

DRAFT

RESOLUTION RECOMMENDING THAT THE HOUSE OF REPRESENTATIVES FIND STEPHEN L. JOHNSON, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, AND SUSAN DUDLEY, ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET, WHITE HOUSE, IN CONTEMPT OF CONGRESS FOR REFUSAL TO COMPLY WITH SUBPOENAS DULY ISSUED BY THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

REPORT OF THE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM HOUSE OF REPRESENTATIVES

The form of the resolution that the Committee on Oversight and Government Reform would recommend to the House of Representatives for citing Stephen L. Johnson, Administrator of the U.S. Environmental Protection Agency, and Susan E. Dudley, Administrator of the Office of Information and Regulatory Affairs in the White House Office of Management and Budget, for contempt of Congress pursuant to this report is as follows:

Resolved, That pursuant to 2 U.S.C. §§ 192 and 194, the Speaker of the House of Representatives shall certify the report of the Committee on Oversight and Government Reform, detailing the refusal of Stephen L. Johnson, Administrator of the U.S. Environmental Protection Agency, to produce documents to the Committee on Oversight and Government Reform as directed by two subpoenas, to the United States Attorney for the District of Columbia, to the end that Mr. Johnson be proceeded against in the manner and form provided by law; and be it further

Resolved, That pursuant to 2 U.S.C. §§ 192 and 194, the Speaker of the House of Representatives shall certify the report of the Committee on Oversight and Government Reform, detailing the refusal of Susan E. Dudley, Administrator of the White House Office of Information and Regulatory Affairs in the Office of Management and Budget, to produce documents to the Committee on Oversight and Government Reform as directed by subpoena, to the United States Attorney for the District of Columbia, to the end that Ms. Dudley be proceeded against in the manner and form provided by law.

I. BACKGROUND ON THE COMMITTEE INVESTIGATIONS

The Oversight and Government Reform Committee has been investigating two recent actions by the U.S. Environmental Protection Agency and the White House role in those actions: (1) the denial of California's petition for a waiver to regulate greenhouse gas emissions from motor vehicles and (2) the revision of the national ambient air quality standards for ozone.

These investigations have led the Committee to seek information from Stephen L. Johnson, Administrator of the U.S. Environmental Protection Agency, and Susan E. Dudley, Administrator of the Office of Information and Regulatory Affairs in the White House Office of Management and Budget. Administrator Johnson and Administrator Dudley provided approximately 60,000 pages of documents to the Committee. These documents were useful to the Committee in understanding the views and recommendations of EPA's career staff, including lawyers and technical experts. In the case of the revision of the ozone air quality standard, the produced documents have also helped the Committee understand the interactions between EPA and the Office of Information and Regulatory Affairs. However, Administrator Johnson and Administrator Dudley have refused to provide responsive documents that would show the role and influence of the White House, including documents that would show whether improper or illegal considerations influenced the regulatory decisions.

As discussed in detail below, subpoenas have been duly issued to both Administrator Johnson and Administrator Dudley. The Committee has afforded every accommodation to Mr. Johnson and Ms. Dudley, meeting with agency counsel and White House counsel as requested, narrowing requests where possible, and allowing additional time beyond the returnable dates of the subpoenas to provide for sufficient opportunity for EPA and the White House to review responsive documents.

However, Mr. Johnson and Ms. Dudley are both more than a month overdue in providing subpoenaed documents to the Committee. They have had ample opportunity to provide the documents, and White House counsel has had ample opportunity to review the withheld documents for executive privilege concerns. Yet they continue to withhold responsive documents that the Committee needs to meet its oversight and legislative duties without any assertion of executive privilege by the President and without any commitment to provide the responsive documents at any time in the future.

A. California's Waiver Request

The Clean Air Act authorizes two sets of standards to control tailpipe pollution from motor vehicles: (1) federal standards and (2) state standards established by California, which can also be adopted by other states. Section 209(b) of the Clean Air Act requires EPA to waive federal preemption for California motor vehicle standards if the agency determines that California's standards in the aggregate will be at least as protective of public health and welfare as federal standards. EPA may reject a waiver request only if the Administrator finds: (1) California's determination regarding protectiveness is "arbitrary and capricious;" (2) California does not need state standards "to meet compelling and extraordinary conditions;" or (3) California's standards are not consistent with statutory requirements for adequate lead-time and technological feasibility.¹

The special authority for California to set its own motor vehicle standards was part of the Air Quality Act of 1967 and was retained when Congress adopted the original 1970 Clean Air

¹ Clean Air Act § 209(b).

Act.² This authority was expanded in the 1977 amendments, with Congress recognizing that “the underlying intent” of section 209 is “to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.”³

In internal documents, EPA has recognized that the language of section 209, its legislative history, court decisions, and consistent EPA interpretation of the provision over several decades all indicate that California has the “broadest possible discretion in developing [its] program, and EPA has only narrow and circumscribed discretion to deny a waiver to California.”⁴ According to these internal documents, the “[b]urden of proof is on parties opposing a waiver,” and “EPA traditionally looks broadly at whether [California] has conditions such that it still needs its own motor vehicle emission program. [EPA has] not examined the need and conditions for specific standards or specific air pollution problem[s].”⁵

In September 2004, California amended its existing motor vehicle regulations to include standards requiring cars and light-duty trucks to limit emissions of greenhouse gases.⁶ The standards begin with the 2009 model year and phase-in gradually over eight years.⁷ By the 2016 model year, they would cut global warming pollution from new vehicles by almost 30%.⁸ Thirteen other states — Arizona, Connecticut, Maine, Maryland, Massachusetts, New Mexico, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington — have

² See *Motor & Equipment Mfrs. Ass’n v. EPA* (“MEMA I”), 627 F.2d 1095, 1108-1111 (D.C. Cir. 1979); *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. New York State Dept. of Environmental Conservation*, 17 F.3d 521, 525 (2nd Cir. 1994).

³ H.R. Rep. No. 294, 95th Cong., 1st Sess. 301-02 (1977).

⁴ Environmental Protection Agency, *California Request for a Waiver of Preemption of GHG Standards*, at 5 (Apr. 30, 2007) (briefing slides for Administrator Johnson). See also *Motor & Equipment Mfrs. Ass’n v. EPA* (“MEMA I”), 627 F.2d 1095, 1108-1111 (D.C. Cir. 1979).

⁵ Environmental Protection Agency, *California Request for a Waiver of Preemption of GHG Standards*, at 7, 10 (Apr. 30, 2007) (briefing slides for Administrator Johnson).

⁶ California Environmental Protection Agency Air Resources Board, Final Regulation Order — Amendments to Sections 1900 and 1961 and Adoption of New Sections 1961.1, Title 13, California Code of Regulations as Approved by OAL, California Exhaust Emission Standards and Test Procedures for 2001 and Subsequent Model Passenger Cars, Light Trucks and Medium-Duty Vehicles as Approved by OAL (Sept. 24, 2004 hearing date) (online at www.arb.ca.gov/regact/grnhsgas/grnhsgas.htm).

⁷ California Environmental Protection Agency Air Resources Board, Request for a Clean Air Act Section 209(b) Waiver of Preemption for California’s Adopted and Amended New Motor Vehicle Regulations and Incorporated Test Procedures to Control Greenhouse Gas Emissions: Support Document, at 6 (Dec. 21, 2005).

⁸ California Environmental Protection Agency Air Resources Board, *ARB Approves Greenhouse Gas Rule* (Sept. 24, 2004) (press release) (online at www.arb.ca.gov/newsrel/nr092404.htm).

already adopted the California standards. Together, these 14 states' consumers buy over 40% of the new vehicles sold nationwide each year.⁹

On December 21, 2005, California requested that EPA grant a waiver of preemption under section 209(b) for the California greenhouse gas emissions standards.¹⁰ EPA took no public action on the waiver request until the Supreme Court ruled in *Massachusetts v. EPA* on April 2, 2007, that greenhouse gases are air pollutants under the Clean Air Act.¹¹ EPA then published a notice on April 30, 2007, announcing a public hearing and a comment period on the waiver request.¹² The public comment period closed on June 15, 2007.¹³

On December 19, 2007, Administrator Johnson announced that he had “found that California does not have a ‘need to meet compelling and extraordinary conditions’” and that he had decided to deny California’s waiver request.¹⁴ In an unusual departure from agency practice, the Administrator announced this decision without releasing a decision document explaining the legal basis for the decision. The formal legal justification for the decision was not released until March 6, 2008, when Administrator Johnson wrote in the Federal Register:

I do not believe section 209(b)(1)(B) was intended to allow California to promulgate state standards for emissions from new motor vehicles designed to address global climate change problems; nor, in the alternative, do I believe that the effects of climate change in California are compelling and extraordinary compared to the effects in the rest of the country.¹⁵

⁹ Union of Concerned Scientists, *Automakers v. the People* (online at www.ucsusa.org/clean_vehicles/avp/) (accessed May 8, 2008).

¹⁰ Letter from Catherine Witherspoon, Executive Director, California Air Resources Board, to Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency, Re: Regulations to Control Greenhouse Gas Emissions From Motor Vehicles; Request for Waiver of Preemption Under Clean Air Act Section 209(b) (Dec. 21, 2005).

¹¹ *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007).

¹² Environmental Protection Agency, California State Motor Vehicle Pollution Control Standards; Request for Waiver of Federal Preemption; Opportunity for Public Hearing, 72 Fed. Reg. 21260 (Apr. 30, 2007).

¹³ Environmental Protection Agency, California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12156, 12157 (Mar. 6, 2008).

¹⁴ Letter to Arnold Schwarzenegger, Governor of California, from Stephen L. Johnson, Administrator, U.S. EPA (Dec. 19, 2007).

¹⁵ Environmental Protection Agency, California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12156, 12157 (Mar. 6, 2008).

As discussed in the attached Committee Memorandum of May 19, 2008, the record before the Committee shows: (1) the career staff at EPA unanimously supported granting California's petition; (2) Administrator Johnson also supported granting California's petition at least in part; and (3) Administrator Johnson reversed his position after communications with officials in the White House. However, insufficient information has been provided to the Committee to determine the considerations that motivated White House involvement in this matter and whether those considerations were proper under the Clean Air Act.

B. Ozone Air Quality Standards

Ozone is an air pollutant that contributes to what is typically referred to as smog. When ozone is inhaled, it reacts chemically with biological molecules in the respiratory tract, causing serious adverse health effects. Exposure to ozone can decrease lung function, cause inflammation of airways, and induce respiratory symptoms such as coughing, throat irritation, chest tightness, wheezing, pain, burning, discomfort, and shortness of breath. Exposure to ozone can result in school absences, doctor visits, emergency room visits, hospital admissions, and even premature death.

Ozone can also damage sensitive vegetation and ecosystems. According to EPA, ozone injures crop production and native vegetation and ecosystems "more than any other air pollutant."¹⁶ Ozone exposure can damage leaves, interfere with photosynthesis, and reduce the ability of sensitive species to adapt to or withstand environmental stresses, such as freezing temperatures and pest infestation.¹⁷ Exposure to ozone reduces crop yields for fruits and vegetables and can stunt the growth of trees.¹⁸

The Clean Air Act requires EPA to protect against the public health and environmental effects of ozone by establishing national ambient air quality standards (NAAQS).¹⁹ Under the Act, EPA is required to establish two standards: (1) a primary standard for the protection of public health; and (2) a secondary standard for the protection of "public welfare," including the environment.²⁰ These standards must be established without regard to compliance costs. In 2001, in the case of *Whitman v. American Trucking Association*, the Supreme Court ruled that "EPA may not consider implementation costs in setting the secondary NAAQS."²¹

¹⁶ Environmental Protection Agency, *Review of National Ambient Air Quality Standards for Ozone: Policy Assessment of Scientific and Technical Information*, at 7-1 (Jan. 2007) (EPA-452/R-07-003).

¹⁷ *Id.* at 7-6 – 7-9.

¹⁸ *Id.* at 7-9, 7-10.

¹⁹ Clean Air Act § 109 (2005).

²⁰ *Id.*

²¹ *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001).

In January 2007, EPA staff recommended that the primary NAAQS for ozone be reduced from 80 ppb to as low as 60 ppb.²² In addition, the staff concluded that it was no longer appropriate “to use an 8-hr averaging time for the secondary O₃ standard” and recommended to Administrator Johnson that the “8-hr average form should be replaced with a cumulative, seasonal, concentration weighted form.”²³ EPA staff recommended that the new secondary standard be a “cumulative, weighted total of 12-hour (8 a.m. – 8 p.m.) exposures over a 3-month period giving greater weight to exposures at higher levels of ozone.”²⁴ The staff made this recommendation because the cumulative, seasonal form is more “biologically relevant” to vegetation and new research showed that the eight-hour standard would not cover the same “areas of concern for vegetation” as the cumulative, seasonal standard.²⁵

The Clean Air Act establishes a Clean Air Scientific Advisory Committee (CASAC) to guide the EPA Administrator on setting the NAAQS.²⁶ CASAC reviewed the staff recommendations on the ozone standards and unanimously supported them. In the case of the secondary standard, its Ozone Review Panel members were “unanimous in supporting the recommendation in the Final Ozone Paper that protection of managed agricultural crops and natural terrestrial ecosystems requires a secondary Ozone NAAQS that is substantially different from the primary ozone standard in averaging time, level and form.”²⁷

Internal EPA documents show that the “option selection” meeting with the Administrator occurred on January 7, 2008.²⁸ At this meeting or shortly thereafter, the Administrator decided to proceed with a primary standard of 75 ppb and a cumulative, seasonal secondary standard.²⁹ A

²² Environmental Protection Agency, *Review of National Ambient Air Quality Standards for Ozone: Policy Assessment of Scientific and Technical Information* at 6-77 (Jan. 2007) (EPA-452/R-07-003).

²³ *Id.* at 8-24.

²⁴ Environmental Protection Agency, *Review of National Ambient Air Quality Standards for Ozone Final Staff Paper, Human Exposure and Risk Assessments and Environmental Report* (Jan. 2007) (online at www.epa.gov/ttn/naaqs/standards/ozone/data/2007_01_finalsp_factsheet.pdf).

²⁵ *Id.* at 8-20.

²⁶ Clean Air Act § 109(d)(2) (2005).

²⁷ Letter from Dr. Rogene Henderson, Chair of the Clean Air Scientific Advisory Committee, to EPA Administrator Stephen L. Johnson (Mar. 26, 2007).

²⁸ Environmental Protection Agency, *Ozone NAAQS Review; SAN 5008; Tier 1* (Revised on Mar. 4, 2008).

²⁹ *Id.* EPA has not responded to a Committee request to identify the exact date on which Administrator Johnson made the option selection.

draft final rule reflecting these decisions was submitted by Administrator Johnson to the White House Office of Management and Budget on February 22, 2008.³⁰

The draft final rule submitted by Administrator Johnson stated that adoption of a seasonal secondary standard was supported by “compelling” evidence and was “necessary” to protect the environment.³¹ According to the draft approved by Administrator Johnson: “EPA has found no evidence that, from the perspective of biological impact of O₃ exposure, the 8-hour standard form is an appropriate metric to protect vegetation.”³² The draft added: “the Administrator concludes that to provide adequate protection, the standard should be revised by establishing a distinct secondary standard with a cumulative, seasonal form that is biologically relevant to O₃-related effects.”³³

During the evening of March 11, 2008, EPA staff was directed to reject the seasonal standard and make the secondary standard equal to the primary one, as OMB had previously urged. An e-mail from an EPA attorney working on the ozone standard explained:

Well, we lost on the secondary. the decision came in about 7:00 to make it equal to the primary. About an hour later we heard there was also to be some sort of presidential announcement.³⁴

The following day, Ms. Dudley sent a letter to EPA Administrator Johnson explaining that the President had reviewed the secondary standard. According to Ms. Dudley’s letter:

The President has concluded that, consistent with Administration policy, added protection should be afforded to public welfare by strengthening the secondary ozone standard and setting it to be identical to the new primary standard.³⁵

³⁰ Memorandum from Administrator Susan Dudley, Office of Information and Regulatory Affairs, Office of Management and Budget, to EPA Administrator Stephen L. Johnson (Mar. 6, 2008).

³¹ U.S. Environmental Protection Agency, *Draft Ozone Rule*, at 243 (EPA-HQ-OAR-2005-0172-7183.1) (Mar. 12, 2008).

³² U.S. Environmental Protection Agency, *Draft Ozone Rule*, at 252 (EPA-HQ-OAR-2005-0172-7183.1) (Mar. 12, 2008).

³³ U.S. Environmental Protection Agency, *Draft Ozone Rule*, at 243 (EPA-HQ-OAR-2005-0172-7183.1) (Mar. 12, 2008).

³⁴ E-mail from John Hannon to Richard Ossias and Kevin McLean (Mar. 12, 2008; 7:40 a.m.).

³⁵ Letter from Administrator Susan Dudley, Office of Information and Regulatory Affairs, Office of Management and Budget, to EPA Administrator Stephen L. Johnson (Mar. 12, 2008). The letter is misdated as March 13, but was actually transmitted on March 12 as evidenced by its availability on that date and the citation to the letter in the March 12 final regulation.

As discussed in the attached Committee Memorandum of May 20, 2008, the record before the Committee shows that the President triggered what EPA staff called an “emergency rewrite” of the final rule. However, insufficient information has been provided to determine the considerations that motivated White House involvement in this matter and whether those considerations were proper under the Clean Air Act.

II. THE COMMITTEE SUBPOENAS TO ADMINISTRATOR JOHNSON AND ADMINISTRATOR DUDLEY

A. EPA Administrator Stephen L. Johnson

On April 9 and May 5, 2008, the Committee issued subpoenas to Stephen L. Johnson for the production of documents relevant to the Committee investigations. Administrator Johnson has neither complied with these subpoenas by their returnable date nor asserted any privilege to justify withholding documents from the Committee.

1. The April 9 Subpoena

On December 19, 2007, Administrator Johnson denied California’s petition to regulate greenhouse gas emissions from motor vehicles. The next day, Chairman Waxman requested documents relating to the decision, other than those that were available on the public record, including “all communications between the agency and persons outside the agency, including persons in the White House, related to the California waiver request.”³⁶ The deadline for this request was January 23, 2008.

On January 18, EPA began to produce documents to the Committee and EPA staff informed the Committee that the agency would complete production by February 15.³⁷ Although Administrator Johnson provided additional documents in January and February, he failed to complete production by February 15. On March 10, 2008, Chairman Waxman wrote to Administrator Johnson again to request that EPA staff work with Committee staff to establish by the close of business on March 12, 2008, a mutually agreeable deadline for the production of documents involving the White House.³⁸ EPA staff responded on March 12 that the agency anticipated providing final responses regarding documents involving the White House no later

³⁶ Letter from Chairman Henry A. Waxman to EPA Administrator Stephen L. Johnson (Dec. 20, 2007).

³⁷ Letter from EPA Associate Administrator Christopher Bliley to Chairman Henry A. Waxman (Jan. 18, 2008).

³⁸ Letter from Chairman Henry A. Waxman to EPA Administrator Stephen L. Johnson (Mar. 10, 2008).

than March 28.³⁹ On March 24, Chairman Waxman wrote to Administrator Johnson again and requested the documents involving the White House by noon on March 28.⁴⁰

On March 28, 2008, EPA staff informed the Committee that the agency would respond by April 3, 2008.⁴¹ On April 4, EPA staff informed Committee staff that approximately 90 responsive documents would not be made available to the Committee, but there was no assertion of executive privilege.⁴²

On April 9, Chairman Waxman issued a subpoena to Administrator Johnson for the production of the remaining responsive documents. The subpoena required Administrator Johnson to produce the responsive documents by April 11.

On April 11, Administrator Johnson did not provide the documents. Instead, EPA staff requested a meeting with the Committee staff and White House counsel to discuss the production of EPA's documents reflecting communications with the White House.⁴³ In response to this request, Committee staff met repeatedly with EPA and White House counsel to inquire about the content of the withheld responsive documents and to seek information about the White House role in the EPA decision. EPA and the White House counsel did not provide sufficient clarification of the White House role and Administration Johnson continued to withhold responsive documents without any assertion of executive privilege.

On April 22, 2008, EPA produced additional documents to the Committee bringing the total number of pages produced to approximately 27,500 pages of documents.⁴⁴ These documents have helped the Committee understand what occurred inside the agency, but not the role and the influence of the White House.

On the same day, White House counsel informed Committee staff that EPA possesses 32 documents that evidence telephone calls or meetings in the White House involving at least one high-ranking EPA official and at least one high-ranking White House official. The White House counsel described these documents as "indicative of deliberations at the very highest level

³⁹ Letter from EPA Associate Administrator Christopher Bliley to Chairman Henry A. Waxman (Mar. 12, 2008).

⁴⁰ Letter from Chairman Henry A. Waxman to EPA Administrator Stephen L. Johnson (Mar. 24, 2008).

⁴¹ Letter from EPA Associate Administrator Christopher Bliley to Chairman Henry A. Waxman (Mar. 28, 2008).

⁴² Phone conversation between Oversight and Government Reform Committee staff and EPA staff (Apr. 4, 2008).

⁴³ Phone conversation between Oversight and Government Reform Committee staff and EPA staff (Apr. 11, 2008).

⁴⁴ Letter from EPA Associate Administrator Christopher Bliley to Chairman Henry A. Waxman (Apr. 22, 2008).

of government.”⁴⁵ These responsive documents have not been provided to the Committee, and there has been no assertion of executive privilege.

2. The May 5 Subpoena

The Committee issued a separate subpoena to Administrator Johnson in a second investigation. On March 12, 2008, Administrator Johnson issued revised national ambient air quality standards for ozone. On March 14, Chairman Waxman requested documents relating to this decision, including complete and unredacted copies of documents reflecting “communications between EPA and persons in the White House relating to the updated NAAQS for ozone.”⁴⁶ The deadline for the production of communications with the White House was March 21.

Administrator Johnson began to produce documents to the Committee on April 11, and EPA staff informed Committee staff that the agency hoped to complete the production by April 18.⁴⁷ On April 28, EPA staff informed Committee staff that Administrator Johnson was withholding approximately 200 EPA documents involving the White House and that the agency was consulting with the White House about its production. EPA staff was unable to provide any estimate of when these documents would be produced.⁴⁸

On May 2, EPA staff informed Committee staff that consultations with the White House regarding the production of documents continued and that they could provide no information about when or whether the documents would be provided.⁴⁹ That day, Chairman Waxman wrote to Administrator Johnson to request that the outstanding EPA documents reflecting communications with the White House be provided by May 5.⁵⁰

On May 5, Administrator Johnson did not provide the documents, and there was no assertion of executive privilege. Instead, EPA staff informed the Committee that it was prepared to provide only 15 of the approximately 200 responsive documents and requested a meeting with

⁴⁵ Meeting between Oversight and Government Reform Committee staff, EPA staff, and White House staff (Apr. 22, 2008).

⁴⁶ Letter from Chairman Henry A. Waxman to EPA Administrator Stephen L. Johnson (Mar. 14, 2008).

⁴⁷ Phone conversation between EPA staff and House Oversight and Government Reform Committee staff (Apr. 11, 2008).

⁴⁸ Phone conversation between EPA staff and House Oversight and Government Reform Committee staff (Apr. 28, 2008).

⁴⁹ Phone conversation between Oversight and Government Reform Committee staff and EPA staff (May 2, 2008).

⁵⁰ Letter from Chairman Henry A. Waxman to EPA Administrator Stephen L. Johnson (May 2, 2008).

the Committee staff and White House counsel to discuss the production of EPA's communications with the White House.⁵¹

On May 5, Chairman Waxman issued a subpoena to Administrator Johnson requiring production of the responsive documents by 5 p.m. on May 6. On May 6, Committee staff met with EPA staff and White House counsel, and White House counsel said approximately 35 documents would not be produced to the Committee because they are "indicative of high level" decisionmaking material.⁵²

On May 16, Chairman Waxman wrote to Administrator Johnson again, stating:

[T]he Committee has not been provided sufficient access to the information to understand why the President rejected your recommendations regarding the ozone standard. The Clean Air Act specifies the factors that may be permissibly considered in setting air quality standards and those that may not. The record before the Committee does not provide enough insight into the deliberations inside the White House to assess whether the President and other White House officials acted in compliance with the requirements of the law.⁵³

Chairman Waxman also noted that Administrator Johnson would be testifying before the Committee on May 20 and advised him:

Unless the President asserts a valid claim of executive privilege with respect to the documents being withheld by EPA, you will be expected to personally bring the documents to the hearing. The Committee's subpoena was directed to you and you will be in defiance of the subpoena if you appear at the hearing without the documents.⁵⁴

At the May 20 hearing, Administrator Johnson did not produce the remaining responsive documents and he testified that the President was not asserting executive privilege.⁵⁵ EPA staff confirmed at the hearing that Administrator Johnson was continuing to withhold approximately 35 responsive documents from the Committee without an assertion of executive privilege.⁵⁶

⁵¹ Phone conversation between Oversight and Government Reform Committee staff and EPA staff (May 5, 2008).

⁵² Meeting between Oversight and Government Reform Committee staff, EPA staff, and White House staff (Apr. 22, 2008).

⁵³ Letter from Chairman Henry A. Waxman to EPA Administrator Stephen L. Johnson (May 16, 2008).

⁵⁴ *Id.*

⁵⁵ House Oversight and Government Reform Committee, *Hearing on EPA's New Ozone Standards*, 110th Cong. (May 20, 2008).

⁵⁶ Conversation between Oversight and Government Reform Committee staff and EPA staff (May 20, 2008).

In total, EPA has produced approximately 30,000 pages of documents to the Committee related to this investigation. These documents have been helpful in showing what occurred inside EPA. But Administrator Johnson has not provided the documents that would explain the role and influence of the White House.

On June 13, Chairman Waxman wrote to Administrator Johnson to inform him that “unless the documents are provided to the Committee or a valid assertion of executive privilege is made, the Committee will meet on June 20 to consider a resolution citing you in contempt.”⁵⁷ On June 18, EPA requested that the Committee not proceed with a resolution of contempt against Administrator Johnson indicating that “an additional set of documents” would be produced.⁵⁸ However, EPA did not specify what these documents are or when they would be produced and attempts by Committee staff to learn what additional documents would be provided and when were unsuccessful. Chairman Waxman responded the following day that “EPA’s offer to produce some unspecified additional documents at some unspecified time does not satisfy our reasonable request.”⁵⁹ The Chairman urged Administrator Johnson to reconsider his position and to comply with the duly issued subpoena.

B. OIRA Administrator Susan E. Dudley

On April 16, 2008, the Committee issued a subpoena to Administrator Dudley for the production of documents relevant to the Committee’s investigation of EPA’s revision of the national ambient air quality standards for ozone. Administrator Dudley has neither complied with this subpoena by its returnable date of April 18, 2008, nor asserted any privilege to justify withholding documents from the Committee.

On March 14, 2008, Chairman Waxman wrote to request that Administrator Dudley provide the Committee with documents relating to EPA’s revised national ambient air quality standards for ozone.⁶⁰ The Chairman requested that Administrator Dudley provide these documents by March 26. On March 26, Administrator Dudley provided only a partial response. Jeff Rosen, General Counsel for the Office of Management and Budget (OMB), responded by providing copies of a number of responsive documents that were either part of the publicly available docket or were expected to be placed in the docket.⁶¹ In his letter, Mr. Rosen also stated that the White House would not be providing an unspecified number of documents

⁵⁷ Letter from Chairman Henry A. Waxman to EPA Administrator Stephen L. Johnson (June 13, 2008).

⁵⁸ Letter from EPA Associate Administrator Christopher Bliley to Chairman Henry A. Waxman (June 18, 2008).

⁵⁹ Letter from Chairman Henry A. Waxman to EPA Administrator Stephen L. Johnson (June 19, 2008).

⁶⁰ Letter from Chairman Henry A. Waxman to Susan Dudley, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget (Mar. 14, 2008).

⁶¹ Letter from Jeffrey A. Rosen, General Counsel, Office of Management and Budget, to Chairman Henry A. Waxman (Mar. 26, 2008).

responsive to the Committee's request, citing "the confidentiality of the Executive Branch deliberative and consultative process," but did not state that executive privilege had been asserted.⁶² Although Committee staff and OMB staff communicated repeatedly in the remaining days of March, Administrator Dudley did not provide any additional documents.

On April 1, Chairman Waxman wrote to Administrator Dudley again and explained:

There are two options available to OMB if you wish to cooperate voluntarily with the Committee's request. One is to provide the responsive documents to the Committee by the close of business on April 7, 2008. The other is to bring the responsive documents to the Committee offices for a staff review, the purpose of which would be to assess whether the documents are relevant to the Committee's investigation and need to be produced. If OMB would prefer this alternative approach, then I ask that you provide a mutually agreeable schedule for the staff review by close of business on April 7, 2008.⁶³

On April 7, Administrator Dudley did not provide any additional documents. OMB staff informed Committee staff that she would provide some additional documents on April 11.⁶⁴

At a meeting between Committee staff and OMB staff on April 11, some additional documents were produced to the Committee. However, despite a hearing being scheduled for April 24, OMB staff would not commit to a schedule for producing the remaining documents. Also, OMB staff stated that there would not be a commitment to producing internal OMB communications.⁶⁵

On April 16, Chairman Waxman issued a subpoena to Administrator Dudley requiring production of the responsive documents by 5 p.m. on April 18. On April 18, she provided some additional documents and OMB counsel objected to the subpoena on grounds including its scope.⁶⁶ OMB counsel also requested further discussion on the matter, and in response to this request, Committee staff met repeatedly with OMB staff and White House counsel. As an accommodation to Administrator Dudley, the Committee conducted a staff level review of approximately 600 pages of documents, and as a result of this review, the Committee narrowed the scope of the document request.

⁶² *Id.*

⁶³ Letter from Chairman Henry A. Waxman to Susan Dudley, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget (Apr. 1, 2008).

⁶⁴ Phone conversation between Oversight and Government Reform Committee staff and OMB staff (Apr. 7, 2008).

⁶⁵ Meeting between Oversight and Government Reform Committee staff and OMB staff (Apr. 11, 2008).

⁶⁶ Letter from Jeffrey A. Rosen, General Counsel, Office of Management and Budget, to Chairman Henry A. Waxman (Apr. 18, 2008).

In total, Administrator Dudley provided approximately 6,800 pages of documents to the Committee, including approximately 5,500 pages that were not otherwise publicly available. These documents have provided the Committee with insight about the communications between the agency and the White House. But Administrator Dudley has in effect drawn a curtain across what happened inside the White House.

On April 25, OMB staff and White House counsel informed the Committee that she continued to withhold approximately 1,900 pages of responsive documents.⁶⁷ Approximately 275 pages of responsive documents are communications between the Office of Information and Regulatory Affairs (OIRA) and other White House officials outside of OMB.⁶⁸ The remaining 1,625 pages of documents relate to internal OIRA communications about EPA's revised ozone standards.⁶⁹ These documents have been completely withheld from the Committee with no assertion of executive privilege.

On May 16, Chairman Waxman wrote to Administrator Dudley again, stating:

[T]he Committee has not been provided sufficient access to the information to understand why the President rejected the recommendations of EPA Administrator Stephen Johnson. The Clean Air Act specifies the factors that may be permissibly considered in setting air quality standards and those that may not. The record before the Committee does not provide enough insight into the deliberations inside the White House to assess whether the President and other White House officials acted in compliance with the requirements of the law.⁷⁰

Chairman Waxman also noted that Administrator Dudley would be testifying before the Committee on May 20, and advised her:

Unless the President asserts a valid claim of executive privilege with respect to the documents being withheld by OMB, you will be expected to personally bring the documents to the hearing. The Committee's subpoena was directed to you and you will be in defiance of the subpoena if you appear at the hearing without the documents.⁷¹

At the May 20 hearing, Administrator Dudley did not produce the remaining documents, nor did the President assert executive privilege.⁷²

⁶⁷ Meeting between Oversight and Government Reform Committee staff, OMB staff and White House counsel (Apr. 25, 2008).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Letter from Chairman Henry A. Waxman to OIRA Administrator Susan E. Dudley (May 16, 2008).

⁷¹ *Id.*

⁷² House Oversight and Government Reform Committee, *Hearing on EPA's New Ozone Standards*, 110th Cong. (May 20, 2008).

On June 13, Chairman Waxman wrote to Administrator Dudley to inform her that “unless the documents are provided to the Committee or a valid assertion of executive privilege is made, the Committee will meet on June 20 to consider a resolution citing you in contempt.”⁷³ On June 18, OMB requested that the Committee not proceed with a resolution of contempt, but did not produce any additional documents and did not indicate that any assertion of executive privilege had been made.⁷⁴ Chairman Waxman responded the following day, urging Administrator Dudley to reconsider her position and to comply with the duly issued subpoena.⁷⁵

III. AUTHORITY AND PURPOSE

The Committee on Oversight and Government Reform is a standing committee of the House of Representatives, duly established pursuant to the rules of the House of Representatives, which are adopted pursuant to the Rulemaking Clause of the Constitution.⁷⁶ House Rule X grants to the Committee broad oversight jurisdiction, including authority to “conduct investigations of any matter without regard to clause 1, 2, 3, or this clause [of House Rule X] conferring jurisdiction over the matter to another standing committee.”⁷⁷ The rules direct the Committee to make available “the findings and recommendations of the committee ... to any other standing committee having jurisdiction over the matter involved.”⁷⁸

House Rule XI specifically authorizes the Committee to “require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary.”⁷⁹ The rule also provides that the “power to authorize and issue subpoenas” may be delegated to the Committee chairman.⁸⁰ The subpoenas discussed in this report were issued pursuant to this authority.

The Committee’s investigation into actions by the Administrator of the Environmental Protection Agency and the involvement of the White House in denying California’s petition to regulate greenhouse gases from motor vehicles and in issuing revised national ambient air

⁷³ Letter from Chairman Henry A. Waxman to OIRA Administrator Susan E. Dudley (June 13, 2008).

⁷⁴ Letter from Jeffrey A. Rosen, General Counsel, Office of Management and Budget, to Chairman Henry A. Waxman (June 18, 2008).

⁷⁵ Letter from Chairman Henry A. Waxman to OIRA Administrator Susan E. Dudley (June 19, 2008).

⁷⁶ U.S. Const., art. I, § 5, clause 2.

⁷⁷ House Rule X, clause (4)(c).

⁷⁸ *Id.*

⁷⁹ House Rule XI, clause (2)(m)(1)(B).

⁸⁰ House Rules XI, clause 2(m)(3)(A)(I).

quality standards for ozone is being undertaken pursuant to the authority delegated to the Committee under House Rule X as described above.

The oversight and legislative purposes of the investigations are (1) to examine and expose any possible malfeasance, abuse of authority, or violation of existing law on the part of the executive branch with regard to the denial of the California petition and the issuance of the revised ozone standard and (2) based on the results of the investigation, to assess whether the conduct uncovered may warrant additions or modifications to federal law and to make appropriate legislative recommendations.