formed the basis of agency action. EPA did not place the communications in the public docket, even though they resulted in a Rule carefully calibrated to shut down existing coal power plants. *See* Response of Energy & Environmental Legal Institute to Stay Motions (ECF Doc. 1582259 in D.C. Cir. No. 15-1398).

In particular, Michael Goo, then EPA’s Associate Administrator for the Office of Policy, was tasked with writing the initial memo on EPA’s options regarding regulating coal power plants. *See* JA at____. Using his private email,

¹ As this brief seeks to supplement Petitioner’s Brief of Core Legal Issues and Petitioner’s Brief of Procedural and Record-Based Issues, it incorporates by reference necessary sections to avoid duplication, including the Glossary of Terms, the Jurisdictional Statement, the Statutes and Regulations, and the Statement of the Case.

rather than his official EPA email, Mr. Goo shared his draft options secretly, with lobbyists and high-level staffers at the Sierra Club, the Natural Resource Defense Council, and the Clean Air Task Force (CATF) who in turn, also using his non-official account, told him how to draft or alter the policy that was ultimately implemented in the Rule. For example:

- On May 30, 2011, a Sierra Club lobbyist sent Mr. Goo an email to his personal address stating, *in toto*, “[Y]ou might want to change your personal email address, now that you have new job and all. Attached is a memo I didn’t want to send in public.” The two-page memo was entitled, “Standards of Performance for Existing Sources” and concluded: “EPA can therefore establish a performance standard for existing plants that is not achievable by any plant nearing the end of its ‘remaining useful life’ as defined by EPA.” Only two hours after receiving this Goo sent to other high ranking EPA staff a document entitled “NSPS new source options” which was withheld as being the agency’s internal deliberations. *See* JA at ___.
- Goo, using his non-official email account, sent Sierra Club a draft of the EPA working grouping document titled the “NSPS Option X” laying out the proposed rule (despite the title, this memo and related correspondence were not limited to the NSPS rule, but also addressed existing-source regulation; beginning May 5, 2011). He also sent Sierra Club

another version of this document, one which reflected edits made the day before by staff for the outside activist group Clean Air Task Force, as extensively documented in Petitioners' Appendix, and again all on his private account. This version, "NSPS Option for Existing Utilities: Single Emission Rate Approach," was marked "Draft Deliberative." This meant that it reflected the deliberations of senior governmental policy-making officials.

- Using his non-official account senior staff at NRDC sent Goo numerous consultant analyses/advocacy pieces (for which Goo thanked them), and an internal NRDC analysis titled "Retire v Co-fire," which told him they were "concerned that a coal only standard is not likely to achieve significant emissions reduction" and argued against allowing existing coal plants to reduce emissions by co-firing coal and natural gas and in favor of forcing those plants to close. JA at ___. Indeed the three NRDC staff Goo emailed from his private account, David Doniger, David Hawkins, and Daniel Lashof, were noted by a New York Times analysis of NRDC's influence on these GHG rules as having played an outsized role in developing the rule. It noted, e.g., what was "Indisputable, however, is that the Natural Resources Defense Council was far ahead of the E.P.A. in drafting the architecture of the proposed regulation" about which, the article quoted another supporter

of the EPA's rule in saying, "The NRDC's proposal has its fingerprints throughout this."²

- Goo informed CATF of when he planned to brief the EPA administrator on the proposed rule and was told "I know you said the NSPS briefing for the Administrator is today. Here is the latest on our development of a function" for use in a EGU NSPS rule." CATF also sent a multi-page presentation done by its own contractor. (See JA at __) Later CATF received a "read out" from Goo's meeting on the options with the Administrator, and responded saying "I wanted to give you some brief reactions from CATF staff to your read out from the meeting with the Administrator."

Through these communications, and by heavily incorporating their work into EPA's own deliberative drafts, Goo made CATF and these other groups effectively part of EPA's taskforce. None of these communications were docketed in the public record when the Notice of Proposed Rulemaking (NPRM) was released for comments. Goo only provided these records to EPA in late August 2013, nearly two and a half years after much of the correspondence occurred, while preparing to leave the Agency's employ. Yet EPA did have these records in its possession in time to have placed them in the public docket when it released NPRM). The result of this

² See Coral Davenport, *Taking Oil Industry Cue, Environmentalists Drew Emissions Blueprint*, New York Times, July 6, 2014. <http://www.nytimes.com/2014/07/07/us/how-environmentalists-drew-blueprint-for-obama-emissions-rule.html>.

deficiency is that commenters could not have known that the Rule was drafted through such extensive ex parte contacts with environmental groups with whom Mr. Goo once worked when employed by NRDC. Such secrecy is inconsistent with fundamental principles of due process, fair notice, and accountable government. This far exceeds what, in December 2015, the General Accounting Office criticized as improper practices in finding that EPA violated federal law by engaging in “covert propaganda” and “grassroots lobbying” in connection with another rule.³

In *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), this Court opined that “[i]f actual positions were not revealed in public comments . . . and, further, if the Commission relied on these apparently more candid private discussions in framing the final . . . rules, then the elaborate public discussion in these dockets has been reduced to a sham.” *Id.* at 52–54. Such secrecy is inconsistent “with fundamental notions of fairness implicit in due process and with the ideal of reasoned decision making on the merits.” *Id.* at 56. Here parties who engaged in the notice and comment period were denied critical information that would have allowed them to effectively communicate concerns to about the rule to the agency. Without this information, without an ability to legitimately engage with the agency on a rule that would substantially affect them, all those affected were denied their due process rights.

³ See GAO, Environmental Protection Agency — Application of Publicity or Propaganda and Anti-Lobbying Provisions, B-326944 (Dec. 14, 2015).

CONCLUSION

For the foregoing reasons, as well as for those set forth in the Core Legal Issues Brief and Petitioner's Brief on Procedural and Records-Based Issues, the petitions should be granted and the Rule vacated.

Dated: February 19, 2016

Respectfully Submitted,

/s/ Chaim Mandelbaum

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rules 32(a)(1) and 32(a)(2)(C), I hereby certify that the foregoing Supplement to Brief Petitioners on Procedural and Record-Based Issues contains 1291 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count.

Dated: February 19, 2016

/s/ Chaim Mandelbaum

Chaim Mandelbaum

CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of February 2016, a copy of the foregoing Joint Opening Brief of Petitioners on Record-Based Issues was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

/s/ Chaim Mandelbaum
Chaim Mandelbaum