

SELECT COMMITTEE ON ENERGY INDEPENDENCE
AND GLOBAL WARMING,
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TELEPHONIC INTERVIEW OF: JASON K. BURNETT

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Appearances:

For SELECT COMMITTEE ON ENERGY INDEPENDENCE AND
GLOBAL WARMING

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(None)

1 discuss some of the discussion within EPA and the
2 administration more generally with regard to the potential
3 for regulating stationary source emissions of greenhouse
4 gases under the Clean Air Act after the Massachusetts v. EPA
5 decision in April of 2007.

6 So I just wanted to start by asking, just to give
7 us a little bit of context, can you just describe your sort
8 of position and role within the agency during the period of
9 the matters that we're going to be discussing today?

10 A Sure. The Administrator of EPA, Administrator
11 Steve Johnson, asked for me to return to the agency in June
12 of -- early June of 2007 in order to help him lead the effort
13 to respond to the Massachusetts v. EPA Supreme Court
14 decision. So I started in my position as associate deputy
15 administrator in early June 2007.

16 And my general portfolio was climate and energy,
17 although by far my main focus was developing a response and
18 coordinating the development of a response to the Supreme
19 Court, both within the agency as well as through the
20 interagency process.

21 Q Great. Just for my own clarification, I've seen
22 your title reported either as the deputy associate
23 administrator or as associate deputy administrator. Can you
24 just set me right on that?

25 A I have seen it both ways. My correct title is

1 associate deputy administrator.

2 Q Great. Thanks. And when did you leave that
3 position?

4 A My last day at the agency was June 9th of this
5 year.

6 Q All right. So from early June 2007 to June 9th of
7 this year. And you mentioned that you were returning to the
8 agency at Administrator Johnson's request.

9 Can you just -- again, just for context, can you
10 briefly sort of explain what your prior role at the agency
11 was?

12 A Sure. I had previously been asked to come to the
13 agency by then-Governor Leavitt, Administrator Leavitt. And
14 my role was the senior policy advisor within the Office of
15 Air and Radiation.

16 That office is the office in charge of setting air
17 quality standards and developing rules to meet those
18 standards, either at the federal level or working with
19 states. And in that position, I worked on several power
20 plant rules as well as the national air quality standard for
21 particulate matter.

22 Q And the time frame during which you had that policy
23 advisor role or senior policy advisor role to the OAR head?

24 A From 2004 to 2006. I left in the fall of 2006
25 following the decision on the fine particle national ambient

1 air quality standard.

2 Q And what motivated -- I mean, you mentioned
3 Administrator Johnson's request for you to come back on board
4 to work on the agency's response to the Massachusetts v. EPA
5 decision. What motivated you to want to come back to the
6 agency and agree to take on that work?

7 A Well, I had left the agency just a number of months
8 before, I suppose about eight months before, for two reasons.

9 The first is I was disappointed in the fine
10 particle air quality decision, both the decision process and
11 the decision itself. But also, I wanted to return to working
12 on climate. I had studied climate change economics at
13 Stanford University, and had done work prior to joining the
14 agency on climate change.

15 During my first time at EPA, the time from 2004 to
16 2006, there wasn't a lot going on within the agency on
17 policy-making for climate change. There was important work
18 being done with EnergyStar and various voluntary programs,
19 but in terms of a regulatory approach to greenhouse gases,
20 there wasn't much activity at all within the agency. So I
21 had left enough agency in part to work on climate change.

22 After the Supreme Court case of Massachusetts v.
23 EPA came down, it became clear to me and many other people
24 that, suddenly, a lot more was going to occur within the
25 agency developing regulations. And when the Administrator

1 asked if I would be willing to come back to work on that, it
2 was an honor to come help lead such an important endeavor.

3 Q Great. So, I mean, it sounds like you were fairly
4 optimistic that EPA was going to be engaged in sort of
5 proactive process to really take some steps forward on
6 regulating greenhouse gas emissions.

7 A Well, before I agreed to come back to the agency, I
8 tried to do my homework, talking with people within the
9 agency and talking with observers on the outside. And most
10 people thought that the agency was indeed moving forward with
11 regulation, and they thought that for two basic reasons.

12 One is a recognition that this administration
13 probably would want to put its mark on such an important
14 regulatory program; and that was echoed by the fact that the
15 President, that President Bush had given remarks in the
16 spring of 2007 following the Supreme Court case directing EPA
17 to work with other agencies and departments towards the first
18 federal greenhouse gas regulations for both fuels and
19 vehicles. And that was accompanied by an executive order.

20 So there were a number of reasons why I thought
21 that it was a serious undertaking, that this administration
22 did intent to respond to the Supreme Court and develop at
23 least mobile source regulations. And because of that, I
24 decided it was an important and unique opportunity to help
25 lead the effort to develop those first-ever federal

1 greenhouse gas regulations.

2 Q Thank you. So there's been a fair amount of public
3 discussion about some of the process within the agency
4 related to regulation of emissions from mobile sources as
5 well as regulation of greenhouse gas emissions from fuels for
6 on-road and non-road engines.

7 I wanted to talk today about stationary source
8 emissions. So maybe just to begin, in your role in advising
9 the Administrator on climate change and energy issues, and in
10 responding to the Massachusetts v. EPA decision, were you
11 involved in exploration or discussions of whether stationary
12 sources of greenhouse gases such as power plants, refineries,
13 or other sources could or should be effectively regulated
14 under the Clean Air Act?

15 A Yes.

16 Q And can you describe I guess the nature of EPA's
17 work in this area, as well as the timing of its work on
18 potential regulations for stationary sources?

19 A Sure. The first observation to make is that while
20 the Supreme Court case in Massachusetts v. EPA was
21 specifically addressing Title II authority and Section 202,
22 which is the authority to regulate emissions from new motor
23 vehicles, virtually everyone recognizes that that decision
24 has profound consequences well beyond the mobile sources of
25 Title II.

1 And the agency recognized that early on in the
2 process and we began sorting through, first of all, how any
3 regulation of mobile sources would affect and potentially
4 limit options for stationary source regulation. And then we
5 began to look at what stationary source regulation would be
6 most appropriate.

7 That undertaking looked not only at what sources
8 may be appropriate for regulation, but what sections of Title
9 I of the Clean Air Act, the stationary source title of the
10 Clean Air Act, would be most workable for a new pollutant
11 like greenhouse gases.

12 Q If I can just interject for a moment, Jason, what
13 was the time frame during which this process that you're
14 describing began?

15 A In the summer of 2007, we began a careful look at
16 the different provisions of the Clean Air Act and how they
17 might work for greenhouse gas regulation. We began that
18 process first within the agency, but early on engaged the
19 interagency process, the other departments and agencies
20 within the administration that had an interest in stationary
21 sources and the potential for stationary source greenhouse
22 gas regulation.

23 Q I'd like to circle back with regard to that
24 interagency process. But before going there, can you just
25 talk a little bit about which types of sources were under

1 serious consideration by the agency as potential targets for
2 regulation?

3 A Well, there are several different sections of the
4 Clean Air Act that could potentially apply. Let me talk
5 about two in particular. The first is the PSD program, the
6 prevention of significant deterioration program within the
7 new source review program. And that part of the Clean Air
8 Act will be triggered immediately upon greenhouse gases
9 becoming a regulated pollutant.

10 And the statutory thresholds for regulation are
11 quite low and could potentially bring in a very large number
12 of sources, ranging from large sources like power plants and
13 refineries and factories, but also to much smaller sources.
14 And so we were working through different options for making
15 that program work as well as it could, given that it clearly
16 was not designed to regulate a pollutant like greenhouse
17 gases or CO₂.

18 The other focus of our work was determining what
19 section that would not be automatically triggered but would
20 eventually be triggered because of the Supreme Court
21 decision. And there was a choice between three basic
22 sections of the Clean Air Act, the Section 108/109, which is
23 the national ambient air quality standards; Section 111,
24 which is the new source performance standards, and existing
25 sources can also be regulated under Section 111; and

1 Section 112, which is the hazardous air pollutant section.

2 Most people thought that Section 111 afforded the
3 most flexibility both in terms of what sources were regulated
4 and the regulatory design of any program. We were focused on
5 the larger sources for a couple reasons. There were several
6 court cases or court deadlines that were going to compel
7 action for some sources.

8 Petroleum refineries, Portland cement, utility and
9 industrial boilers in particular had court cases or court
10 deadlines. But we were looking at some sources beyond those
11 as possibly appropriate to be subject to regulation under
12 Section 111.

13 Q And were there other source categories in addition
14 to the three that you mentioned, petroleum refineries,
15 Portland cement manufacturing, and utility and industrial
16 boilers?

17 A There are numerous sources that are already listed
18 under Section 111. So if the agency were to decide to move
19 down a 111 pathway, the agency would have to determine how
20 many of those sources and what sequence to pursue regulation
21 for those sources.

22 One source that was of interest was large landfills
23 because it was believed that greenhouse gas emission
24 reductions could be achieved very cost-effectively from that
25 source category. But we were looking at a range of source

1 categories that are already listed under Section 111.

2 Q Can you talk a little bit about the agency's
3 internal process for considering potential regulations for
4 these various source categories? I think we're interested in
5 things like, you know, an approximate number of meetings or
6 other interactions within the agency; whether, you know,
7 those meetings at times included senior-level career staff or
8 political appointees. And can you paint a picture for what
9 that process looked like?

10 A Section 111 is administered out of the Office of
11 Air Quality, Planning, and Standards, which is based in
12 Research Triangle Park in North Carolina. The basic process
13 that we had was to ask the staff in OAQPS, along with the
14 lawyers in the Office of General Counsel, to develop options
15 for the Administrator's consideration.

16 And those options were presented to -- those option
17 briefings were developed within the Office of Air and
18 Radiation, and I was also involved in overseeing the
19 development of those briefings for the Administrator.

20 Ultimately, the Administrator was briefed on the
21 options, and --

22 Q Jason?

23 A Yes.

24 Q Sorry, I didn't know if you paused or if we lost
25 connection with you.

1 A I had simply paused. He would often have follow-on
2 questions that came out of a given briefing that would lead
3 to a follow-up briefing.

4 Q And can you describe -- so in addition to the OAQPS
5 staff in Research Triangle Park that was tasked with
6 developing the options for various stationary source
7 categories, what was the nature of the sort of -- who all was
8 involved in the process within the Administrator's office or,
9 you know, at the level of senior appointees or career
10 officials within the Office of Air and Radiation, or
11 elsewhere in the agency if appropriate?

12 A Formulating a response to the Massachusetts v. EPA
13 Supreme Court case was the highest priority for the agency,
14 for the Administrator, during this period of time. And these
15 briefings received very high level attention across the
16 agency, across the relevant offices and the senior political
17 and career leadership.

18 That included the heads of the policy office, the
19 air office, the general counsel's office, and others
20 within -- myself and others within the Administrator's
21 office.

22 Q Can you describe what some of the EPA staff's
23 conclusions were regarding the feasibility and
24 appropriateness of going forward with regulation of
25 greenhouse gas emissions from various stationary source

1 categories?

2 A Well, part of the approach that we took was, first
3 of all, recognizing that regulation would be required under
4 the Clean Air Act unless Congress passes new legislation that
5 supersedes or replaces the Clean Air Act authority.

6 So we weren't so much asking ourselves whether
7 regulation would be appropriate, but how regulation could
8 best be developed, given that it was required by the Clean
9 Air Act and the Supreme Court's interpretation of the Clean
10 Air Act.

11 Q So what were some of the agency staff's conclusions
12 with regard to that specific question? Were there
13 recommendations to proactively go forward with specific
14 proposed regulations, or what other recommendations were
15 there?

16 A Well, the general approach that was recommended not
17 only by career staff but by many of us was to attempt to
18 channel regulation into the sections of the Clean Air Act
19 that had the most flexibility and therefore could be most --
20 could be adapted to regulation of a new pollutant like
21 greenhouse gases.

22 Most everybody believed that Section 111 was the
23 most flexible and the most appropriate for greenhouse gas
24 regulation. And the question was: Could regulation be
25 channeled to Section 111, and could regulation under 111 be

1 used as one of the justifications for not moving forward with
2 a national ambient air quality standard for CO₂ or greenhouse
3 gases generally.

4 Q And what were the conclusions with regard to those
5 questions?

6 A Well, the basic conclusion was that rolling off the
7 national ambient air quality standard for CO₂ had challenges,
8 had legal challenges associated with it, but that the Office
9 of General Counsel believed that they could defend such a
10 position provided that we could point to other authority that
11 was used to accomplish basically the same result.

12 And so the belief was that by moving forward with
13 regulation under 111, we could argue that it was not
14 appropriate to move forward with the national ambient air
15 quality standard for CO₂ or greenhouse gases. And so in this
16 way, by moving forward with regulation under 111, we could
17 channel regulation away from Section 108 and 109, the
18 national ambient air quality standards.

19 Q And recognizing that you're not an attorney and
20 weren't representing the Office of General Counsel here,
21 what was the legal argument for the proposition that the
22 Administrator wouldn't be inexorably required to go forward
23 with a national ambient air quality standard?

24 A Well, you are correct to observe that I am not an
25 attorney, so this is simply my best articulation of the

1 advice that I received and others in the Administrator's
2 office received.

3 There are three listing criteria for national --
4 for new criteria pollutants, for new NAAQS pollutants. The
5 first is the public endangerment test. It's quite similar to
6 the test for Section 202, the section at issue in the Supreme
7 Court case.

8 And everyone believed that that first criteria was
9 clearly met. The public is endangered by greenhouse gases,
10 and so there was no way to argue that the Administrator would
11 not list greenhouse gases as a NAAQS pollutant based on the
12 first criteria.

13 The second criteria is that the pollutant comes
14 from numerous and diverse sources. For CO₂ and greenhouse
15 gases, that's also clearly the case, and so the second
16 criteria is also met.

17 That left us with the third criteria. And I have
18 to apologize, I do not have the Clean Air Act before me. But
19 the third criteria basically specifies that it is for
20 pollutants for which the Administrator intends to issue air
21 quality criteria, in other words, for which the Administrator
22 intends to move forward with the NAAQS -- for establishing a
23 NAAQS.

24 And the belief was that we could argue that the
25 Administrator did not intend to move forward with

1 establishing air quality criteria on the grounds that there
2 were other ways of addressing the same air pollutants,
3 namely, Section 111.

4 Q And so the Office of General Counsel advised the
5 Administrator that a decision to go forward with regulation
6 under Section 111, but not under Sections 108 and 109, could
7 be defended on the basis that the Administrator -- could
8 successfully be defended on the basis that the Administrator
9 had discretion not to go forward with a NAAQS if regulations
10 were being put forward under Section 111?

11 A That's basically correct. There is clearly legal
12 risk associated with that position. It's a similar position
13 to the position the agency took, first arguing not to lift
14 lead as a NAAQS, and the agency lost several decades ago.

15 There are reasons why both the fact patterns are
16 different here and the standard -- as I understand it, the
17 standard for judicial review has changed post-Chevron.

18 But I don't want to say that the Office of General
19 Counsel expressed the view that that position was not without
20 some legal risk.

21 Q One of the primary objections that's been stated to
22 moving forward with any regulation under the Clean Air Act is
23 the one that you mentioned before, the effects that would be
24 triggered for the prevention of significant deterioration or
25 PSD program.

1 What recommendations did EPA staff make with regard
2 to how those effects would be avoided or mitigated if the
3 agency went forward with stationary source regulations, for
4 example, under Section 111?

5 A Three different options, and all three could be
6 pursued in parallel. The first was that this is an area
7 where the agency and the regulatory program would clearly
8 benefit from at least a targeted legislative fix.

9 Most greenhouse gas regulations that are pursued in
10 states or other countries focus their efforts on sources that
11 emit quite a bit more CO₂ than 100 tons or 250 tons, the
12 thresholds for the PSD program. And so there was a believe
13 that many groups would be open to the prospects of raising
14 those thresholds through a legislative fix.

15 Short of a legislative fix, two other options
16 remained. The first was to try to make an argument that for
17 greenhouse gases and CO₂ in particular, the gas of greatest
18 concern for the PSD program given the concentrations and
19 volumes emitted, of CO₂ emitted from many sources, to argue
20 that the threshold should be higher than 100 tons or 250
21 tons. And there were various theories that were put forward
22 for how that could be done.

23 The third option was the option of phasing in the
24 program over time, starting with the largest sources and only
25 moving down to medium-sized sources and smaller sources after

1 the program was established for the largest sources. And
2 that could be phased in over a number of years, and that
3 would dovetail well with the approach of seeking a
4 legislative fix, namely, you would start out with the sources
5 that most people who have studied greenhouse gas regulation
6 recognize probably should be covered by regulation, namely,
7 large factories, refineries, power plants, those types of
8 sources.

9 And over time, as EPA began looking at smaller and
10 smaller sources, Congress would have ample opportunity to
11 come in and establish a threshold above, well above, the 100
12 tons or 250 tons that are currently written in the Clean Air
13 Act.

14 Q Was there a preferred approach? Was one of these
15 approaches preferred by you, by the Office of General
16 Counsel, and/or other officials that were advising the
17 Administrator?

18 A All three approaches could be pursued in parallel.
19 And so I don't want to say that one was preferred over
20 another. They all could work together to make the PSD
21 program work as well as possible, given the complexities and
22 challenges created by the statute.

23 Q Did you personally have a preference about how to
24 proceed?

25 A Most everyone within the agency that I am familiar

1 with, that I interacted with, thought that it made sense to
2 move forward with a fix, a regulatory fix and a legislative
3 fix, to the PSD program.

4 The worst possible scenario for the country for a
5 sensible regulatory system is to embark upon or begin
6 implementing the PSD program without first issuing a
7 rulemaking that laid out one or multiple of these options
8 that I'm describing. So there was very much a sense that the
9 agency should be proactive in addressing the challenges posed
10 by the PSD program.

11 Q Is it fair to say that you and others within the
12 agency felt that these were not insurmountable obstacles, but
13 ones that were manageable?

14 A In the short run, we believed that there was a very
15 good case for phasing in the PSD program. We had support for
16 that from numerous groups, ranging from environmental groups
17 to industry groups, that didn't think that the PSD program
18 should be triggered for all sources, large and small alike,
19 at the outset.

20 And so we had a high degree of confidence that we
21 could move forward with a PSD program that initially was
22 focused on the largest sources, and the sources for which
23 there is greater potential for greenhouse gas reduction.

24 I think that the concerns with the PSD program
25 would come in over time as there was pressure to move to

1 smaller and smaller sources. But many of us felt that there
2 was a good enough case to be made that the agency shouldn't
3 rush to apply PSD to those smaller sources and could phase in
4 the PSD program in a measured way, allowing Congress plenty
5 of time to take action if indeed there were concerns and
6 problems with the way the agency was moving forward.

7 Q Thank you. Can you talk a little bit about -- did
8 the agency pursue -- well, let me step back a second.

9 In the technical support document for the Advanced
10 Notice of Proposed Rulemaking that the agency released on
11 July 11, 2008, there is a discussion of options for reducing
12 greenhouse gas emissions from a variety of sources, including
13 power plant and industrial boilers, petroleum refineries,
14 cement manufacturing plants, steel plants, oil and gas
15 extraction and production, landfills, and agriculture.

16 Did the agency -- was the agency during this period
17 engaged in any quantitative analysis of what the costs and
18 benefits of going forward with regulation of any or all of
19 those source categories under Section 111 would be?

20 A Yes. And we approached it from two basic angles.
21 The first is the agency and EIA, the Energy Information
22 Administration, both have very sophisticated economy-wide
23 models that estimate the potential for greenhouse gas
24 reductions from different sectors and the costs associated
25 with that.

1 And for the level of emission reductions that most
2 legislative proposals are considering, it appears that the
3 most cost-effective greenhouse gas reduction would come from
4 the stationary source sector generally, and power plants in
5 particular. The other -- sorry.

6 That general insight was gained from the analysis
7 that the agency did of three different legislative packages,
8 the McCain-Lieberman, Lieberman-Warner, and Bingaman-Spector
9 packages. And all three of those, the analysis of all three
10 of those, suggested that the largest emission reduction would
11 come from stationary sources and the power sector in
12 particular.

13 Now, Section 111 may not be appropriate, and it
14 certainly has not been used in the past, to look out over as
15 long a time horizon as the legislative packages looked, out
16 to 2050 or beyond. So we took a sector-by-sector more near
17 term approach, looking -- rather than using an economy-wide
18 model, looking at an individual sector and performing an
19 assessment of the sorts of emission reductions that could be
20 achieved, and the nature of a regulatory program that could
21 provide incentives for industry to seek those emission
22 reductions.

23 By and large, in the short run, emission reductions
24 would be achieved through improvements in efficiency.
25 Because the technology is not yet available to sequester, to

1 capture and sequester, carbon dioxide emissions, the near
2 term, the 5-10 year prospect for emission reductions from
3 coal-fired power plants, for example, would be through the
4 power plant operators taking steps to increase the efficiency
5 of those power plants.

6 And the Office of Air Quality, Planning, and
7 Standards performed technical assessments of what level of
8 emission reductions could be achieved using those rather --
9 the known technologies of improving the efficiencies of those
10 operations.

11 Q So would those assessments be reflected in
12 documents that were circulated within the agency?

13 A Those assessments were presented in briefings to
14 senior management, including the Administrator. I do not --
15 you referenced the technical support document that was
16 released on Friday. I have not completed my review of all of
17 those documents, of what was actually made public.

18 I was involved in developing that package. But I'm
19 not able to comment at this time as to the document that was
20 actually released because I have not yet completed my review
21 of those documents.

22 Q Did you or any other senior staff within the agency
23 recommend to the Administrator at any time that the agency
24 actually move forward with regulations for one or more
25 stationary source categories?

1 A The agency developed a plan for moving forward with
2 several Section 111 regulations in order to establish a -- to
3 set the precedent for what would be appropriate regulation
4 under Section 111 for a new pollutant like greenhouse gases,
5 and to channel regulation away from 112 or 108, the two other
6 sections of the Clean Air Act that we judged were less
7 appropriate for greenhouse gas regulation, as well as moving
8 forward with a regulation for addressing the PSD program.

9 And the agency had developed a plan that was
10 comprised of four or five Section 111 regulations and the PSD
11 regulation.

12 Q And can you describe the four or five Section 111
13 regulations that were contemplated, just briefly?

14 A The basic idea would be -- was to move forward with
15 Section 111 regulation for the three sectors for which the
16 agency had a court deadline or a court ruling, namely,
17 utility and industrial boilers, petroleum refineries, and
18 Portland cement.

19 There were a couple other sectors that were
20 contemplated. Landfill gas was contemplated. And then the
21 PSD program, as I have described, to phase in that program
22 over time and to create whatever other arguments were
23 available for raising the thresholds, at least temporarily.

24 Q Can you characterize how, I guess, stringent or
25 aggressive the regulations were that were contemplated for

1 the three source categories that you've mentioned?

2 A The basic idea was to establish that regulation
3 under the Clean Air Act should be tempered by a recognition
4 that the Clean Air Act poses challenges that new legislation
5 could much more easily overcome.

6 And so I would characterize the general stringency
7 of the regulations that we are contemplating as a step
8 forward, but not -- but relying on existing technologies,
9 relying on efficiency improvements, and not actively or
10 aggressively promoting new technologies.

11 I say that with the note that the plan was to
12 develop regulations that could have allowed for and would
13 have provided incentives for new technologies. But the
14 regulations could have been met with existing technologies.

15 It overall was the plan that this administration
16 would move forward with regulations that would again
17 establish that the Clean Air Act can be used but shouldn't be
18 the mechanism -- should not take the place of legislation.

19 Q Is this plan reflected in one or more documents
20 that were circulated within the agency and/or presented to
21 the Administrator?

22 A Yes. It was generally laid out in options
23 briefings to the Administrator. Now, we were all very
24 careful to not preclude options, particularly during the
25 early stages of the decision-making process. So we worked to

1 keep open the option of moving forward under different
2 sections of the Clean Air Act.

3 Ultimately, the Administrator made a judgment that
4 Section 111 was the most sensible because it allowed for
5 consideration of costs and technology and benefits and
6 energy, all factors that he thought should be considered in
7 developing greenhouse gas regulations. And that is in stark
8 contrast with either Section 112, the HAP program, or Section
9 108 and 109, the NAAQS program, which don't allow for
10 consideration of costs or technology to the degree that
11 Section 111 does.

12 And so he decided that it did make the most sense
13 to pursue a 111 strategy. And we worked through to talk with
14 others within the administration about how and when that
15 strategy should be put in place.

16 Q When did the Administrator reach that
17 determination?

18 A In the fall of 2007, it was a long decision
19 process. And so I don't want to characterize, you know, a
20 single meeting or a single briefing that was the day when a
21 decision was made.

22 But throughout the fall, it became increasingly
23 clear to many of us that this approach made the most sense,
24 and that this approach needed to be acted on quite quickly in
25 order to have something in place before the court deadline

1 for the petroleum refineries and Portland cement -- those
2 court deadlines have now come and passed, but they were for
3 spring of 2008 -- as well as moving forward in such a way
4 that this administration could both propose and finalize the
5 rule so that it could establish what it thought was the best
6 approach for dealing with this challenge.

7 Q So did the Administrator reach that decision before
8 Thanksgiving of 2007, to the best of your recollection?

9 A Yes. We were -- during most of the fall time
10 frame, we were working to educate our interagency colleagues
11 on the Clean Air Act and the reasons why Section 111 made a
12 lot more sense than the other options before the agency.

13 Q Are there any documents that were circulated within
14 the agency or in interagency communications that
15 Administrator Johnson's conclusion that this was the right
16 way to move forward?

17 A Yes. We developed pro/con papers and other
18 briefing papers that we used in interagency discussions to --
19 for Administrator Johnson to educate his counterparts. And
20 that culminated in a plan for stationary sources that we sent
21 to various individuals in the White House in the November
22 time frame.

23 My memory might not be quite right as to exactly
24 when I sent that. But it reflected a plan to move forward
25 with several Section 111 regulations and a PSD regulation,

1 along with the mobile source regulations for fuels and
2 vehicles that we had been working on throughout the second
3 half of 2007.

4 Q Can you just sort of describe what some of the
5 discussions with other agencies were and whether -- in other
6 words, can you tell us which agencies Administrator Johnson
7 or other senior officials within EPA consulted with and
8 whether they concurred in the recommendations that EPA
9 ultimately made to the White House?

10 A We had conversations with most all of the relevant
11 offices and departments within the administration -- the
12 Department of Energy, the Treasury Department, the Council of
13 Economic Advisors, the Council on Environmental Quality, OMB,
14 and others -- to first lay out the challenge posed by the
15 Supreme Court case.

16 The simple observation either this administration would
17 need to move forward with responding to the challenge or the
18 next one would need to move forward with responding to the
19 challenge. And it was the general belief of the political
20 leadership of this administration that if they moved forward
21 with the challenge, that they could put in place a sensible
22 framework. And the general feeling was that it made sense to
23 establish that mark and set that precedent for such an
24 important decision.

25 Q What was the nature of the consultations -- I mean,

1 at what level did the consultations with these other agencies
2 occur? Did Administrator Johnson speak directly with his
3 counterparts, heads of the offices that you've mentioned and
4 departments that you've mentioned, or were these discussions
5 at a staff level? And if at a staff level, how senior a
6 level?

7 A Both. I talked with my counterparts. I know that
8 others in a similar position as mine, others within EPA,
9 talked with their counterparts. And Administrator Johnson
10 talked with his counterparts, fellow cabinet-level officials.
11 This decision was and is a profound decision for the
12 country, and had the attention of individuals at the very
13 highest level.

14 Q And I understood from what you said previously that
15 at the highest level of each of these other agencies, there
16 was concurrence in the plan that was ultimately submitted to
17 the White House to move forward with regulation not only of
18 mobile sources but also with a number of categories of
19 stationary sources. Is that correct?

20 A There was a general belief that moving forward with
21 a challenge and establishing a precedent in channeling
22 regulation would serve the country better than leaving the
23 challenge to the next administration.

24 The details of how to move forward were being
25 discussed, but certainly most people that we talked to and

1 most of the cabinet-level officials that Administrator
2 Johnson talked to recognized the importance of considering
3 costs and benefits and technology and energy in developing
4 greenhouse gas regulations. And therefore, most everyone
5 gravitated towards Section 111, the section that allows
6 consideration of all of those factors.

7 Q Just so we're clear, when we're talking about, you
8 know, the general belief that other agencies had or that
9 everyone agreed on this general approach, are we talking
10 about Administrator Johnson's counterparts in these agencies,
11 including Secretary Bodman for the Department of Energy,
12 Secretary Paulson for the Department of Treasury, James
13 Connaughton for CEQ, I guess it would be Edward Lazear for
14 the Council of Economic Advisors, and so on?

15 A Yes.

16 Q And I'd like to follow up on that, actually,
17 because many of the individuals or offices that you've
18 mentioned are ones that actually wade in publicly on the ANPR
19 that was released on July 11th. So I'll just, you know, kind
20 of run down the list just to refresh my own memory and yours.

21 But these are officials that specifically wrote to express
22 their opinion that the Clean Air Act was inherently flawed
23 for purposes of regulating greenhouse gas emissions.

24 And so those included actually Administrator
25 Johnson himself, Susan Dudley of the Office of Information

1 and Regulatory Analysis at OMB, Secretary of Agriculture
2 Edward Schafer, Secretary of Commerce Carlos Gutierrez,
3 Secretary of Transportation Mary Peters, Secretary of Energy
4 Samuel Bodman, Chairman of the Council of Economic Advisors
5 Edward Lazear, Director of the Office of Science and
6 Technology Policy John Marburger, Chairman of the Council on
7 Environmental Quality James Connaughton, and Chief Counsel
8 for Advocacy for the Small Business Administration Thomas
9 Sullivan.

10 Are all of those individuals that previously in
11 this process in fall of 2007 that you describe had already
12 essentially signed off on the Administrator's plan to move
13 forward with regulation of mobile and stationary sources
14 under the Clean Air Act?

15 A Most of them were. I do not know if all of them
16 were. For example, I believe that the Secretary of
17 Agriculture is new to that position. But also, I don't know
18 that all of the other individuals that you mentioned had been
19 essentially involved as the offices that I mentioned earlier,
20 namely DOE, DOT certainly for mobile sources, Treasury, OMB,
21 CEQ, CEA.

22 Q Was the --

23 A Now, allow me to offer up this observation. Much
24 of this depends on how the question is framed. If the
25 question is framed as: Is the Clean Air Act the right tool

1 for moving forward with regulation of greenhouse gases, most
2 everybody who I have talked to would say no. I certainly
3 would say no. The Clean Air Act is not the best tool for
4 moving forward with regulation. New legislation is
5 preferable, and far preferable.

6 The debate that was occurring, however, last year
7 and early this year was not whether the Clean Air Act should
8 be used but recognizing that the Clean Air Act will be used,
9 given the law, the Supreme Court case, and the science, how
10 best to use it.

11 And those are very different questions. So when
12 the question was posed how best to use the Clean Air Act,
13 there was a general agreement that this administration wanted
14 to have its hand in answering that question, wanted to help
15 establish how best to use the Clean Air Act, particularly
16 given the profound consequences doing so would have for our
17 country.

18 Now, more recently, the debate seems to have
19 shifted, at least in the minds of certain individuals in the
20 interagency process, towards the question whether the Clean
21 Air Act should be used. But that question has already been
22 asked and answered by the Supreme Court case.

23 It is not within the executive branch's power to
24 not follow the law. It is within Congress's power to pass a
25 new, better law. But in the meantime, the question needs to

1 be asked how best to move forward with the law that is
2 currently on the books.

3 Q That makes a lot of sense, and I'd like to actually
4 circle back and get your view on some of that in just a
5 moment.

6 But before we go there, can you just -- you
7 mentioned earlier that this plan that was the subject of --
8 this EPA plan that was the subject of discussions with other
9 agencies was ultimately submitted to individuals within the
10 White House.

11 Can you share with us who those individuals were?

12 A I believe that we sent that document to Susan
13 Dudley, the administrator of the Office of Information and
14 Regulatory Affairs in OMB; James Connaughton, the chairman of
15 the Council on Environmental Quality; Amy Farrell, who at the
16 time, I believe, was working for James Connaughton, Jim
17 Connaughton; and Keith Hennessey, who works as an advisor to
18 the President.

19 Q Are there any documents of which you're aware that
20 would reflect either the other agencies -- the views of the
21 other agencies with which you consulted on the plan, or of
22 the officials or others within the White House with whom you
23 shared the plan?

24 A I don't believe there are many, if any, documents
25 that were not generated by EPA. There are not many

1 documents. I believe that there are some but not many
2 documents that were generated by others that were shared with
3 us at EPA. Again, EPA is charged with administering the
4 Clean Air Act and has the most expertise. So we were
5 generally asked to produce the documents that were used for
6 the decision process.

7 Q Can you describe any of those documents that might
8 have been generated outside of the agency relating to this
9 proposal, if you feel comfortable doing so?

10 A There were documents that referenced the stationary
11 source for [ramifications] of moving forward with mobile
12 sources. And those documents were produced at the time of
13 the decision process. The decision for how to define
14 endangerment was largely informed by the stationary source
15 consequences of that endangerment finding.

16 And others were charged with developing the
17 decision documents and decision memos for how the
18 administration would find endangerment to public health or
19 welfare.

20 Q Well, we may circle back to that if we have time.
21 But maybe it would be helpful at this point to -- well,
22 actually, before I move on, can you -- so you mentioned that
23 this plan was shared with Susan Dudley, with Jim Connaughton,
24 with Amy Farrell, and with Keith Hennessey.

25 Did the Administrator or any senior official in EPA

1 receive any kind of communication back or have any meetings
2 with those officials in which they expressed their views or
3 recommendations on whether and how to move forward with
4 stationary source regulations?

5 A We had numerous meetings hosted by OMB that talked
6 about how to move forward generally. And the document that I
7 sent to the individuals at CEQ and OMB and the White House
8 was sent at their request for more specificity as to how EPA
9 would move forward with these stationary source regulations.

10 Q And did any of those officials or anybody else from
11 the White House ever communicate any approval of that
12 approach?

13 A There generally was approval of the approach of
14 moving forward with Section 111 regulation, and a regulation
15 that would work to address the challenges posed by the PSD
16 program. The plan was to propose those regulations in the
17 spring of 2008 and finalize them in the fall of 2008.
18 However, that plan was shelved when the Energy Independence
19 and Security Act of 2007 was passed and signed into law on
20 December 19th.

21 Q So can you explain how that change occurred when
22 the Energy Independence and Security Act of 2007 was passed
23 and what or who caused the change with regard to this plan?

24 A Prior to the passage of the Energy Bill, there were
25 two basic reasons why the administration wanted to move

1 forward with a response to the Supreme Court. The first was
2 they felt that they would -- they wanted to be the ones to
3 establish the important policy decisions for how the Clean
4 Air Act would be used.

5 And the second was they wanted to have a way to
6 move forward with the President's 20 and 10 goal of
7 increasing fuel economy of vehicles and increasing the
8 quantity of renewable and alternative transportation fuels.

9 With the passage of the Energy Bill, the
10 administration largely accomplished the President's Twenty in
11 Ten goal, and the remaining -- and in so doing, eliminated
12 one of the two reasons for moving forward. The remaining
13 reason for moving forward was to help establish the
14 precedent, but ultimately that was not found to be a
15 compelling enough reason for this administration to take on
16 such a profound challenge.

17 Q Who is the "they" that were talking about who held
18 these views and, you know, whose views changed?

19 A This decision was made at the highest level within
20 the administration. The concern was that while moving
21 forward with the response would enable a more sensible
22 response to the Supreme Court than if the administration left
23 it to the courts or the next administration, the concern was
24 over the President's legacy and not wanting to have an
25 increase in regulation, particularly regulation under the

1 Clean Air Act, to be attributed to this administration and to
2 President Bush's legacy.

3 Q Can you share with us who the main proponents of
4 that view were?

5 A Throughout 2007, after the executive order and the
6 President's direction to move forward, there were individuals
7 and offices that were looking for ways to avoid responding to
8 the Supreme Court and hoping for either a legislative fix,
9 new legislation, or some other way of moving forward with a
10 response but limiting it to just the motor vehicles for which
11 President Bush had articulated a goal of increasing fuel
12 economy and therefore reducing greenhouse gas emissions.

13 That effort was headed by individuals in the Office of
14 the Vice President, the Office of Management and Budget, and
15 the Council on Environmental Quality.

16 Ultimately, the decision to move forward was made
17 by the President's chief of staff, the Office of the Chief of
18 Staff, and Administrator Johnson was given the go-ahead to
19 move forward with an endangerment finding. That was the
20 finding that EPA developed and we sent to the Office of
21 Management and Budget on December 5th of last year.

22 The chief of staff's office then appears to have
23 changed its mind, given that the Energy Bill in early
24 December looked like it was moving well through Congress.
25 And certainly after the passage of the Energy Bill, there was

1 a lot more pressure to simply leave a response to the Supreme
2 Court to the next administration.

3 Q Who within the Office of the President's Chief of
4 Staff gave Administrator Johnson the go-ahead for the
5 endangerment finding? Was it the chief of staff himself or
6 someone else?

7 A Most of the interaction that we had we with Joel
8 Kaplan, the deputy chief of staff for policy. And we clearly
9 had the go-ahead from the chief of staff's office to move
10 forward with an endangerment finding up until December 5th,
11 when we received a phone call from the White House asking for
12 us to retract the endangerment finding that we had sent.

13 Q And from whom did that phone call come?

14 A The initial phone call came from -- was between a
15 lawyer at the White House to our general counsel. But it was
16 followed by a call from Joel Kaplan to Administrator Johnson
17 asking for the agency to recall the endangerment finding that
18 had just moments ago been sent.

19 Q When was it that Joel Kaplan and the President's
20 chief of staff's office gave Administrator Johnson the go-
21 ahead to make the endangerment finding?

22 A I don't remember the precise date, but it was in
23 the early to mid November time frame, if my memory serves me
24 well.

25 Q And did Administrator Johnson refuse the request

1 from Joel Kaplan to retract the endangerment finding?

2 A Yes. We explained -- the first request was to send
3 a follow-up note stating that the finding had been sent in
4 error. And we pointed out that not only had we not sent it
5 in error, but in fact it was consistent with the decision
6 that was agreed to by Mr. Kaplan himself and therefore could
7 not -- we could not honestly say that it had been sent in
8 error because it had not been.

9 The request then was to send a note saying that the
10 finding should not be reviewed because the Energy Bill moving
11 through Congress could make the finding moot by amending the
12 Clean Air Act.

13 Q And what was Administrator Johnson's response to
14 that second request?

15 A We explained that if Congress did amend the Clean
16 Air Act, then it would -- in such a way as to make the
17 Supreme Court case moot, then it would be appropriate for us
18 to no longer move forward with a response. But until that
19 occurred, we thought it was best to move forward, and
20 Administrator Johnson thought it was best to move forward,
21 with continuing to respond to the Supreme Court.

22 Q So Administrator Johnson didn't agree that there
23 was a rationale for halting EPA's work on the endangerment
24 finding and the associated regulatory efforts following the
25 passage of the Energy Independence and Security Act?

1 A Well, the day in question was before the Energy
2 Independence and Security Act passed.

3 Q Yeah. Thank you for the clarification.

4 A We at that point thought that it made sense to move
5 forward because we didn't know whether or not the Energy
6 Independence and Security Act would pass, and if so, whether
7 there would be a provision in there that made the Supreme
8 Court case moot.

9 In fact, the law that did pass left the relevant
10 section of the Clean Air Act unchanged, and therefore a
11 response is still required and was still required. And it
12 was the agency's judgment and Administrator Johnson's
13 judgment that the country was best served by confronting the
14 challenge and moving forward with a response.

15 Q So did he communicate that view, that the agency
16 should and indeed was required to move forward with its
17 regulatory efforts even after the passage of the Energy
18 Independence and Security Act? Did he communicate that view
19 to the White House?

20 A Yes.

21 Q And can you describe the nature and timing of that
22 communication?

23 A I will simply say that it was in the first few
24 months of 2008. There was very high level discussion and
25 back and forth between EPA and the White House as to whether

1 the agency should move forward or whether the agency should
2 leave the decision to the next administration.

3 It was the agency's view and Administrator
4 Johnson's view that the challenge was best addressed head-on
5 by this administration. But ultimately, the decision was to
6 issue an Advance Notice of Proposed Rulemaking in order to
7 leave the important regulatory decisions to the next
8 administration.

9 Q And was Administrator Johnson directed by the White
10 House to pursue the ANPR approach in lieu of moving forward
11 with actual proposed regulations as he had proposed or as he
12 had advocated?

13 A I want to be careful about the word "directed." It
14 became abundantly clear that the White House wanted to -- did
15 not want to move forward with a response, and wanted to move
16 forward with an advance notice that would point out the
17 complexities and the interconnections. And ultimately,
18 Administrator Johnson agreed to go along with that White
19 House decision.

20 Q How did the White House's view on this become
21 abundantly clear?

22 A We were told to move forward with an ANPR, and were
23 told how the ANPR should be structured, and that the ANPR
24 should not establish a path forward or a framework for
25 regulation, but should emphasize the complexity of the

1 challenge.

2 And we worked back and forth on how to characterize
3 the task of the ANPR because we wanted to ensure that
4 document was ultimately productive and helpful to the agency
5 and the next administration, and through seeking public
6 comment on the complexity and on the different options that
7 the agency must confront.

8 Q Who at the White House communicated to
9 Administrator Johnson or to others in the agency that the
10 White House did not want to go forward with a regulatory
11 proposal and that an ANPR would be preferable?

12 A We worked with the same individuals that had been
13 involved throughout the process. And it was clear that the
14 desire to move forward with an ANPR was coming from the White
15 House at the very highest levels.

16 Q So when you mention the same individuals involved
17 throughout the process, do you mean, among others, Joel
18 Kaplan, the deputy chief of staff?

19 A Yes. He wanted to avoid responding, and thought
20 the best strategy -- as I understand, his strategy was to
21 leave these decisions so that they would be on the record on
22 the legacy of the next president, not of President Bush.

23 Q Were there any communications at a higher level
24 than Mr. Kaplan?

25 A I'll simply leave it that the agency and

1 Administrator Johnson made it very clear that -- what our
2 views were, that the country would be best served by moving
3 forward with a response. At that point in the first few
4 months of 2008, it no longer was possible to move forward
5 with both stationary source regulations other than the PSD
6 regulation and the mobile source regulations.

7 So we had scaled back what we were proposing to
8 do to simply responding to the Supreme Court, issuing an
9 endangerment finding, and issuing the mobile source
10 regulations under Section 202 and the fuel regulations under
11 211.

12 Q Can you give an idea of when the time frame was
13 that Mr. Kaplan and others in the White House communicated to
14 Administrator Johnson or to senior EPA officials that the
15 White House no longer wanted to move forward with a
16 regulatory proposal?

17 A We were advancing the plan to move forward in
18 January and early February of 2008. Ultimately, the decision
19 not to move forward was made public in a letter -- letters
20 that Administrator Johnson sent to the Hill, to members of
21 Congress, articulating the ANPR option and decision.

22 Q When was the decision that's reflected in that
23 letter to the Hill actually made by Administrator Johnson?

24 A It was made by the administration in the late
25 February time frame.

1 Q Are there any documents reflecting that decision
2 that you're aware of?

3 A There are -- there are documents reflecting the
4 decision process that ultimately led to a decision to move
5 forward with the ANPR.

6 Q And when you said that the administration reached
7 that decision in February, I believe you said, do you mean
8 the President's chief of staff or deputy chief of staff made
9 that decision in that time frame?

10 A Administrator Johnson had decided it was best to
11 move forward, and he was told that that was not the path that
12 this administration would be taking.

13 Q And was he told by the chief of staff's office?

14 A Yes.

15 Q Thanks. Let me turn actually to what -- briefly,
16 at least, to what some of the consequences of that decision
17 not to move forward with an actual regulatory proposal were.
18 As I understand it, there were a number of other stationary
19 source rulemakings that were pending before the agency,
20 including the petroleum refinery new source performance
21 standard rule and the Portland cement manufacturing new
22 source performance standard rule. These were revisions to
23 existing standards.

24 The agency took the position that notwithstanding
25 the Massachusetts v. EPA decision, it wasn't required to

1 include controls on greenhouse gas emissions in those rules.

2 Can you share with us any -- what the nature of the
3 discussion around that decision was and whether the Office of
4 General Counsel and other senior agency officials thought
5 that it was appropriate or legally defensible for the agency
6 refuse to include greenhouse gas controls in those rules?

7 A In the fall of 2007 time frame, we were
8 recommending that the agency should move forward with NSPS
9 regulations for greenhouse gases in order to keep that issue
10 out of the courts and in order to channel regulation to
11 Section 111, again, the section that could best be tailored
12 to address greenhouse gases.

13 The concern was that the agency would not be able
14 to successfully defend a decision not to move forward with
15 greenhouse gas emission controls in an NSPS reviewing the
16 Supreme Court's decision that greenhouse gas are air
17 pollutants under the definition of the Clean Air Act.

18 Ultimately, the fallback position of the agency
19 was to use the Advance Notice of Proposed Rulemaking as the
20 justification for not moving forward at this time for
21 greenhouse gas regulations. But I think that it is clear
22 to many that those -- that such regulations will be coming
23 out of the agency after the close of the comment period of
24 the ANPR and whatever policy process the next administration
25 engages in.

1 Q And did you believe that the ANPR provided a
2 sufficient justification for not proposing controls,
3 greenhouse gas controls, either in these rulemakings or that
4 that would not -- let me rephrase. I apologize.

5 Did you believe that the agency could legally
6 defend, not including controls for these sources, relying on
7 the justification of the ANPR?

8 A That's a legal judgment and a question that the
9 courts will be asked to address.

10 Q Did they --

11 A It certainly will be a challenge for the agency to
12 defend a decision not to move forward with controls for
13 greenhouse gases, and the agency would be in a more
14 defensible position if it could point to a plan that said
15 these issues are very complicated.

16 And the Advance Notice of Proposed Rulemaking
17 really does make it clear that there are both profound
18 ramifications of any decision and many interconnections that
19 need to be thought through. So we'll have to wait and see
20 whether the courts accept the agency's rationale to first
21 complete that advance notice process before actually moving
22 forward.

23 Q So were you present at any briefings that the
24 Administrator received from agency officials on the
25 litigation risk, you know, or policy consequences associated

1 with refusing to include greenhouse gas controls in these
2 rules?

3 A Yes. Again, there were a couple reasons that we
4 thought it made sense to move forward with Section 111
5 greenhouse gas regulations. One certainly was the legal risk
6 that the agency faces in issuing an NSPS but not issuing
7 controls for pollutants that are clearly omitted from those
8 same source categories.

9 Q Are there any documents of which you're aware,
10 memoranda, white papers, or other documents, reflecting
11 concerns about the defensibility of not including greenhouse
12 gas controls in those regulations?

13 A Yes. I believe there are briefing papers on
14 different options for moving forward with the new source
15 performance standards that the agency has finalized in the
16 case of petroleum refineries and proposed in the case of
17 Portland cement.

18 And there were several options laid out for the
19 Administrator's consideration, along with the associated
20 legal arguments that would need to be made to support any of
21 those options. I think it was made clear that the option of
22 not moving forward with a regulation presented a legal
23 challenge that the agency could and would defend, but that it
24 would be harder to defend than taking steps towards a
25 regulation, whether that be a proposed rule or a direct final

1 rule in the case of the petroleum refineries.

2 Q Thanks. Thanks for explaining that.

3 Mr. Beauvais. I just was reminded, though, we've been
4 going for quite a while here. This has been fascinating, and
5 had lost track of the time. We've been going for two hours.

6 We would like to ask a few more questions of you, if
7 possible, but I wanted to give you a chance to take a
8 five-minute break, if you'd like.

9 Mr. Burnett. Yes. Why don't we take a five-minute
10 break. And if you can call me back at this number?

11 Mr. Beauvais. Great. That should work just fine.
12 Thanks very much, Jason. We'll call you back in five minutes
13 or so.

14 [Recess.]

15 Mr. Beauvais. All right. This is still again Jason.

16 BY MR. BEAUVAIS:

17 Q I thought maybe we're at a kind of good point in
18 the progression of what you've shared with us to talk a
19 little bit about the process leading up to the release of the
20 ANPR on July 11, 2008.

21 So there had been a May 30, 2008 version of the
22 ANPR that was obtained by a number of individuals outside of
23 the agency. And I wanted to ask whether that draft, that
24 May 30th draft, was sent to OMB or not.

25 A I do not believe that it was. We submitted a draft

1 for informal review on May 23rd, I believe. It is possible
2 that somebody sent a May 30th draft to individuals either
3 at -- within the executive branch outside of EPA. But I
4 didn't authorize a version going out after the May 23rd
5 version.

6 Q What does that mean when you say that it was
7 informally shared with OMB?

8 A It means simply that we gave them a version before
9 we submitted it for the formal review that triggers both the
10 Clean Air Act public docketing and Executive Order 12866. It
11 is, in essence, a courtesy copy allowing them a preview of
12 the document that we were working on and getting ready to
13 submit formally.

14 Q And did OMB then sort of communicate views or
15 provide direction on what shape the ANPR should take after
16 receiving that -- when it received that informal version or
17 that informal transmittal?

18 A Yes, they did. They were concerned about the
19 length of the document and, generally, the tone of the
20 document in particular sections, concerned that it would
21 leave a reader with the impression that the Clean Air Act was
22 not -- that the Clean Air Act didn't have challenges when in
23 fact I think we all believed that the Clean Air Act is not
24 the ideal authority to be using to address greenhouse gas
25 emissions.

1 Q Did OMB provide direction as to how to address
2 those concerns?

3 A I had worked to establish a principle that EPA was
4 not taking direction from OMB during the informal review
5 period because I didn't want to allow for the informal review
6 to be the same as the familiar review, simply without the
7 public transparency.

8 So the general guidance or direction that I
9 provided to EPA staff, the team that we had working on the
10 ANPR and the team that was listening to and considering OMB's
11 comments was to accept comments and observations and
12 suggestions that, in EPA's judgment, made the document
13 stronger.

14 And so we worked to that end, and I believe that
15 the draft did become stronger from May 23rd through June 9th,
16 my last day at the agency. And the last draft that I saw was
17 a draft on that day. It is my understanding that that
18 process continued through to the time when a draft was
19 formally submitted to OMB later in June.

20 Q What were some of the changes that were made during
21 the period during which you were involved, the May 23rd to
22 June 9th period?

23 A Just an example would be there was a concern that
24 the reader may come away with the feeling that the NAAQS
25 program could work well for greenhouse gases, and that the

1 agency was in fact backing such a program. That was not the
2 case. The agency and the office that was working, that works
3 to set and implement the NAAQS, thought that there were
4 significant challenges with the NAAQS. And so we worked to
5 change primarily the tone of that section so that it made it
6 clear that the agency was not advocating a NAAQS for
7 greenhouse gases.

8 Q When the ANPR was ultimately released on July 11,
9 2008, there was an introductory statement from Administrator
10 Johnson and letters from a number of cabinet agency heads as
11 well as heads of White House offices.

12 And I wanted ask you, first, just prior to asking
13 you about some of those statements, had the agency received
14 feedback on earlier drafts of the proposal, of the ANPR,
15 either the May 23rd draft or the May 30th draft that later
16 was released to some outside sources? Had you received
17 feedback on either of those drafts from other agencies?

18 A We had -- our conversations were with OMB, although
19 it was clear that OMB was relaying comments from others.

20 Q So you had no direct communications from other
21 agencies, but the communications that you were getting from
22 OMB made clear that they were sharing those drafts with other
23 agencies and were relaying those agencies' views?

24 A Yes.

25 Q Can you provide any insight as to -- well, let me

1 back up for a moment.

2 You've said that Administrator Johnson, following
3 the passage of the Energy Independence and Security Act in
4 December of 2007, continued to believe that the agency should
5 go forward with regulations under the Clean Air Act, and that
6 the passage of the December 2007 legislation hadn't changed
7 the rationale for going forward.

8 Administrator Johnson included an introductory
9 statement in the ANPR stating, among other things, that the
10 Clean Air Act was ill-suited for regulation of greenhouse
11 gases and that -- you know, essentially suggesting that it
12 wouldn't be prudent to go forward with regulation.

13 Can you provide any insights as to why his view on
14 this may have changed?

15 A The first observation is that President Bush gave a
16 speech earlier this year in which the President articulated
17 the view that the Clean Air Act should not be used. So I
18 believe that part of what the introductory material, both
19 from Administrator Johnson and from others within the
20 administration, reflect an echoing of President Bush's views
21 about the Clean Air Act.

22 The second observation is that there was always a
23 concern with moving forward with Clean Air Act regulation
24 because the Clean Air Act is not the -- was not designed to
25 address greenhouse gases, and poses a number of challenges

1 that would not be inherent in legislation specifically
2 designed for that type of pollutant.

3 And I think what we have seen is a change in
4 strategy from accepting the ramifications of the Supreme
5 Court decision and, along with that, a believe that moving
6 forward with a response would be better than leaving the
7 response to either the courts or the next administration, to
8 now a strategy of highlighting the problems with a response
9 and hoping that that will motivate Congress to pass new,
10 better legislation.

11 Q Do you think that -- I mean, you speak of these
12 communications as echoing the President's views, you know, as
13 he had expressed in that April speech from this year.

14 Do you think or are you aware of any pressure from
15 the White House or direction from the White House either to
16 Administrator Johnson or to any of the other agency or office
17 heads who included statements with the ANPR to sort of
18 reflect on the unworkability or difficulty of moving forward
19 under the Clean Air Act?

20 A No. I was as surprised as most others when I
21 learned that the agency was going to release a document that
22 contained the particular statements from others within the
23 administration articulating those sorts of views.

24 We long understood that there were concerns with
25 greenhouse gas regulation generally in some quarters, and

1 greenhouse gas regulation under the Clean Air Act certainly.

2 And we knew that parts of the ANPR were likely to be
3 significantly modified as part of the interagency review
4 process.

5 But I have not experienced a situation where there
6 is -- where differences are not worked out as part of the
7 interagency process, but rather are presented -- but rather
8 those differences are presented in a formal regulatory
9 document to be published in the Federal Register.

10 Q Do you have any idea, based on communications with
11 your former colleagues since you've left the agency or
12 otherwise, as to how this unusual approach came about?

13 A I do not. I have been hesitant to engage in many
14 conversations with my former colleagues because I don't want
15 to put them in a difficult position.

16 Q Understood. I want to in just a moment give you a
17 chance to sum up some of your reflections on the issues
18 raised by some of the matters that we've discussed. But just
19 looking over my notes, I had just a couple of quick follow-up
20 questions that I wanted to pursue with you.

21 Just recently you were talking about the change
22 in strategy within the administration from accepting the
23 implications of the Supreme Court's decision and moving
24 forward under a view that it would be better that this
25 administration shape the trajectory of regulation under the

1 Clean Air Act than leave it to the courts and the next
2 administration.

3 Earlier in our discussion, you had said that that
4 view was abandoned, essentially, because of concerns within
5 the White House that it would be -- it would reflect
6 negatively on the President's legacy to have increased
7 regulation under the Clean Air Act.

8 And you specifically mentioned that individuals
9 within the Office of the Vice President and within OMB had
10 championed the view that it would not be -- that it would
11 reflect negatively on the President's legacy, and that
12 therefore EPA shouldn't go forward with any regulation under
13 this administration.

14 I wondered if you could expand on who the principal
15 people within the administration, whether in the Office of
16 the Vice President or OMB, were seeking to block regulation
17 from going forward.

18 A My answer to that question depends on the time
19 frame. Before the passage of the Energy Bill, or at least
20 before it looked like the Energy Bill was going to move
21 through the Congress, most individuals accepted the
22 president's decision to confront the challenges of the
23 Supreme Court and move forward with regulation because that
24 would enable the administration to accomplish the President's
25 Twenty in Ten goal of reducing gas consumption.

1 After the passage of the Energy Bill, then it
2 looked to a number of individuals within the administration
3 that responding would have no longer the up side of
4 accomplishing the President's Twenty in Ten goal -- because
5 that was already accomplished -- and only the down side, from
6 their perspective, of having to grapple with the challenges
7 posed by the Clean Air Act.

8 Q And so who were the individuals who had opposed
9 regulation from the outset, even before the passage of the
10 Energy Bill became imminent?

11 A There was all along concern from the Department of
12 Transportation because responding to the Supreme Court would
13 give EPA similar authority to the authority that Department
14 of Transportation had. And there was concern about the
15 regulatory turf between EPA and the Department of
16 Transportation.

17 Within the White House, the individuals in the
18 Office of Management and Budget's general counsel's office
19 were quite concerned about giving additional authority to
20 EPA, even on the transportation side. And the Office of the
21 Vice President also was concerned, both on the transportation
22 side but more specifically on the stationary source side.

23 Q It was reported in the Washington Post recently
24 that F. Chase Hutto III, Vice President Cheney's energy
25 advisor, and Jeffrey Rosen, general counsel to OMB, both

1 played a key role in trying to block regulatory action.

2 Is that accurate? Are they some of the individuals
3 who had opposed regulatory action from the outset?

4 A Yes.

5 Q Are they the highest level officials in OMB or the
6 Office of the Vice President who had expressed opposition?

7 A Over time and after the passage of the Energy Bill,
8 the opposition to move forward came from higher up. But
9 during the interagency decision-making process, they were
10 certainly central to the arguments for either not moving
11 forward, keeping an option to not move forward, or in many
12 cases unrealistically limiting the ramifications of the
13 Supreme Court case to just cars and trucks, or at least
14 mobile sources.

15 Q Just one further question on that decision process
16 from fall of 2007 before we kind of move to wrapping up.

17 You had mentioned earlier consultations with
18 industry and environmental stakeholders and, you know, you
19 had mentioned some consultation specifically with regard to
20 a PSD rule.

21 I just wanted to ask you if you could characterize
22 which industry stakeholders had some direct involvement in
23 the agency's decision-making process about whether to go
24 forward with stationary source regulations, and what kind of
25 positions were those stakeholders taking?

1 A Well, as part of any rulemaking, certainly a
2 rulemaking of this complexity, there are numerous discussions
3 with different individuals and different groups, so I
4 can't -- I don't know all of the discussions that took place.

5 But generally, we tried to reach out, and I tried
6 to reach out, to groups on the environmental side and groups
7 on the industry side to make sure that we were benefitting
8 from a diversity of opinions and perspectives.

9 There was a general -- industry divided into
10 two basic camps, frankly, the same camps within the
11 administration, some believing that a response was inevitable
12 and it would be done more sensibly by the executive branch
13 rather than leaving decisions to the courts, and others who
14 thought that moving forward should be put off as long as
15 possible in the hopes that there would be new legislation
16 passed, or at least that regulation could be delayed.

17 Q Who were some of the leading stakeholders in each
18 of those two groups?

19 A In the -- on the side of recognizing that the
20 Supreme Court needed to be responded to, certain groups and
21 individuals representing the power sector, power plants,
22 thought that it did make sense to start moving forward.
23 Generally, the individuals representing the oil industry were
24 opposed to moving forward, and some of those individuals
25 expressed the argument that moving forward would harm

1 President Bush's legacy by having on his legacy an increase
2 in regulations.

3 Q And who were some of those individuals representing
4 the oil industry that expressed that argument?

5 A I would prefer to not go into the individual names.
6 They were individuals working for particular oil companies,
7 Exxon Mobil, as well as individuals working for trade
8 associations, American Petroleum Institute and NPRA.

9 Q Thank you. Among the groups representing
10 stakeholders in the power sector who thought that it did make
11 sense to move forward, what kind of regulatory approach or
12 strategy were those stakeholders advocating?

13 A Moving forward with Section 111 regulations that
14 would cover not only their industry but also others. And
15 they thought that it made sense to move forward with
16 Section 111 regulations, and offered to work with the Office
17 of Air Quality, Planning, and Standards to help provide
18 information and other data to help with such a regulatory
19 effort.

20 Q And who were the companies or trade groups that
21 were leaders on that side?

22 A The Edison Electric Institute is a prominent
23 example of a group that recognized that this was coming, and
24 that they at least said that they thought that their members
25 would be better served by getting out in front and actively

1 engaging rather than trying to fight what they judged to be
2 inevitable.

3 Mr. Beauvais. Thanks very much. That's extremely
4 informative.

5 That concludes the outline of what we wanted to
6 discuss with you today. But I wanted to offer you the
7 opportunity to talk as we conclude about your views on this
8 process, the workability and/or advisability of moving
9 forward with regulations under the Clean Air Act, and sort
10 of the trajectory or decision that this administration has
11 taken on that front.

12 Mr. Burnett. Well, let me start with the last. I came
13 to the agency to work on this issue with the belief that
14 actively engaging on it would -- regardless of the magnitude
15 of the challenge, would be better than leaving at the
16 challenge for another day.

17 I still think that that is the case. And it is not
18 too soon for both of the campaigns for President to start
19 thinking about how their administrations would address the
20 challenges posed by greenhouse gas regulation under the Clean
21 Air Act.

22 I don't want to sugar-coat or -- it's important to
23 emphasize that there are real challenges posed by Clean Air
24 Act regulation. But the question is how best to address
25 those challenges, now how to avoid regulation, because there

1 is no defensible way of avoiding an endangerment finding
2 unless Congress takes action.

3 That brings me to my second point. I think that
4 part of the legislative debate must be a recognition that
5 existing Clean Air Act authority not only authorizes but
6 obligates regulation of greenhouse gases, and it's not too
7 soon for the legislative debate to seriously consider what
8 parts of the Clean Air Act should be left in place and what
9 parts of the Clean Air Act should be modified or eliminated
10 as they apply to greenhouse gases when Congress works towards
11 new legislation.

12 I think that there are parts of the Clean Air Act
13 that can work quite well, and so one option is to begin
14 moving forward with those sections of the Clean Air Act and
15 take whatever progress can be made under those sections and
16 incorporate that progress in new legislation when Congress
17 does pass new climate change legislation.

18 Mr. Beauvais. Thank you, Jason. That's very helpful.
19 Is there anything further that you'd like to add expounding
20 on any of those points or other points that we haven't
21 addressed that you'd like to talk about?

22 Mr. Burnett. I think that the agency -- the EPA draft
23 of the Advance Notice of Proposed Rulemaking is a solid
24 document that lays out a number of options, the sort of
25 options that the next administration will be able to choose

1 from. And I hope that there can be a robust public
2 discussion of those options and a robust discussion in
3 Congress.

4 There are authorities that the agency can use to
5 develop a cap in trade system for greenhouse gases under
6 existing authority, probably not a system that would work as
7 well as if Congress passes new legislation.

8 But the opportunity and the challenge will be to
9 move forward with that existing authority in a way that
10 doesn't preclude a better legislative path, but in fact
11 informs and compliments the legislative debate.

12 Mr. Beauvais. Great. Well, thank you very, very much
13 for sharing your insights. Thank you for your generosity
14 with your time. I realize that we've been at this for quite
15 a while, and we really appreciate the time that you've taken
16 and your insights and how forthcoming you've been in
17 discussing these matters.

18 So with that, I think my questions conclude. I'll hand
19 over to Michal in case she has anything to say or ask in
20 conclusion.

21 Ms. Freedhoff. No. I just want to reiterate Joel's
22 thanks. It's been very, very helpful. And again, just
23 thanks for all the time. I know you've got a lot on your
24 plate right now.

25

1 Mr. Burnett. You are both welcome, and have a good
2 afternoon.

3 Ms. Freedhoff. Thanks, Jason.

4 [Whereupon, the interview was concluded at 4:51 p.m.]

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CERTIFICATE OF DEPONENT/INTERVIEWEE

I have read the foregoing 63 pages, which contain the correct transcript of the answers made by me to the questions therein recorded.

Jason K. Burnett