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Committee on Oversight and Government Reform
Darrell Issa (CA-49), Chairman



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The Truth about President Obama's Actions Against Domestic Energy Production

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Executive Summary

President Obama claimed to support an inclusive energy production strategy in his 2012 State of the Union Address, declaring, “[t]his country needs an all-out, all-of-the-above strategy that develops every available source of American energy.”¹ However, the Obama Administration’s actions do not match the President’s promises. An “all-of-the-above” energy strategy entails maximizing all available sources of domestic energy generated from traditional and renewable sources. In reality, the Administration’s policies have curtailed less expensive and easily obtainable domestic energy resources in favor of more expensive, harder to obtain energy.

President Obama and his appointees at the U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Interior (DOI) have implemented policies that hinder the production and use of oil, natural gas, and coal as energy sources. These policies include using red tape to tie up new extraction technologies, constraining the efficient movement of North American-produced oil by restricting pipelines, and waging a “war on coal” – one of the nation’s cheapest and most abundant energy sources.

This report will examine the questionable claim that the President robustly supports the use of abundant and reliable domestic, carbon-based energy reserves by detailing specific instances in which the Obama Administration has abandoned an “all-of-the-above” energy strategy by targeting oil, natural gas, and coal production with regulatory barriers.

I. President Obama's Assault on Innovative Oil and Gas Production Techniques

The Administration has imposed unreasonable and costly regulations on hydraulic fracturing, a common and inexpensive technique to produce oil and gas from deep layers of shale rock. First used in Oklahoma in 1948, recent technological advancements – notably horizontal drilling – have dramatically increased its contribution to domestic energy production.² The U.S. Energy Information Administration (EIA) reports that over the last five years, increased production from shale oil and gas has been a “game changer” for the U.S. energy outlook.³ Production from these sources has led to dramatic and unexpected economic growth. One study conducted by PricewaterhouseCoopers determined that over the next decade, increased shale gas production could create over one million jobs and deliver \$11.6 billion in annual savings to the manufacturing sector.⁴

The Obama Administration claims to support the use of hydraulic fracturing to access domestic energy reserves. In his 2012 State of the Union Address, President Obama voiced strong support for domestic natural gas production, and specifically praised “the technologies to

¹ Press Release, *Remarks by the President in State of the Union Address*, The White House, Jan. 24, 2012, available at <http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address>.

² U.S. ENERGY INFORMATION ADMINISTRATION, REVIEW OF EMERGING RESOURCES: U.S. SHALE GAS AND SHALE OIL PLAYS 4 (July 2011), available at <http://www.eia.gov/analysis/studies/usshalegas/pdf/usshaleplays.pdf>.

³ *Id.*

⁴ PRICEWATERHOUSECOOPERS, SHALE GAS: A RENAISSANCE IN US MANUFACTURING? 7 (2011), available at http://www.pwc.com/en_US/us/industrial-products/assets/pwc-shale-gas-us-manufacturing-renaissance.pdf.

extract all this natural gas out of shale rock.”⁵ The President even promised action, asserting that his Administration would take “every possible action” to safely develop shale production.⁶ Heather Zichal, the President’s top aide for energy and environmental issues, echoed this refrain: “Since taking office the President has made clear that he believes this important, abundant domestic resource holds unique promise to fuel our energy sector, fuel our vehicles, as well as fuel job growth – all while reducing harmful emissions.”⁷

However, contrary to the President’s promise, the Obama Administration is adopting a broad array of policies and regulations that will bury hydraulic fracturing and domestic energy production in red tape. In fact, *The Wall Street Journal* recently reprimanded the Obama Administration for subjecting hydraulic fracturing to a “federal deluge” of regulations.⁸ It opined, “[f]ederal agencies from the EPA to the Occupational Safety and Health Administration are looking for ways to justify imposing their own rules on fracking in the name of water quality, worker safety, and more.”⁹ Three policies from EPA and the Department of the Interior deserve particular attention due to the magnitude of their impact.

a. EPA Targets Oil & Gas Production by Redefining "Diesel Fuels"

The EPA is attempting to restrict oil and gas production by imposing unnecessary and expensive permitting requirements on hydraulic fracturing under the Underground Injection Control (UIC) program. UIC is designed to protect underground sources of drinking water.¹⁰ However, in hydraulic fracturing, the actual fracturing process occurs thousands of feet below the bottom of even the deepest aquifers.¹¹ Recognizing this fundamental distinction, Congress specifically delineated the scope of the UIC program in 2005. Section 322 of the Energy Policy Act of 2005 states, “the term ‘underground injection’ excludes . . . the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities.”¹² Section 322 is a plain and unambiguous statement that EPA is not to regulate hydraulic fracturing under the UIC program unless the operator uses “diesel fuels” in the fracturing fluid.

In an apparent end-run around the law, EPA has defined an extremely broad range of chemicals as “diesel fuels” in order to over-regulate hydraulic fracturing. In May 2012, the EPA Office of Water released a draft guidance (Underground Injection Control Program Guidance

⁵ President Barack Obama, State of the Union Address (Jan. 24, 2012).

⁶ *Id.*

⁷ Heather Zichal, Facilitating Safe and Responsible Expansion of Natural Gas Production, <http://www.whitehouse.gov/blog/2012/04/13/facilitating-safe-and-responsible-expansion-natural-gas-production> (Apr. 13, 2012, 11:56 AM EDT).

⁸ Editorial, *A Fracking Rule Reprieve*, WALL ST. J., June 30, 2012, at A14.

⁹ *Id.*

¹⁰ Safe Drinking Water Act of 1974, Pub. L. 93-523, 88 Stat. 1660 (codified as amended at 42 U.S.C. §§ 300f–300j-9).

¹¹ Alvin Powell, *Weighing the risks of fracking*, HARVARD GAZETTE, Oct. 28, 2011 (statement of Susan Tierney, Assistant Sec’y for Policy at the U.S. Dep’t of Energy under President Bill Clinton), *available at* <http://news.harvard.edu/gazette/story/2011/10/weighing-the-risks-of-fracking/>.

¹² Energy Policy Act of 2005 § 322, Pub. L. 109-58, 119 Stat. 694 (codified at 42 U.S.C. 300h(d)).

#84).¹³ The draft guidance defines the statutory term “diesel fuels” to include not only diesel fuel, but also a panoply of substances including kerosene, home heating oil, distillates, and crude oil.¹⁴ By expanding the definition of “diesel fuels” far beyond any reasonable definition, EPA has unilaterally claimed the ability to regulate a far greater swath of hydraulic fracturing operations than allowed by law.

The potential impacts of this overreach are dramatic. The UIC program has a dual enforcement structure: in some states, EPA possesses primary enforcement responsibility; in others, EPA has assigned primary enforcement authority to a State regulator.¹⁵ In the latter, known as “primacy” states, the State program must be “at least as stringent as the federal program.”¹⁶ In jurisdictions where EPA is the primary enforcer, operators will be directly subjected to expensive, unnecessary, and potentially illegal permitting requirements under the UIC. In State primacy jurisdictions, State regulators will be faced with extraordinary uncertainty: enforce a guidance document they did not write, or risk the loss of their primacy and severe disruption of the State regulatory regime. This overreach by the Obama Administration threatens the State regulatory regimes that are already in place and are already adequately ensuring the safety of hydraulic fracturing.¹⁷ EPA’s attempt to regulate hydraulic fracturing through the draft guidance is just another example of the Federal Government’s attempts to take power from the States and hinder the efficient extraction of domestic energy resources.

b. EPA Uses Questionable Data to Impose Burdensome Regulations on Oil & Gas Production

On April 17, 2012, EPA issued a rule revising emissions standards for the oil and gas sector.¹⁸ Unprecedented provisions in the rule specifically target wells that are hydraulically fractured.¹⁹ A new standard, known as Subpart OOOO (Quad-O), requires that natural gas wells that are hydraulically fractured install reduced emission completion (REC) technology, also known as “green completion.”²⁰ Unfortunately, there is strong evidence that the methane emissions estimates EPA used to justify the rule were wildly inaccurate and based on junk science.

¹³ U.S. ENVTL. PROT. AGENCY, PERMITTING GUIDANCE FOR OIL AND GAS HYDRAULIC FRACTURING ACTIVITIES USING DIESEL FUELS – DRAFT: UNDERGROUND INJECTION CONTROL PROGRAM GUIDANCE #84 (May 2012) [hereinafter DRAFT GUIDANCE]

¹⁴ *Id.*

¹⁵ U.S. Environmental Protection Agency, Office of Water, UIC Program Primacy, *available at* <http://water.epa.gov/type/groundwater/uic/Primacy.cfm>.

¹⁶ *Id.*

¹⁷ *See Rhetoric v. Reality, Part II: Assessing the Impact of New Federal Red Tape on Hydraulic Fracturing and American Energy Independence: Hearing Before the Subcomm. on Technology, Information Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Gov’t Reform*, 112th Cong. 89, 90 (2012) (statements of Michael Krancer, Sec’y, Pennsylvania Department of Environmental Protection, and Lori Wrotenberry, Director, Oil and Gas Conservation Commission, Oklahoma Corporation Commission)

¹⁸ Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews, 77 Fed. Reg. 49490, 49497 (Aug 16, 2012).

¹⁹ *Id.*

²⁰ *See id.* (to be codified at (40 C.F.R. Part 60, Subpart OOOO)).

Regulatory policy must be based on sound science. However, in developing this rule, EPA completely ignored this requirement. In August 2011, an energy consulting firm, IHS CERA, released a report entitled *Mismeasuring Methane: Estimating Greenhouse Gas Emissions from Upstream Natural Gas Development*.²¹ The report strongly criticized EPA's estimations, finding that EPA's methodology "lacks rigor" and "should not be used as a basis for analysis and decision-making."²² The report specifically criticized EPA's reliance on only a handful of inappropriate data points, the use of uninformed assumptions about industry practices, and questionable math – EPA employed questionable practices in rounding numbers, implying a level of precision well beyond that of the underlying data.²³ Perhaps most importantly, EPA's estimates fail a common-sense safety test – if the methane emissions were truly at those levels, an extremely hazardous condition would exist at the well site.²⁴ IHS CERA describes the assumption as "at odds with industry practice and with safe operation of drilling sites."²⁵

IHS CERA's findings were confirmed in subsequent studies.²⁶ Nonetheless, EPA continued to rely on the miscalculated methane emissions in the development of, and justification for, the Quad-O rule.²⁷ EPA's revised air emissions standards for hydraulically fractured wells will impose significant costs on energy producers that are forced to install costly equipment.²⁸ The wild inaccuracy of the rule's underlying science – coupled with its downstream effects – compounds the seriousness of this regulatory failure.

c. Sweeping New Regulations of Hydraulic Fracturing Operations on Federal Lands

The Department of the Interior's Bureau of Land Management (BLM) oversees approximately 700 million subsurface acres of Federal mineral estate and 56 million subsurface acres of Indian mineral estate across the United States.²⁹ Oil and gas production from Federal lands is vital to both American energy independence and our economy. According to a recent BLM report, oil and gas production on BLM lands contributed \$49.8 billion to the U.S. economy in fiscal year 2011.³⁰ On May 11, 2012, DOI proposed sweeping regulations on hydraulic

²¹ IHS CERA, *Mismeasuring Methane: Estimating Greenhouse Gas Emissions from Upstream Natural Gas Development* (Aug. 2011), available at <http://epa.gov/quality/informationguidelines/documents/12003-attA.pdf> [hereinafter CERA Private Report].

²² *Id.* at 5.

²³ *Id.* at 6.

²⁴ *Id.* at 8.

²⁵ *Id.*

²⁶ See, e.g., TERRI SHIRES AND MIRIAM LEV-ON, URS CORPORATION AND THE LEVON GROUP, *CHARACTERIZING PIVOTAL SOURCES OF METHANE EMISSIONS FROM UNCONVENTIONAL NATURAL GAS PRODUCTION* (June 1, 2012), available at <http://www.anga.us/media/252594/task%20%20api%20anga%20survey%20report%2019%20july%20final.pdf>.

²⁷ See *America's Energy Future, Part I: A Review of Unnecessary and Burdensome Regulations: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 112th Cong. 14 (2012) (statement of Joe Leonard, Environmental Health and Safety Engineer, Devon Energy Corporation).

²⁸ Mike Soraghan, *Driller suspicious of EPA's new frack notification*, ENERGY & ENVIRONMENT, Oct. 9, 2012.

²⁹ Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands, 77 Fed. Reg. 27,691 (May 11, 2012)

³⁰ BUREAU OF LAND MANAGEMENT, *THE BLM: A SOUND INVESTMENT FOR AMERICA 2* (Oct. 2012), available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications_Directorate/public_affairs/socioeconomic.Par.81.563.File.dat/socioeconomic_2012.pdf.

fracturing on the BLM-managed mineral estate.³¹ The proposed regulatory regime is unjustified, duplicative, and unnecessary.

Federal officials have consistently affirmed hydraulic fracturing as a safe technique to extract oil and gas, yet BLM attempts to justify this proposed rule by labeling vague and unsubstantiated complaints as “public concern.” As observed by the Independent Petroleum Association of America, “[u]nfounded concerns without basis in fact should not be the justification for a rule that will impose significant costs. [The proposed rule] is a poorly-conceived solution to a non-existent problem.”³² The rule is further called into question by fact that the individual States *already regulate* hydraulic fracturing. State regulators, and the regulations they enforce, are effective, nimble, and best-tailored to the individual State in which they operate. Furthermore, State regulators possess greater expertise in their State’s geology, topography, and hydrology. This expertise, coupled with an institutionalized familiarity with hydraulic fracturing regulation, leaves them best positioned to regulate the practice.³³

If implemented, the BLM rule will impose exorbitant costs on oil and gas producers. The Western Energy Alliance commissioned John Dunham & Associates (JDA), an economic modeling firm, to determine the total aggregate costs of the regulations.³⁴ JDA concluded that the total aggregate costs for new permits and well-workovers will be at least \$1.5 billion and as high as \$1.6 billion.³⁵ These compliance costs will directly hurt domestic energy production by raising costs and squeezing competition by pricing out smaller operators. Mike McDonald, the owner of a small oil and gas company in Oklahoma, offered the following insight in testimony before the Committee: “Every dollar that I must spend on compliance and paperwork is a dollar I cannot spend exploring for oil and gas.”³⁶ The Obama Administration’s BLM rule will hurt taxpayers by driving producers away from public lands, decrease revenues from leases and royalties, and disproportionately harm the tribes and western States that have a heavy dependence on Federal land investment.

³¹ Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands, 77 Fed. Reg. 27691 (May 11, 2012).

³² *Id.*

³³ See *Rhetoric v. Reality, Part II: Assessing the Impact of New Federal Red Tape on Hydraulic Fracturing and American Energy Independence: Hearing Before the Subcomm. on Technology, Information Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Gov’t Reform*, 112th Cong. 89, 90 (2012) (statements of Michael Krancer, Sec’y, Pennsylvania Department of Environmental Protection, and Lori Wrotenberry, Director, Oil and Gas Conservation Commission, Oklahoma Corporation Commission). See also *America’s Energy Future, Part I: A Review of Unnecessary and Burdensome Regulations: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 112th Cong. 14 (2012) (statement of Patrice Douglas, Commissioner, Oklahoma Corporation Commission).

³⁴ Memorandum from John Dunham, Managing Partner, John Dunham & Associates, to Kathleen Sgamma, VP of Gov’t & Public Affairs, Western Energy Alliance, June 11, 2012, available at <http://westernenergyalliance.org/wp-content/uploads/2009/05/John-Dunham-Associates-Economic-Analysis-of-BLM-Fracing-Regulations-FINAL.pdf>.

³⁵ *Id.*

³⁶ *America’s Energy Future, Part I: A Review of Unnecessary and Burdensome Regulations: Hearing Before the H. Comm. on Oversight and Gov’t Reform*, 112th Cong. 75 (2012) (statement of Mike McDonald, President and co-owner, Triad Energy, Inc.).

II. President Obama Wrongly Takes Credit for Increased Oil Production

President Obama continues to take credit for an increase in oil production during his tenure in office. As the President stated, “when it comes to oil production, under my Administration, America is producing more oil today than at any other time in the last eight years. That is fact. That’s a fact.”³⁷ However, the President wrongly takes credit for this increase. In reality, almost all of the increases in domestic oil production have occurred on private rather than public land. The Congressional Research Service reports that since 2007, 96 percent of increases in oil production in the United States have occurred on non-Federal lands.³⁸ For instance, the Bakken formation in North Dakota and Montana is one of the primary drivers of increased domestic oil production in the United States. Yet, most of the production from that region is on private land that does not require Federal leases and is not subject to the Federal regulatory regime of the Department of the Interior.³⁹

Despite significant expansion on private land, the Obama Administration has failed to show even a modest increase in oil sales and leases on public lands. The U.S. Energy Information Administration reports that total crude oil sales from Federal and Indian lands have remained stagnant between 2009 and 2011.⁴⁰ Moreover, the number of leases issued by the BLM to drill on Federal land is down under this Administration. From 2007-2008, BLM issued an average of 2,957 leases.⁴¹ In comparison, the average number of leases issued from 2009-2010 decreased to 1,690, which is a 43 percent drop.⁴² Furthermore, the number of drilling permits issued on these lands has fallen by nearly 2,000 a year since President Obama took office.⁴³ As BLM’s own data shows, the Administration has done nothing to create this increase in oil production, and it is disingenuous for President Obama to claim credit.

a. President Obama’s "Pipeline Veto" Stifles Industry Growth and Job Creation

The increase in oil and gas production promises to deliver an economic boon to the United States. Perhaps the best example of this is in the Bakken region of North Dakota where hydraulic fracturing has been used to extract enormous quantities of oil from shale rock.⁴⁴ In a field hearing in the region, the Committee received testimony about the extraordinary economic

³⁷ Press Release, *Remarks by the President on American Energy*, The White House, Mar. 1, 2012 available at <http://www.whitehouse.gov/the-press-office/2012/03/01/remarks-president-american-energy>.

³⁸ MARC HUMPHRIES, CONGRESSIONAL RESEARCH SERVICE, U.S. CRUDE OIL PRODUCTION IN FEDERAL AND NON-FEDERAL AREAS, Mar. 20, 2012, available at <http://www.crs.gov/pages/Reports.aspx?PRODCODE=R42432&Source=search>.

³⁹ National Atlas of the United States, Federal Lands and Indian Reservations, North Dakota, available at <http://www.nationalatlas.gov/printable/images/pdf/fedlands/ND.pdf>.

⁴⁰ U.S. Energy Information Administration, Sales of Fossil Fuels Produced from Federal and Indian Lands, FY 2003 through FY 2011, March 2012, at 2-3.

⁴¹ Bureau of Land Management, Summary of Onshore Oil & Gas Statistics, Nov. 9, 2011, available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/MINERALS_REALTY_AND_RESOURCE_PROTECTION_/energy/oil_gas_statistics/data_sets.Par.69959.File.dat/table-01.pdf.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Drew Hendricks, *The Great American Oil Rush: The Economic Impact of North Dakota’s Bakken Oil Boom*, NATIONAL GEOGRAPHIC NEWSWATCH, available at <http://newswatch.nationalgeographic.com/2012/10/11/the-great-american-oil-rush-the-economic-impact-of-north-dakotas-bakken-oil-boom/>.

benefits from shale oil development in the region: North Dakota has since seen the lowest unemployment in the nation, the creation of thousands of high-paying jobs, and the revitalization of diverse sectors of the economy.⁴⁵ The benefits of Bakken oil ripple through the entire country. In addition to lowering national oil prices by increasing supply, Bakken oil has also created thousands of jobs in oilfield services, construction, and transportation across the country.⁴⁶ It is clear that this expansion in oil and gas production can be the shining star of American economic recovery and has occurred despite Obama Administration policies that hinder fossil fuel production.

An obstacle to the expansion of oil production in the Bakken formation is transportation. The safest and most efficient way to transport oil is through pipelines. While the Obama Administration claims that it is supportive of expanding the U.S. pipeline system,⁴⁷ President Obama opted to stifle the movement of domestically-produced oil by vetoing a permit for the Keystone XL pipeline. Keystone XL would have been the first major pipeline to transport Bakken oil. Now, as a result of the veto, struggling refineries in the South and East are unable to efficiently gain access to the tremendous oil reserves in the North.

Meanwhile, the high volume of oil production in the Bakken formation is constrained by the limited capacity of existing pipelines. As a result, almost all of the oil moves by small scale pipeline, rail and highway. Transporting oil outside a pipeline is generally more expensive, less efficient, and creates more safety risks than transporting via pipeline. Rail is currently the only viable means of shipping Bakken oil to eastern oil refineries, increasing the price of that oil.⁴⁸ Despite higher costs, these refineries have put more rail cars on the tracks to move Bakken oil and stay in business.⁴⁹ Sunoco recently credited access to Bakken oil for saving one of its refineries outside of Philadelphia.⁵⁰ Approving large-scale pipeline projects, such as the Keystone XL pipeline, would help to address cost and safety concerns. Moreover, it would help fulfill a market demand for Bakken oil at refineries across the United States.

Not only does President Obama's decision to veto the Keystone XL pipeline threaten the viability of the oil production operations in Bakken Formation, but also in other regions like it around the country. Early in 2012, North Dakota became the second largest oil producing state in the country, surpassing Alaska and competing with Texas for the top spot.⁵¹ Other similar

⁴⁵ *America's Energy Future, Part II: A Blueprint for Domestic Energy Production: Hearing before the H. Comm. on Oversight and Gov't Reform*, 112th Cong. (2012) (statement of Michael Ziesch).

⁴⁶ *Id.*

⁴⁷ Jackie Calmes, *In Oklahoma, Obama Declares Pipeline Support*, N.Y. Times, March 22, 2012.

⁴⁸ Aaron Clark, *Bakken Oil Premium Widens on Expanded Rail Shipping Capacity*, BLOOMBERG, Sept. 4, 2012, available at <http://www.bloomberg.com/news/2012-09-04/bakken-oil-premium-widens-on-expanded-rail-shipping-capacity.html>.

⁴⁹ Ryan Dezember, *Carlyle Bets Big on U.S. Energy*, WALL ST. J., July 2, 2012, available at <http://online.wsj.com/article/SB10001424052702304299704577502390528647370.html>; *PN Bakken: Phillips 66 might buy 2,000 rail cars to haul mid-con shale oil; sees lower NGL prices thru' 2017*, PETROLEUM NEWS, June 17, 2012, available at <http://www.petroleumnews.com/pntruncate/602104141.shtml>.

⁵⁰ Ryan Dezember, *Carlyle Bets Big on U.S. Energy*, WALL ST. J., July 2, 2012, available at <http://online.wsj.com/article/SB10001424052702304299704577502390528647370.html>.

⁵¹ *ND becomes nation's second-leading oil producer*, ALASKA JOURNAL OF COMMERCE, May 15, 2012, available at <http://www.alaskajournal.com/Alaska-Journal-of-Commerce/May-Issue-2-2012/ND-becomes-nations-second-leading-oil-producer/>.

Bakken-like formations are in equally remote areas of the country, such as the Eagle Ford formation in South Texas and the Niobrara formation in Wyoming, Colorado, and Montana.⁵² To realize the great potential of these formations, a solid infrastructure of pipelines for transporting the oil and gas from these locations is necessary. The future of affordable, domestic energy depends on access to pipelines with increased capacity, but President Obama has failed to approve any major pipeline since he took office.

Greater access to pipelines would provide U.S. refineries with greater price competition against the oil currently purchased from international markets. A barrel of North Dakota Sweet Oil from the Bakken sells for approximately \$62.⁵³ Transportation costs increase the cost of Bakken oil well beyond that price.⁵⁴ Refineries near pipelines often pay approximately \$78 a barrel for Bakken oil at West Texas Intermediate prices. The East Coast refineries, without pipeline access, buy oil at the more expensive foreign Brent pricing—roughly \$100 a barrel.⁵⁵

The President's veto of the Keystone XL Pipeline denies inexpensive oil to refineries; it also forces them to rely on international sources for this oil, rather than domestic ones. This dependence on foreign oil means a continued increase in gasoline prices and a loss of American jobs. According to the manufacturer of the Keystone XL project, construction of the pipeline would result in 13,000 jobs in construction and 7,000 in manufacturing for a total of 20,000 jobs in the United States.⁵⁶ President Obama's actions perpetuate a system of relying on foreign oil and shipping American jobs overseas. This can be alleviated by promoting domestic oil production and increased domestic oil transportation.

b. More Than \$4 Billion of Oil Trapped by President Obama's "Pipeline Veto"

The tangible impacts of President Obama's pipeline policy can be seen first-hand in the town of Cushing, Oklahoma. The official settlement point for light sweet crude futures on the New York Mercantile Exchange, Cushing is a critical storage hub in a pipeline network that stretches across the Midwest and Gulf Region. Because of inadequate pipeline capacity, there is a massive "traffic jam" of oil in Cushing.⁵⁷ As of October 12, 2012, the storage tanks in Cushing held 44.0 million barrels of oil – almost 12 percent of the entire domestic supply and more than

⁵² Institute for Energy Research, 2012 Energy Outlook: Fossil Fuels Leading the Future, *available at* <http://www.instituteforenergyresearch.org/2012/06/29/2012-energy-outlook-fossil-fuel-energy-leads-the-future/>.

⁵³ Rose Rock Midstream, October 2012 Report, *available at* <http://crudeoilpostings.semgrouppcorp.com/>.

⁵⁴ Aaron Clark, *Global Partners Boosts Bakken Shipments to Eastern Refiners*, BUSINESSWEEK, Apr. 18, 2012, *available at* <http://www.businessweek.com/news/2012-04-18/global-partners-boosts-bakken-shipments-to-eastern-refiners>.

⁵⁵ Keith Schaefer, *Forget Keystone, The US Desperately Needs An East-West Pipeline*, BUSINESS INSIDER, Mar. 14, 2012, *available at* http://articles.businessinsider.com/2012-03-14/markets/31163503_1_oil-refinery-crude-light-oil.

⁵⁶ TransCanada, *Media Advisory – TransCanada Releases Detailed Keystone XL Job Creation Data* (Jan. 10, 2012), *available at* <http://www.transcanada.com/5921.html>.

⁵⁷ Ben Lefebvre, *Bakken crude prices rise as railroad reach grows*, MARKET WATCH, Oct. 4, 2012, *available at* <http://www.marketwatch.com/story/bakken-crude-prices-rise-as-railroad-reach-grows-2012-10-04-14485240>.

four times the total oil stocks on the entire East Coast of the United States.⁵⁸ At today's prices this oil is worth more than \$4 billion dollars.⁵⁹

Additional pipelines are desperately needed to move the oil stuck in Cushing more efficiently around the country. Regional supply asymmetries such as the Cushing chokepoint have contributed to refinery closures in the Northeast and are a significant factor in gasoline prices.⁶⁰ Despite his demonstrated hostility to pipeline development, President Obama has brazenly claimed he is working to address infrastructure incapacity. In March 2012, President Obama staged a photo-op in Oklahoma to announce he was "fast-tracking" the southern leg of the Keystone project, the Keystone Gulf Pipeline running from Cushing to Port Arthur, Texas. Such an assertion was at best inaccurate and at worst disingenuous: the southern leg does not even require a Presidential Permit from the U.S. Department of State, and the applicable permitting process was effectively complete. The Presidential Memorandum issued in conjunction with the event – which directed no specific action and explicitly stated it did *not* change any existing law – was little more than a press release.⁶¹

III. EPA Wages War on Coal through Increased Costs, Early Power Plant Retirement, and Mining "Permitorium"

President Obama seeks to appear moderate by supporting the use of clean coal as part of an "all-of-the-above" energy plan.⁶² In May of 2012, a campaign spokesman for President Obama said that clean coal has "been an essential part of the president's "all-of-the-above" energy strategy."⁶³ In reality, this Administration has shown a hostile attitude toward coal. It has proposed a host of regulations that will come at an enormous cost and destroy thousands of jobs.

Over the past four years, the President has consistently made statements indicating his support to end or significantly curtail the use of coal and other fossil fuels as energy sources. In 2008, as a presidential candidate, President Obama declared,

Under my plan of a cap-and-trade system, electricity rates would necessarily skyrocket... Coal-powered plants, you know, natural gas, you name it, whatever

⁵⁸ Energy Information Administration, Petroleum & Other Liquids, Crude Oil Stocks and Days of Supply, available at http://www.eia.gov/oog/info/twip/twip_crude.html.

⁵⁹ Adam Wilmoth, *Cushing, OK stores more than \$4.1 billion in oil*, THE OKLAHOMAN, Mar. 25, 2012, available at <http://newsok.com/cushing-ok-stores-more-than-4.1-billion-in-oil/article/3660501/?page=2>.

⁶⁰ U.S. ENERGY INFORMATION ADMINISTRATION, POTENTIAL IMPACTS OF REDUCTIONS IN REFINERY ACTIVITY ON NORTHEAST PETROLEUM PRODUCT MARKETS, (Feb. 2012), available at <http://www.eia.gov/analysis/petroleum/nerefining/update/pdf/neprodmkts.pdf>.

⁶¹ Memorandum from President Obama to the Heads of the Executive Departments and Agencies, Expediting Review of Pipeline Projects from Cushing, Oklahoma to Port Arthur, Texas, and Other Domestic Pipeline Infrastructure Projects, Mar. 22, 2012, available at <http://www.whitehouse.gov/the-press-office/2012/03/22/presidential-memorandum-expediting-review-pipeline-projects-cushing-okla>.

⁶² Obama-Biden, All of the Above, available at <http://www.barackobama.com/energy?source=primary-nav>.

⁶³ Andrew Restuccia, *House Republicans, Romney Take Aim at Obama's Stance on Coal Industry*, THE HILL, May 20, 2012, available at <http://thehill.com/blogs/e2-wire/e2-wire/228455-gop-takes-aim-at-obamas-stance-on-coal>.

the plants were, whatever the industry was, they would have to retrofit their operations. That will cost money.⁶⁴

More recently, President Obama's campaign website failed to acknowledge coal as a part of the President's "all-of-the-above" energy plan. Only after criticism was leveled at the President for the omission did the campaign add coal to the website.⁶⁵

Other members of this Administration have also spoken out against coal. On the campaign trail in 2008, Vice President Biden said, "[w]e are not supporting clean coal[,]" and declared, "[n]o coal plants here in America."⁶⁶ That same year, current Secretary of Energy Steven Chu repeatedly stated, "[c]oal is my worst nightmare."⁶⁷ EPA officials have provided further insights into the Administration's position on coal. EPA Region 1 Administrator Curt Spalding stated in March 2012, "Lisa Jackson has put forth a very powerful message to the country . . . if you want to build a coal plant, you got a big problem."⁶⁸ Moreover, he described the decision to implement the New Source Performance Standards for greenhouse gas emissions regulation (discussed below) as "painful" because

you got to remember if you go to West Virginia, Pennsylvania, and all those places, you have coal communities who depend on coal. And to say that we just think those communities should just go away, we can't do that. But she had to do what the law and policy suggested. And it's painful. It's painful every step of the way.⁶⁹

One apparent goal of the Obama Administration's failed cap-and-trade legislation was to make the use of coal economically unviable through increased, costly regulation.⁷⁰ This legislation was never approved by Congress, but it appears the Administration is attempting to accomplish it by administrative fiat. Indeed, many observers of the Obama Administration's actions have characterized them as a "War on Coal." These have taken the form of a slate of regulations attacking coal at its production, such as making it increasingly difficult to receive permits for mining, and at its use, such as enacting regulations to make it more expensive to convert into electricity at power plants.

⁶⁴ Deroy Murdock, *Obama Declares War on Coal*, NATIONAL REVIEW (Nov. 3, 2008) (Original source: audio/video of Obama's appearance before the San Francisco Chronicle's editorial board in Jan. 2008).

⁶⁵ Andrew Restuccia, *House Republicans, Romney Take Aim at Obama's Stance on Coal Industry*, THE HILL, May 20, 2012, available at <http://thehill.com/blogs/e2-wire/e2-wire/228455-gop-takes-aim-at-obamas-stance-on-coal>.

⁶⁶ <http://www.youtube.com/watch?v=iJ55UzAsp6M>; Elana Schor, *Obama declares support for 'clean' coal*, THE GUARDIAN, Sept. 24, 2008, available at <http://www.guardian.co.uk/environment/2008/sep/24/energy.uselections2008>.

⁶⁷ Keith Johnson, *Steven Chu: 'Coal is My Worst Nightmare*, WALL ST. J., Dec. 11, 2008, available at <http://blogs.wsj.com/environmentalcapital/2008/12/11/steven-chu-coal-is-my-worst-nightmare/>.

⁶⁸ Statement of Curt Spalding, Regional Administrator, U.S. Environmental Protection Agency, Region I, available at <http://www.youtube.com/watch?v=bvS0DpI3SAo>.

⁶⁹ *Id.*

⁷⁰ See generally, AMERICAN LEGISLATIVE EXCHANGE COUNCIL, *EPA'S REGULATORY TRAIN WRECK: STRATEGIES FOR STATE LEGISLATORS* (2012), available at <http://www.alec.org/docs/EPA-TRAIN-WRECK-2011-Final-Full-printres.pdf>.

Numerous coal producers have announced layoffs, and all have blamed the hostile anti-coal policies and regulations enacted by the Administration as the primary reason. On September 18, 2012, Alpha Natural Resources, a coal producer in Appalachia, announced it was terminating 1,200 jobs companywide.⁷¹ These layoffs include the loss of 400 jobs from the closure of mines in Virginia, West Virginia, and Pennsylvania.⁷² The Ohio Valley Coal Co. announced it plans to lay off 29 workers at its coal mines.⁷³ Already this year, coal producers in eastern Kentucky have announced hundreds of layoffs in the region.⁷⁴ These losses are especially unfortunate because jobs in the coal mining industry are high-paying—averaging \$70,000 per year.⁷⁵ Moreover, the tax revenue derived from coal mining contributes to local communities. Job losses and decreases in revenue in local communities are harmful to the entire State and region.

a. President Obama Restricts Coal Permitting

In a calculated attempt to stymie coal production in Appalachia, the EPA has overstepped its congressionally-delegated authority to regulate the permitting of coal extraction projects by seizing permitting decision-making power from the States and the Army Corps of Engineers (Corps). Under the Clean Water Act (CWA), Congress gave States the authority to issue Section 402 permits and the Corps authority to issue Section 404 permits. Section 402 permits regulate point source discharges of pollutants into waters.⁷⁶ Under the law, States have the authority to administer permits in accordance with the State-created environmental quality standards for pollutants. States set their own standards, but they must be at least as stringent as EPA standards, which are established through notice and comment rulemaking.⁷⁷ Section 404 permits regulate mining operations, which discharge dredge and fill material into waters. The Corps implements the 404 permit program and issues these permits using guidelines established by EPA. EPA has the ability, under the Clean Water Act, to “veto” a permit after the permit has been submitted to the Corps, but before the Corps approves it. In the past, EPA has first conducted an enhanced review immediately after the permit has been issued by the Corps, instead of using its authority to withdraw permit applications before they are finalized.⁷⁸

On April 1, 2010, EPA released a guidance document in which the agency acknowledged it was taking “sweeping regulatory action” with regard to the issuance of CWA permits for coal mining operations in Appalachia.⁷⁹ This document shifted 402 and 404 permitting power from

⁷¹ Vicki Smith, *Alpha closing 8 mines, cutting 1,200 jobs in all*, ASSOCIATED PRESS, Sept. 18, 2012, available at <http://news.yahoo.com/alpha-closing-8-mines-cutting-1-200-jobs-113623583.html>.

⁷² *Id.*

⁷³ Scott Suttell, *Murray Energy’s Ohio Valley Coal subsidiary lays off 29 hourly workers*, CRAIN’S CLEVELAND BUSINESS, July 20, 2012, available at <http://www.crainscleveland.com/article/20120720/FREE/120729977>.

⁷⁴ Bill Estep, *Coal industry sheds jobs, leaving Eastern Kentucky economy in tatters*, LEXINGTON HERALD-LEADER, July 29, 2012, available at <http://www.mcclatchydc.com/2012/07/29/158502/coal-industry-sheds-jobs-leaving.html>.

⁷⁵ *Id.*

⁷⁶ U.S. Environmental Protection Agency, Office of Water, Overview of EPA Authorities for Natural Resources Managers Developing Aquatic Invasive Species Rapid Response and Management Plans, available at <http://water.epa.gov/type/oceb/habitat/cwa402.cfm>.

⁷⁷ *Id.*

⁷⁸ Briefing by Army Corps of Engineers to Staff of the H. Comm. on Oversight and Gov’t Reform, June 28, 2011.

⁷⁹ U.S. Environmental Protection Agency, *Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order*,

the States and the Corps, respectively, to EPA. The EPA effectively established a new “conductivity” benchmark. Conductivity, or the ability of a given quantity of water to conduct electricity at a given temperature, is not a “meaningful measure of contamination” according to the Federation for American Coal, Energy, and Security.⁸⁰ The new benchmark usurped the States’ authority and imposed EPA’s new conductivity standards on the States.⁸¹ In 2011, EPA began to object to 402 permits previously issued by the States, requiring the States to implement stricter standards than originally required.⁸² Not only have these actions created roadblocks to obtain 402 permits, but they have effectively precluded 404 permits. Many coal projects need both permits to operate, and it is common practice for operators to secure 402 permits before applying for 404 permits. The more stringent 402 standards put in place by EPA has led to a declining number of 404 permit applications.⁸³ Nevertheless, EPA’s guidance document sought to strengthen the ability of EPA to review 404 permits issued by the Corps under the CWA.⁸⁴

On January 13, 2011, in a clear abuse of discretion, EPA cited the guidance document and CWA Section 404(c) as a basis to retroactively veto a validly issued Section 404 permit for the Spruce No. 1 Mine in West Virginia. This was a precedent-setting event because EPA had never before vetoed a permit that was already validly issued by the Corps. While EPA does have the authority to veto permits before the Corps has issued them, revoking permits after they are validly issued is an overreach of EPA’s authority under the CWA. On March 23, 2012, a Federal judge ruled that EPA’s retroactive veto of the Spruce No. 1 Mine lacked the support of statute or regulation.⁸⁵ Moreover, the judge stated that EPA’s action “robs industry of the only way they can possibly measure compliance with the Clean Water Act – a permit.”⁸⁶ Thus, the permit for the Spruce No. 1 Mine was validly issued by the Corps, and EPA is not able to execute its 404(c) authority in a retroactive manner. Unfortunately, the Obama Administration stands by its decision and is appealing the ruling.⁸⁷

(Apr. 1, 2010), available at

http://water.epa.gov/lawsregs/guidance/wetlands/upload/2010_04_01_wetlands_guidance_appalachian_mntop_min_ing_detailed.pdf.

⁸⁰ Federation for American Coal, Energy, and Security. *FACES of Coal to the EPA: Conductivity is Not the Way to Measure Water Quality* available at <http://www.prnewswire.com/news-releases/faces-of-coal-to-the-epa-conductivity-is-not-the-way-to-measure-water-quality-96388914.html>.

⁸¹ Letter to Shawn M. Garvin, Regional Administrator, U.S. Environmental Protection Agency, Region III, from Michael L. Krancer, Secretary Pennsylvania Department of Environmental Protection, May 27, 2011 (on file with author).

⁸² Sayeh Tavangar, *Environmental Protection Agency flags 19 Kentucky coal mining permits for ‘objections’*, COAL TRADER, Oct. 3, 2011, available at <http://www.wusa9.com/news/article/169690/0/Environmental-Protection-Agency-flags-19-Kentucky-coal-mining-permits-for-objections->.

⁸³ Briefing by National Mining Association to Staff of the H. Comm. on Oversight and Gov’t Reform, July 24, 2012.

⁸⁴ “Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order,” Environmental Protection Agency (Apr. 1, 2010), available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/2010_04_01_wetlands_guidance_appalachian_mntop_min_ing_detailed.pdf.

⁸⁵ *Mingo Logan Coal Co. v. EPA*, No. 10-0541 (D.D.C. 2012) available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2010cv0541-87.

⁸⁶ *Id.*

⁸⁷ Manuel Quinones, *Obama Admin Outlines Defense of EPA’s Mountaintop-Mining Veto*, E&E News, July 19, 2012, available at <http://www.eenews.net/Greenwire/2012/07/19/archive/18>.

In a broader ruling, on July 31, 2012, the U.S. District Court for the District of Columbia ruled that EPA overstepped its authority under the CWA as well as the Surface Mining Control and Reclamation Act when it issued the guidance document. The court determined that EPA ran afoul of the Administrative Procedures Act by declining to do a proper rulemaking to implement stricter permitting requirements.⁸⁸ In another instance of the Administration unfortunately choosing to push back against a court decision, EPA has announced it will appeal this ruling, as well.⁸⁹

i. EPA "Permitorium" Prevents Job Growth and Hurts Small Businesses

EPA believes it has the ability to perform an “enhanced review” on certain Appalachian coal permits in conjunction with the Corps. This review goes beyond the normal scope of CWA permitting, subjecting permit applicants to a longer timeline and effectively second-guessing the Corps decision on CWA permits. EPA’s position creates a virtual “permitorium” situation where permits are never acted upon and remain indefinitely in limbo.

Since January 2009, 79 permits were put on the enhanced review list by EPA; only eight of those permits have been issued, 53 have been withdrawn, and 18 are awaiting review or are currently under review.⁹⁰ The number of withdrawn permits likely demonstrates that EPA’s enhanced review process has forced operators to give up on pursuing approval for their mining projects because they are unable to comply with the agency’s demands. Indeed, for many of the enhanced review process permits, EPA has set water quality standards that exceed current water quality levels in the waters where the permits are sought. Therefore, after discharge, it is impossible to meet EPA’s standards.

The permitorium is negatively affecting coal companies in the Appalachian Region. According to a study by the U.S. Senate Environment and Public Works Committee, most of the permits that EPA placed on hold are for small businesses.⁹¹ Small businesses do not have the resources to wait out the permitorium. Many of the applicants who withdrew their permits have since entered into bankruptcy citing their inability to wait out EPA’s “enhanced review process.”⁹² Meanwhile, the permits flagged for “enhanced review” are expected to produce over 2 billion tons of coal, which would support roughly 17,806 existing and new jobs and support 81 small businesses.⁹³ Until the permits make it through the review process, EPA is slowing down the extraction of coal and the creation of jobs in a struggling economy.

⁸⁸ National Mining Association v. Lisa Jackson, Case 1:10-cv-01220-RBW, Filed 07/31/12.

⁸⁹ Manuel Quinones, *EPA Appeals 2 Mountaintop-Removal Rulings*, E&E News, Sept. 28, 2012, available at <http://www.eenews.net/Greenwire/2012/09/28/18>.

⁹⁰ Briefing by Army Corps of Engineers to Staff of the H. Comm. on Oversight and Gov’t Reform, June 28, 2011.

⁹¹ UNITED STATES SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, THE OBAMA ADMINISTRATION’S OBSTRUCTION OF COAL MINING PERMITS IN APPALACHIA, May 21, 2010.

⁹² Briefing by Army Corps of Engineers to Staff of the H. Comm. on Oversight and Gov’t Reform, June 28, 2011.

⁹³ UNITED STATES SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, THE OBAMA ADMINISTRATION’S OBSTRUCTION OF COAL MINING PERMITS IN APPALACHIA, May 21, 2010.

b. EPA Estimates Proposed Regulations Cost Industry As Much As \$129 Billion and Prevent New Coal Burning Power Plants

Since January 2009, EPA has promulgated a series of costly regulations that will adversely affect coal-fired electricity generation in the United States. These regulations will reduce the current output of coal-fired electricity generation, as well as curtail the construction of new coal-fired power plants. Consequently, these regulations will increase the cost of electricity and potentially decrease the reliability of the electricity grid in areas of the country particularly reliant on coal. More than 200 coal-fired electric generating units are scheduled to shut down because of EPA regulations.⁹⁴ Instead of performing a cumulative impact analysis, taking into account the impact of all of concurrent regulations, EPA continues to analyze each rule in a vacuum. The Obama Administration claims to support coal production and electricity generation, but EPA regulations paint an entirely different picture.

In December 2011, EPA finalized a rule that would require new and existing coal and oil-fired electric generating units (EGU) to reduce these emissions under a strict timeline by installing additional anti-pollutant technologies.⁹⁵ This rule, known as Utility MACT, will regulate 1,100 existing coal-fired power units and 300 oil-fired units at approximately 600 power plants.⁹⁶ In the first year of compliance, EPA's own estimates predict that the cost burden of the Utility MACT rule will be \$9.6 billion in that year alone.⁹⁷ The agency has failed to provide an estimate of the total cost of the rule. Other estimates are significantly higher. NERA Economic Consulting projected an annual cost of \$10.4 billion in 2015 and a total compliance cost of \$94.8 billion.⁹⁸ The study found that the rule would result in upwards of 215,000 job losses by 2015.⁹⁹ NERA also predicted the retirement of 25,000 megawatts of coal-powered electricity by 2015, which is approximately seven percent of the total generated.¹⁰⁰ The U.S. Energy Information Administration (EIA) also expects 27 gigawatts of coal-fired generation to retire over the next five years, which is nearly eight percent of last year's total electricity generation from coal.¹⁰¹ EIA attributed this shutdown in part to EPA regulations that would force early retirements of coal-fired electric generating power plants.¹⁰²

The tremendous costs associated with complying with Utility MACT are not the only concern raised about the rule. Numerous groups question the practicality of compliance. In fact, a trade association representing the emission-control industry petitioned EPA to reconsider the rule, stating that its members would not be able to provide control technology capable of meeting

⁹⁴ Press Release, American Coalition for Clean Coal Electricity, New Analysis Shows EPA Rules To Shut Down Coal Units In 25 States (Sep. 18, 2012) (available at <http://www.cleancoalusa.org/new-analysis-shows-epa-rules-shut-down-coal-units-25-states>).

⁹⁵ Environmental Protection Agency, Fact Sheet, *Proposed Mercury and Air Toxics Standards* (May 4, 2011) available at <http://epa.gov/airquality/powerplanttoxics/pdfs/proposalfactsheet.pdf>.

⁹⁶ Environmental Protection Agency, Fact Sheet, *Mercury and Air Toxics Standards for Power Plants*, available at <http://www.epa.gov/mats/pdfs/20111221MATSSummaryfs.pdf>.

⁹⁷ U.S. EPA "Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards," Dec. 2011.

⁹⁸ NERA Economic Consulting, "An Economic Impact Analysis of EPA's Mercury and Air Toxics Standards Rule," Mar. 1, 2012.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Manuel Quinones, *Expect Record Number of Power Plant Retirements – EIA*, E&E NEWS, July 27, 2012.

¹⁰² *Id.*

the limits imposed by Utility MACT.¹⁰³ The Coal Utilization Research Council, an advocacy group representing coal and energy producers, also petitioned EPA to explain that equipment manufacturers could not guarantee utility companies that they could provide them with the technology needed to comply with the rule.¹⁰⁴ Pursuant to these concerns, EPA placed a 90-day stay on implementing the rule, preventing it from going into effect until November 2, 2012, four days before the presidential election. These concerns, and EPA's subsequent actions, demonstrate that the Utility MACT rule is impractical and will cost utilities large sums of money that will be passed on to rate payers, thereby increasing electricity costs across the board.

Another rule finalized by EPA, the Cross-State Air Pollution Rule (CSAPR), requires 27 States to reduce power plant emissions.¹⁰⁵ EPA estimated that the annual cost of CSAPR could reach \$800 million.¹⁰⁶ Fortunately, on August 21, 2012, the U.S. Court of Appeals for the District of Columbia Circuit vacated this rule and required EPA to reconsider it.¹⁰⁷ In the court's ruling, it determined that EPA overstepped its bounds by promulgating CSAPR for two reasons. First, the rule forced upwind States to reduce emissions by more than their "significant contribution" to air pollution in a downwind State.¹⁰⁸ Second, EPA did not give States the opportunity to issue plans to comply with the rule before implementing a Federal plan.¹⁰⁹ Unfortunately, EPA has disagreed with the court's decision and has asked it to reconsider its ruling.¹¹⁰

On March 27, 2012, EPA proposed a rule that would effectively ban the construction of coal-fired power plants. The proposed rule would limit carbon dioxide emissions from new power plants to 1,000 pounds of CO₂ per megawatt hour.¹¹¹ Currently, the average coal-fired power plant in the United States produces more than 1,700 pounds of CO₂ per megawatt hour.¹¹² Under the proposed standards, the rule effectively bans the construction of new coal-fired power plants unless those facilities deploy carbon capture and storage (CCS) technology. CCS technology is currently unproven and commercially unavailable, and in most cases is still in the testing phase. Therefore, under the proposed rule, a new coal-fired power plant will be impractical to build.

¹⁰³ Jean Chemnick, Stakeholders Optimistic as EPA Takes Another Look at Mercury Rule, E&E NEWS, July 24, 2012.

¹⁰⁴ *Id.*

¹⁰⁵ Environmental Protection Agency, Fact Sheet, The Cross-State Air Pollution Rule: Reducing the Interstate Transport of Fine Particulate Matter and Ozone, (July 6, 2011) available at <http://www.epa.gov/airtransport/basic.html>.

¹⁰⁶ U.S. EPA, "Regulatory Impact Analysis for the Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone in 27 States; Correction of SIP Approvals for 22 States," June 2011.

¹⁰⁷ EME Homer City Generation v. EPA, No. 11-1302, slip op. (D.C. Cir. Aug. 21, 2012).

¹⁰⁸ *Id.*

¹⁰⁹ EME Homer City Generation v. EPA, No. 11-1302, slip op. (D.C. Cir. Aug. 21, 2012); Bloomberg D.C. Circuit Vacates Cross-State Rule, Orders EPA to Keep Bush-Era Rule in Place Aug. 22, 2012.

¹¹⁰ Lawrence Hurley and Jeremy P. Jacobs, White House Urges Court to Reconsider Decision on Cross-State Rule, E&E NEWS, Oct. 5, 2012, available at <http://www.eenews.net/Greenwire/2012/10/05/3>.

¹¹¹ U.S. EPA 40 CFR Part 60, Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units, Proposed Rule, available at <http://epa.gov/carbonpollutionstandard/pdfs/20120327proposal.pdf>.

¹¹² Sean Higgins, EPA Emissions Rules to Effectively Ban New Coal Plants, INV. BUS. DAILY, Mar. 27, 2012, available at <http://news.investors.com/032712-605819-epa-effectively-bans-new-coal-plants.aspx>.

A troubling aspect of EPA's analysis of the rule is its assessment of the benefits and effects of the rule. EPA's analysis cites projections that reductions in greenhouse gas (GHG) emissions from EGUs will occur regardless of the implementation of the proposed rule, calling into question the necessity of the rule. EPA does not cite any health benefits tied directly to the proposed rule, only claiming broad public health improvements stemming from the same reductions in carbon emissions projected to happen anyway. Despite the fact the rule effectively prohibits the construction of coal-fired power plants, EPA's analysis claims it will have no impact on the electric power sector.¹¹³ Moreover, the agency's analysis is deficient in its projections of the proposed rule's affect on the price of natural gas. EPA fails to account for an increase in electricity prices if the price of natural gas increases beyond projections.¹¹⁴ An increase in natural gas prices, coupled with the inability to construct new coal-fired power plants, would increase electricity rates because a cheaper fuel alternative, such as coal, would be unavailable to utilities.

On March 28, 2011, EPA proposed a rule that would require the location, design, construction, and capacity of cooling water intake structures to reflect the best available technology for minimizing adverse environmental impact.¹¹⁵ Best available control technology is one of the strictest standards EPA can impose on an entity. EPA estimates the cost of the regulation to the electric power sector will be approximately \$386 million.¹¹⁶ As a result of a "sue and settle" agreement, EPA agreed to finalize the 316(b) rule by July 27, 2013.

On May 4, 2012, EPA proposed a rule to regulate coal by-products, commonly called coal ash or "fly ash", used to make cement, concrete, wallboard, and road building materials. The rule would designate it as either a solid or hazardous waste, despite the fact that states consider coal by-products to be nonhazardous waste. To change coal ash's designation would mean new regulatory burdens under statutes like the Resource Conservation and Recovery Act and complicate its use as a building material. According to EPA, if it designates coal ash as a hazardous waste, the new regulatory burdens associated with the rule would cost \$1.5 billion annually;¹¹⁷ alternatively, a designation as solid waste would cost approximately \$600 million annually.¹¹⁸ An independent study, however, puts the designation of coal ash as a hazardous waste at a much higher cost. The Electric Power Research Institute estimated this would cost between \$5.3 billion and \$7.6 billion annually.¹¹⁹ The rule is expected to be finalized by the end of 2012.

¹¹³ U.S. EPA, "Regulatory Impact Analysis for the Proposed Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources; Electricity Utility Generating Units," March 2012.

¹¹⁴ NERA Economic Consulting, "Analysis of EPA's Proposed GHG New Source Performance Standard for Electric Generating Units," June 25, 2012.

¹¹⁵ U.S. EPA, "Water: Cooling Water Intakes (316b), Basic Information," March 6, 2012, *available at* <http://water.epa.gov/lawsregs/lawsguidance/cwa/316b/basic.cfm>.

¹¹⁶ U.S. EPA, "Economic and Benefits Analysis for the Proposed Section 316(b) Existing Facilities Rule," March 28, 2011.

¹¹⁷ U.S. EPA, "Regulatory Impact Analysis for EPA's Proposed RCRA Regulation of Coal Combustion Residuals (CCR) Generated by the Electric Utility Industry," April 30, 2012.

¹¹⁸ *Id.*

¹¹⁹ Electric Power Research Institute, "Coast Analysis of Proposed National Regulation of Coal Combustion Residuals from the Electricity Generating Industry," Nov. 2010.

IV. Conclusion

President Obama continues to make the false claim that his Administration supports an “all-of-the-above” energy policy. As recently as October 16, 2012, the President stated, “The most important thing we can do is make sure we control our own energy . . . We have increased oil production to the highest levels in 16 years . . . Natural gas production is the highest it’s been in decades . . . We have seen increases in coal production and coal employment.”¹²⁰

However, since taking office, the Obama Administration has enacted numerous regulations to curtail domestic energy production. It is despite these policies, and not because of them, that oil and natural gas producers continue to work to expand their businesses, creating jobs and helping the economy. It is only through technological breakthroughs, not poorly designed new regulations, that processes like hydraulic fracturing and horizontal drilling continue to safely provide even more access to trapped oil and gas.

Despite President Obama’s comments, it is especially clear that coal is not a part of his energy agenda. During this Administration, EPA has enacted new regulations at every stage of the coal process from extraction to electricity generation. These regulations have cost high-paying jobs and imposed increased electricity prices on all Americans, living up to his 2008 campaign promises to severely limit the use of coal as an electricity generating resource.

A true “all-of-the-above” energy policy should not attempt to regulate domestic energy sources into disuse. An “all-of-the-above” policy should promote all domestically available resources such as oil, natural gas, coal, and renewable energy. The Obama Administration, despite the rhetoric, has simply not done this.

¹²⁰ President Barack Obama, Presidential Debate, Hofstra University, Oct. 16, 2012.

About the Committee

The Committee on Oversight and Government Reform is the main investigative committee in the U.S. House of Representatives. It has authority to investigate the subjects within the Committee's legislative jurisdiction as well as "any matter" within the jurisdiction of the other standing House Committees. The Committee's mandate is to investigate and expose waste, fraud and abuse.

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