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## EPA at Helm's Deep: Surviving the Fourth Attack on Environmental Law

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## EPA AT HELM'S DEEP: SURVIVING THE FOURTH ATTACK ON ENVIRONMENTAL LAW

*Thomas O. McGarity\**

### INTRODUCTION

In the second volume of J.R.R. Tolkien's *The Lord of the Rings*, Theoden, King of Rohan, learns that the armies of Saruman, the evil wizard, are advancing upon the defenseless city. He therefore orders the citizens to relocate to Helm's Deep, a massive fortress carved into the side of a mountain that has heretofore remained impenetrable. With the help of some elven allies who arrive in the nick of time from Rivendell, the Rohan soldiers repel wave after wave of attacks by the vicious Uruk-hai. As one wall is breached, the soldiers fall back behind an interior wall until at last there is nowhere to retreat. At that point, the king seizes the offensive, orders his soldiers to mount their steeds and take the battle to the enemy. Fortunately, at that moment Gandalf, a good wizard, returns to Helms Deep with a band of Rohan mounted soldiers, and the two armies put the enemy to rout.<sup>1</sup>

For much of the past 30 years, the Environmental Protection Agency ("EPA") and the laws that it administers have been under siege, much like the people of Rohan, from powerful economic, ideological and political actors who believe that the companies subject to EPA's regulatory authority should have greater freedom to go about their business unimpeded by "senseless" and "burdensome" regulations. The assaults came in three waves that peaked during the first years of the Reagan Administration, the first year of the 104th Congress, and the first six years of the George W. Bush

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\* Joe R. and Teresa Lozano Long Endowed Chair in Administrative Law, University of Texas School of Law. The themes highlighted in this article are explored in greater detail in many additional regulatory contexts in THOMAS O. MCGARITY, *FREEDOM TO HARM* (Yale University Press, forthcoming 2013).

1. J.R.R. TOLKIEN, *THE TWO TOWERS*, ch. 7 (2d ed. 1985) (1965).

Administration. During the first two years of the Obama Administration, EPA seized the offensive. Unlike the heroes of Helm's Deep, however, the forces of environmental progress were driven back behind the ramparts after only two years by a wholly unanticipated fourth assault from a reinvigorated business community that took advantage of an economic crisis brought on by the lack of federal regulation of the banking industry to inspire a populist uprising that inexplicably blamed federal regulation for the nation's current economic woes. Whether EPA and the foundational environmental laws that it implements will survive this fourth assault is by no means clear.

### I. THE FIRST ASSAULT: THE REAGAN ADMINISTRATION

Ronald Reagan, the genial governor of California, was an unlikely choice for the general's role in the business community's first assault on federal environmental regulation when he became one of the country's first conservative radio stars in 1975 with a folksy message touting the virtues of free markets.<sup>2</sup> But he aggressively assumed that role during his 1980 presidential campaign when he declared that air pollution had been "substantially controlled" and promised to invite the steel and coal industries to help him "rewrite clean air rules."<sup>3</sup> Upon assuming office, President Reagan made "regulatory relief" one of the four primary goals of his "economic recovery program."<sup>4</sup>

Soon after the election, a "Coalition on Regulatory Reform" created by the U.S. Chamber of Commerce assembled more than sixty "strategy groups" from different industries to coordinate strategy.<sup>5</sup> It hit the ground running with a "hit list" of federal regulations that had to be repealed or revised by agencies headed by people who met a list of qualifications that the Chamber generously

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2. See RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 99 (2004); DAVID VOGEL, *FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA* 256 (1989).

3. JONATHAN LASH, KATHERINE GILLMAN & DAVID SHERIDAN, *A SEASON OF SPOILS: THE REAGAN ADMINISTRATION'S ATTACK ON THE ENVIRONMENT* 13 (1984).

4. Office of the Press Secretary, The White House, Summary Fact Sheet: The President's Economic Recovery Program and Regulatory Relief vii (June 6, 1981).

5. William J. Lanouette, *Off the Hill and Off the Record, Lobbyist Clubs Dine on Gourmet Tips*, NAT'L J., Apr. 10, 1982, at 633.

provided to the president.<sup>6</sup> OMB Director-designate David Stockman announced that the administration would locate the “environmentalists, the solar power freaks, the Naderites” and “throw them out.”<sup>7</sup>

Because the Democrats remained firmly in control of the House of Representatives, the administration pursued regulatory relief through agencies headed by business-friendly administrators subject to careful oversight and control by the White House’s Office of Management and Budget and a special “Task Force on Regulatory Relief” headed by Vice-President George H.W. Bush.<sup>8</sup> The Task Force asked the business community to nominate federal regulations for revision or repeal, and it drew on those recommendations to prepare “hit lists” for the agencies to use as part of an overall requirement to re-evaluate all existing regulations.<sup>9</sup> The extent to which OMB’s Office of Information and Regulatory Affairs (“OIRA”) was taking its cues from the regulated industries remained hidden behind its closed doors until congressional committees launched a series of hearings into OIRA’s role in agency rulemaking in 1983.<sup>10</sup>

EPA Administrator Anne Gorsuch had been one of the leaders of a small band of extremely conservative Colorado state legislators who called themselves “the crazies.”<sup>11</sup> She and her close associates believed they had a mandate to roll back the agency’s regulatory

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6. Timothy B. Clark, *OMB to Keep Its Regulatory Powers in Reserve in Case Agencies Lag*, NAT’L J., Mar. 14, 1981, at 424, 426.

7. SIDNEY BLUMENTHAL, *THE RISE OF THE COUNTER-ESTABLISHMENT: FROM CONSERVATIVE IDEOLOGY TO POLITICAL POWER* 231 (1986).

8. *See, e.g.*, DONALD T. CRITCHLOW, *THE CONSERVATIVE ASCENDANCY: HOW THE GOP RIGHT MADE POLITICAL HISTORY* 189 (2007); MARTHA DERTHICK & PAUL J. QUIRK, *THE POLITICS OF DEREGULATION* 216 (1985); DONALD J. DEVINE, *REAGAN’S TERRIBLE SWIFT SWORD: REFORMING & CONTROLLING THE FEDERAL BUREAUCRACY* 2 (1991); SUSAN J. TOLCHIN & MARTIN TOLCHIN, *DISMANTLING AMERICA: THE RUSH TO DEREGULATE* 59 (1983).

9. GEORGE C. EADS & MICHAEL FIX, *RELIEF OR REFORM? REAGAN’S REGULATORY DILEMMA* 2-3 (1984); *see also* LASH ET AL., *supra* note 3, at 21.

10. JOAN CLAYBROOK, *RETREAT FROM SAFETY* xix (1984); Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 580 (1989).

11. MARK K. LANDY, MARC J. ROBERTS & STEPHEN R. THOMAS, *THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS* 246 (1990).

programs, and they adopted three strategies to accomplish that goal. First, they replaced career civil servants in mid-level management positions with ideologues who were wholly unqualified for those jobs. Second, they initiated a series of reorganizations aimed primarily at enhancing their control over the civil service staff. Third, they negotiated directly with the regulated industries, thereby undercutting the professionals in the program offices who were attempting to implement the environmental statutes as written.<sup>12</sup>

The Reagan Administration also launched an assault on EPA's budget. Unsatisfied with Gorsuch's request for a 20 percent reduction in the agency's appropriation, OMB demanded even more draconian cuts.<sup>13</sup> OMB explained that "fewer regulators will necessarily result in fewer regulations and less harassment of the regulated."<sup>14</sup> With the help of industry lobbyists, the administration persuaded Congress to accept most of these cuts.<sup>15</sup> The budget reductions and Gorsuch's open contempt for the EPA career staff resulted in the resignations of almost 4,000 seasoned employees, a devastating loss for the fledgling agency.<sup>16</sup>

These institutional changes had a profound impact on the content and quantity of the EPA's regulations.<sup>17</sup> The agency's approach to enforcement under Administrator Gorsuch also departed radically from that of her predecessors. In Gorsuch's view, the goal should be to encourage voluntary compliance, not punish past violations.<sup>18</sup> Mid-level career managers perceived a "deliberate plan to paralyze if

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12. *Id.* at 247-248; *See* LASH ET AL., *supra* note 3, at 18, 29, 47-49.

13. ANNE M. BURFORD & JOHN GREENYA, *ARE YOU TOUGH ENOUGH?* 7 (1986); *see* LASH ET AL., *supra* note 3, at 54-55; *see* LANDY ET AL., *supra* note 11, at 250.

14. *See* LASH ET AL., *supra* note 3, at 57 (quoting OMB memo).

15. *See* BLUMENTHAL, *supra* note 7, at 234.

16. *See* LANDY ET AL., *supra* note 11, at 250.

17. *See* LASH ET AL., *supra* note 3, at 72, 131.

18. *Id.* at 46; *see also* William L. Andreen, *Motivating Enforcement: Institutional Culture and the Clean Water Act*, 24 *PACE ENVTL. L. REV.* 67, 72 (2007); Barry Boyer & Erol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 *BUFFALO L. REV.* 833, 876 (1985); Joel A. Mintz, *Some Thoughts on the Interdisciplinary Aspects of Environment Enforcement*, 36 *ENVTL. L. REP.* 10495, 10501 (2006).

not totally dismantle the enforcement program.”<sup>19</sup> Between June 1981 and July 1982, the number of civil and criminal cases that EPA referred to the Justice Department declined by 84 percent.<sup>20</sup>

When a congressional committee attempted to probe the precipitous decline in enforcement at EPA, the head of the Department of Justice’s (“DOJ”) Office of Legal Counsel instructed EPA to withhold DOJ-designated “enforcement sensitive” documents.<sup>21</sup> The dispute over documents erupted into a full-scale constitutional confrontation over executive privilege.<sup>22</sup> EPA’s relationship with Congress deteriorated even farther when a committee investigating Assistant Administrator Rita Lavelle’s administration of the Superfund program discovered that she had lied in her testimony and ordered her staff to shred documents relevant to the committee’s inquiry. Gorsuch fired Lavelle in early February 1983 before resigning herself under pressure in early March.<sup>23</sup> The first assault on EPA ended at that point with the agency in organizational shambles, bereft of resources, and unsure of its mission. But its statutory authority remained untouched by the assaults from within the administration, and it still retained many high-quality professionals on its career staff.

## II. THE SECOND ASSAULT: THE GINGRICH CONGRESS

President George H.W. Bush promised that he would be the “environmental President,” and he initially stressed pragmatism and

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19. Joel A. Mintz, *Agencies, Congress and Regulatory Enforcement: A Review of EPA’s Hazardous Waste Enforcement Effort, 1970-1987*, 18 ENVTL. L. 683, 717-718 (1988) (quoting EPA official Edward Kurent) [hereinafter Mintz, *Regulatory Enforcement*].

20. Michael E. Kraft & Norman J. Vig, *Environmental Policy in the Reagan Presidency*, 90 POL. SCI. Q. 415, 429 (1984).

21. See BURFORD & GREENYA, *supra* note 13, at 157; See LASH ET AL., *supra* note 3, at 75.

22. BURFORD & GREENYA, *supra* note 13, at 149, 157, 163; see also Mintz, *Regulatory Enforcement*, *supra* note 19, at 739-743.

23. See LASH ET AL., *supra* note 3, at 77; see also LAZARUS, *supra* note 2, at 102. Lavelle was later convicted of perjury and served time in jail. See LASH ET AL., *supra* note 3, at 43. See Robert A. Stallings, Ending Evacuations, 9.2 INT’L J. OF MASS EMERGENCIES & DISASTERS, 183, 191 (1991) (noting that investigations into the handling of the Super Fund and the conflict of interest involving Lavelle soon led to her conviction and prison sentence.)

administrative competence over ideology.<sup>24</sup> He appointed William K. Reilly, a highly regarded conservationist, to head the EPA.<sup>25</sup> With the strong support of President Bush and the agency staff, Reilly worked with Congressman Henry Waxman to enact the comprehensive 1990 amendments to the Clean Air Act over the opposition of the regulated industries and some strong internal opponents within the administration.<sup>26</sup>

President Clinton wanted to “reinvent” government to make it more transparent and effective, but also to make it less intrusive than it had been during the 1970s. President Clinton appointed Carol Browner, the 37-year-old head of Florida’s Department of Environmental Regulation, to be EPA administrator.<sup>27</sup> Like President Bush, President Clinton retained the interagency review process under OIRA, and he gave Vice President Gore final responsibility for resolving interagency disputes.<sup>28</sup> Although modest budget cuts hampered the agency’s efforts to implement the new Clean Air Act through rulemaking, the agency filed a record number of enforcement actions in 1993, and it broke that record in 1994 by filing 2,246 actions.<sup>29</sup>

The industry launched the second assault on EPA immediately following the 1994 off-year elections in which the Republican Party gained control of both the House and the Senate.<sup>30</sup> The field marshal

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24. See, e.g., Keith Schneider, *Bush on the Environment: A Record of Contradictions*, N.Y. TIMES, July 4, 1992, at A1; David Hoffman, *Pragmatism Is Bush’s Mainstay*, WASH. POST, Apr. 30, 1989, at A1.

25. Trip Gabriel, *Greening the White House*, N.Y. TIMES MAG. 25, Aug. 13, 1989.

26. Michael Weisskopf, *Clean Air Power: EPA’s Man With a Mission*, WASH. POST, Dec. 7, 1990, at A21; Michael Weisskopf, *With Pen, Bush to Seal Administration Split on Clean Air Act*, WASH. POST, Nov. 15, 1990, at A23.

27. Keith Schneider, *New Breed, of Ecologist to Lead E.P.A.*, N.Y. TIMES, Dec. 17, 1992, at B20; Paul Richter, *EPA Choice Has Network of Strong Allies*, L.A. TIMES, Dec. 12, 1992, at A23.

28. Robert Duffy, *Regulatory Oversight in the Clinton Administration*, 27 PRESIDENTIAL STUD. Q. 71, 73-74 (1997); Ellen Siegler, *Executive Order 12866: An Analysis of the New Executive Order on Regulatory Planning and Review*, 24 ENVTL. L. REP. 10070 (1994).

29. *Record Number of Enforcement Actions Taken in Fiscal 1994, EPA Says in Report*, 26 ENV’T REP. (BNA) 462 (June 23, 1995); see also *Criminal Cases, Fine Collections Rise in 1993, EPA Says in Report on Enforcement*, 24 ENV’T REP. (BNA) 1516 (Dec. 17, 1993).

30. NINA J. EASTON, GANG OF FIVE 288 (2000).

for the second assault was Newt Gingrich (R-Georgia), the strategically brilliant, but highly abrasive leader of the conservative wing of the Republican Party.<sup>31</sup> The marching orders were contained in the Contract with America, a carefully crafted list of ten legislative initiatives that Republican candidates had promised to complete within 100 days.<sup>32</sup> Under the new majority leader, Richard K. Arney (R-Texas), a small team of conservative activists called the Speaker's Advisory Group rode herd over committee chairmen who no longer controlled the legislative agenda.<sup>33</sup> Republican Whip Tom DeLay called EPA "the Gestapo of government," and urged his colleagues to repeal the Clean Air Act.<sup>34</sup> The Cato Institute declared that "Congress must jettison the entire foundation of modern environmental law if it hopes to provide regulatory relief for a battered economy and environmental protection for generations to come."<sup>35</sup>

Having contributed heavily to the Republican victory, regulated industries expected access to the legislative process, and they got it.<sup>36</sup> Delay assembled an umbrella group, called "Project Relief," consisting of more than 300 companies, trade associations and lobbyists who committed their time and resources to promoting the leadership's regulatory reform bills.<sup>37</sup> With a budget approaching \$30

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31. MATTHEW CONTINETTI, *THE K STREET GANG* 2 (2006); *see also* JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE RIGHT NATION* 101 (2004).

32. REPUBLICAN NATIONAL COMMITTEE, *CONTRACT WITH AMERICA: THE BOLD PLAN* BY REP. NEWT GINGRICH, REP. DICK ARNEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 7 (Ed Gillespie & Bob Schellhas eds., 1994); *see also* Jason DeParle, *Rant/Listen, Exploit/Learn, Scare/Help, Manipulate/Lead*, N.Y. TIMES MAG., Jan. 28, 1996, at 34; Richard E. Cohen, *The Transformers*, 27 NAT'L J. 528 (Mar. 4, 1995).

33. *Id.*

34. *See* CONTINETTI, *supra* note 31, at 21. *See also* LOU DUBOSE & JAN REID, *THE HAMMER: GOD, MONEY AND THE RISE OF THE REPUBLICAN CONGRESS* 97 (2004); James Gerzetzang, *GOP Clouds the Future of Environmental Protection*, L.A. TIMES, Dec. 24, 1995, at A1.

35. *Repeal Most Federal Environmental Laws, Conservatives Urge Congress*, PESTICIDE & TOXIC CHEMICAL NEWS, Feb. 15, 1995; Cindy Skrzycki, *In Regulatory Assault, GOP Has a Lot to Be Thankful For*, WASH. POST, Dec. 2, 1994, at D1.

36. *See* David Maraniss & Mishael Weisskopf, *Speaker and His Directors Make the Cash Flow Right*, WASH. POST, Nov. 27, 1995, at A1.

37. Michael Weisskopf & David Maraniss, *Forging an Alliance for Deregulation; Rep. DeLay Makes Companies Full Partners in the Movement*;



million and operating out of one of the Republican leadership's Capitol Hill offices, Project Relief lobbyists drafted legislation, prepared talking points for committee chairmen, briefed committee staffers and the press, and ran expensive vote counts for the leadership.<sup>38</sup>

The second assault proceeded along three major fronts. First, the leadership introduced "omnibus" regulatory reform legislation that would have imposed numerous procedural and analytical requirements on agency rulemaking and required agencies to base their regulations on formal cost-benefit analysis. Second, it attempted to repeal or substantially rewrite statutes like the Clean Water Act to make them far friendlier to regulatees. Third, it launched piecemeal attacks on the federal bureaucracy through funding cuts and riders to important bills that were aimed at preventing the agencies from carrying out their statutory responsibilities. The leadership singled out EPA and its statutes for special attention.<sup>39</sup>

Rather than rallying the troops to the battlements, a disheartened President Clinton initially ceded the leadership role to the Republicans and scrambled to co-opt the radical attacks by "reinventing" the environmental laws instead abolishing them. He ordered every regulatory agency to comb through every existing regulation and eliminate all "obsolete" and "unnecessary" requirements.<sup>40</sup> EPA reported in June 1995 that its line-by-line review of 12,766 pages of the Code of Federal Regulations had identified almost 1500 pages that could be deleted.<sup>41</sup>

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WASH. POST, Mar. 12, 1995, at A1; Bill Lambrecht, *Project Relief Opens Fire on Regulations*, ST. LOUIS POST-DISPATCH, Dec. 15, 1994, at 3A; Gareth Cook, *Laws for Sale*, WASH. MONTHLY, July/Aug. 1995, at 44. See also CONTINETTI, *supra* note 31, at 18.

38. See CONTINETTI, *supra* note 31, at 14, 19; see also Jill Abramson & Timothy Noah, *In GOP-Controlled Congress, Lobbyists Remain As Powerful as Ever – And Perhaps More Visible*, WALL ST. J., Apr. 20, 1995, at A14; John H. Cushman, Jr., *Lobbyists Helped Revise Laws on Water*, N.Y. TIMES, Mar. 22, 1995, at A16.

39. See LAZARUS, *supra* note 2, at 129.

40. Thomas O. McGarity, *Deflecting the Assault: How EPA Survived a "Disorganized Revolution" by "Reinventing" Itself a Bit*, 31 ENVTL. L. REP. 11249, 11250 (2001).

41. U.S. ENVTL. PROT. AGENCY, REPORT TO THE PRESIDENT: ELIMINATING AND IMPROVING REGULATIONS 3 (1995).

The House passed an omnibus bill that required EPA and other regulatory agencies to prepare detailed risk assessments and extensive quantitative cost-benefit analyses for all “major” rules.<sup>42</sup> Omnibus regulatory reform did not fare as well in the Senate, however, where an even more intrusive version of the bill failed to attract the 60 votes needed to overcome a filibuster from pro-environment Democrats.<sup>43</sup>

After chairing seven days of hearings and soliciting input from several industry task forces, House Transportation and Infrastructure Committee chairman Bud Shuster (R-PA) introduced industry-drafted amendments to the Clean Water Act that would have rewritten all of the core provisions of the 25-year-old statute to reflect a decidedly *laissez faire* approach to water pollution.<sup>44</sup> To head off the attacks, public interest groups seized the high ground by exposing the blatant influence peddling that had occurred and attempting to put a human face on the issues by flying in victims of environmental pollution for congressional hearings.<sup>45</sup> As these counterattacks gained traction, the White House jumped on the environmental bandwagon and began to issue veto threats.<sup>46</sup> Although the House quickly passed the Schuster bill with only minor amendments,<sup>47</sup> President Clinton did not have to veto it because the moderate Republican chairman of the Senate Committee on

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42. McGarity, *supra* note 40, at 11252-53.

43. *See* 141 CONG. REC. 19,661-62 (1995); *see also* McGarity, *supra* note 40, at 11253-54.

44. H.R. REP. NO. 104-112, at 184-85 (1995); *see also* ELIZABETH DREW, *WHATEVER IT TAKES* 116 (1997); McGarity, *supra* note 40, at 11255-56; David A. Dana, *One Green America: Continuities and Discontinuities in Environmental Federalism in the United States*, 24 *FORDHAM ENVTL. L. REV.* 103, 112 (2013) (noting federal law and regulation may control impact of pollution on health effects and the EPA's timid approach with respect to pollution exports after the 1990 amendments to the Clean Air Act).

45. McGarity, *supra* note 40, at 11250; *After 100 Days, a 'Legacy of Unfairness' or a 'Bolder Direction'?*, N.Y. TIMES, Apr. 9, 1995, at A22; *Groups Plan \$2 Million TV Campaign to Counter Assault on Environmental Laws*, Daily Env't Rep. (BNA), Apr. 6, 1995.

46. John H. Cushman, Jr., *Environment Gets a Push From Clinton: New Forceful Stance Over G.O.P Drive*, N.Y. TIMES, July 5, 1995, at A11.

47. 141 CONG. REC. H5013 (daily ed. May 16, 1995).

Environment and Public Works declined to schedule it for a committee markup.<sup>48</sup>

Having failed on the first two fronts, the radical reformers amassed on the third front – the FY 1996 appropriations bill. In the House version of the bill, EPA's funding was cut by almost one-third, and its enforcement budget was cut in half. Majority whip Tom DeLay insisted upon adding 17 deregulatory riders to EPA's appropriation bill that would have, among other things, prevented EPA from promulgating industrial effluent and stormwater discharge limitations under the Clean Water Act, enforcing its wetlands protection program, implementing or enforcing the recently enacted Clean Air Act permit requirements, and promulgating hazardous air emissions standards for refineries.<sup>49</sup> The Senate cut EPA's budget by 15 percent and added riders that would have prohibited EPA from issuing drinking water standards for arsenic and radon, vetoing wetlands permits issued by the Corps of Engineers, and adding new sites to the superfund list.<sup>50</sup> The Conference Committee cut EPA's budget by 14 percent, deleted the House riders, and allowed the Senate's riders to stand.<sup>51</sup>

On November 13, 1995, President Clinton vetoed a continuing resolution that, among other things, contained the entire House omnibus regulatory reform bill as a rider, and all nonessential federal employees went on leave without pay the next day.<sup>52</sup> After a "clean" continuing resolution provided a brief respite, the government shut down again on December 15, 1995.<sup>53</sup> The second shutdown came to an end on January 6, 1996 pursuant to another stopgap continuing resolution. Finally, on April 26, 1996, Congress passed and the President signed a FY 1996 appropriations bill. The bill, which would be in effect for only six months, set EPA's budget at just under its FY 1995 level. In a clear victory for the Administration, it also

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48. See McGarity, *supra* note 40, at 11256.

49. *Id.*

50. 141 CONG. REC. S14177, S14180 (daily ed. Sept. 25, 1995).

51. *Conferees Approve EPA Funding Of \$ 5.7 Billion; Temporary Spending, Reconciliation Bills Passed*, 26 ENV'T REP. CUR. DEV. (BNA) 1265 (Nov. 24, 1995).

52. Ann Devroy & Eric Pianin, *Workers Go Home; Talks Go Nowhere; Clinton, GOP At Impasse On Budget*, WASH. POST, Nov. 15, 1995, A1.

53. See, e.g., *Clinton Vetoes EPA, Interior Bills; Agencies Shut Down For Second Time*, 26 ENV'T REP. (BNA) 1552 (Dec. 22, 1995).

dropped the some of the Senate's environmental riders and weakened others.<sup>54</sup> The Administration's victory marked the end of the second assault on environmental regulation, as even Tom DeLay admitted that "we have lost the debate on the environment."<sup>55</sup>

EPA began to ease out of its defensive posture after the Republican capitulation in the budget standoff in early 1996, and President Clinton's easy re-election victory later that year. Aided by steadily increasing budgets, Administrator Browner pressed the staff to promulgate many long-delayed regulations, including ambitious revisions to the national ambient air quality standards for ozone, more stringent limitations on emissions from diesel engines, and an aggressive program for limiting interstate air pollutions.<sup>56</sup> During the last two years of the Clinton Administration, EPA initiated dozens of enforcement actions against aging refineries and power plants that had unlawfully undergone modifications that significantly increased emissions without undergoing new source review.<sup>57</sup>

### III. THE THIRD ASSAULT: THE GEORGE W. BUSH ADMINISTRATION

#### A. Introduction

With a Republican president and Republican majorities in both houses of Congress following the 2000 elections, the stage was set for the third assault on environmental regulation. The industry's legislative agenda was briefly waylaid, however, when their aggressive efforts to roll back environmental protections so alienated a moderate senator from Vermont that he abandoned the Republican Party and the Democrats regained control of the Senate. That, too,

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54. 141 CONG. REC. H3885, H3921 (daily ed. Mar. 29, 1995); 104th Cong., 2d Sess. (Apr. 25, 1996) (riders survive); *Clinton Signs Omnibus Appropriations Bill, Immediately Waives Environmental Provisions*, 27 ENV'T REP. (BNA) 8 (May 3, 1996).

55. David Rogers, *General Newt; GOP 'Revolution' Leader Takes Lessons, Lingo From Military*, ORANGE CNTY REGISTER, Dec. 30, 1995, at G1.

56. See U.S. ENVTL. PROT. AGENCY, *EPA's Budget and Spending, 1970-2003*, (last updated Jan. 13, 2013), available at <http://www.epa.gov/planandbudget/budget.html>

57. ROBERT S. DEVINE, BUSH VS. THE ENVIRONMENT, 134 (2004) [hereinafter DEVINE, BUSH VS. THE ENVIRONMENT]; Jonathan Remy Nash & Richard L. Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 NW. U. L. REV. 1677, 1692-93 (2007).

changed in 2002 when voters put Republicans firmly in control of both houses.<sup>58</sup> By then, however, a series of business scandals involving Enron, Worldcom and others made it much more difficult for the Republican majorities to enact radical revisions to the regulatory statutes. Nevertheless, a determined George W. Bush Administration, operating without significant congressional oversight, achieved many of the industry's goals administratively by weakening existing regulations, slicing regulatory agency budgets, and cutting back on enforcement.

Christine Todd Whitman was President Bush's choice for EPA Administrator. Like Bush, Whitman was the governor of a populous state with serious environmental problems (New Jersey), and, like Bush, she had attempted to address those problems with market-oriented approaches that were not unduly burdensome to powerful economic interests.<sup>59</sup> Whitman quickly made her presence felt by reorganizing the agency's rulemaking procedures to assign a much more prominent role to the agency's economists.<sup>60</sup> She also supported the administration's attempts to reduce EPA's budget, especially in the area of enforcement.<sup>61</sup> Whitman's appeal for "smarter regulation" translated in practice into less regulation as EPA stressed voluntary approaches and accommodation over stringent rulemaking and strict enforcement.<sup>62</sup> Although the Administration expressed great respect for science in regulatory decision-making, it tended to disregard scientific studies and analysis that pointed in the direction of greater regulation.<sup>63</sup> Not surprisingly, staff morale sank

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58. See CRITCHLOW, *supra* note 8, at 1.

59. David M. Halbfinger & Andrew C. Revkin, *Whitman Seen as Strong Choice for EPA*, N.Y. TIMES, Dec. 21, 2000, at A37.

60. *Whitman Boosts Policy Office to New Leadership Role at EPA*, INSIDE EPA, June 1, 2001, at 10.

61. See William W. Buzbee, *Regulatory Underkill in an Era of Anti-Environmental Majorities*, in STRATEGIES FOR ENVIRONMENTAL SUCCESS IN AN UNCERTAIN JUDICIAL CLIMATE 141, 145-46 (Michael A. Wolf, ed. 2005).

62. Tom Brune, *Many Agencies Headed by Industry Veterans Who Are Watering Down Regulation*, NEWSDAY, Oct. 10, 2004, at A1; see also Melinda Henneberger, *Despite Appearances, Whitman Says She and Bush Agree on the Environment*, N.Y. TIMES, Apr. 17, 2001, at A12.

63. See generally, CHRIS MOONEY, THE REPUBLICAN WAR ON SCIENCE (2005); INTERFERENCE AT THE EPA: SCIENCE AND POLITICS AT THE U.S. ENVIRONMENTAL PROTECTION AGENCY, UNION OF CONCERNED SCIENTISTS 2 (2008), available at

to levels not experienced since the early years of the Reagan Administration.<sup>64</sup>

### B. Approach to Environmental Regulation

The Bush Administration demonstrated a consistent tendency to pursue less ambitious environmental goals that were sometimes at odds with the environmental statutes. For example, EPA proposed to withdraw the Clinton Administration's "midnight" regulations establishing a standard for arsenic in drinking water on the ground that it may have been the result of "a rushed decision."<sup>65</sup> After a firestorm of public protest, however, the agency allowed the Clinton Administration version of the arsenic rule to remain in effect.<sup>66</sup> EPA undertook very few new initiatives to achieve environmental improvement when not compelled by statute to do so.<sup>67</sup> Yet, despite her business-friendly approach to regulation, Administrator Whitman spent most of her two-year tenure in conflicts with OIRA and political operatives in the Office of the Vice President.<sup>68</sup>

### C. Clear Skies Legislative Initiative and Associated NSR Regulations

The Bush Administration's signature legislative initiative was its "Clear Skies" bill to establish a "cap-and-trade" regime for power plants to address emissions of sulfur dioxide (SO<sub>2</sub>), oxides of

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[http://www.ucsus.org/assets/documents/scientific\\_integrity/interference-at-the-epa.pdf](http://www.ucsus.org/assets/documents/scientific_integrity/interference-at-the-epa.pdf).

64. See Jeff Ruch, *EPA at Low Ebb*, ENVTL. F., Mar.-Apr., 2008, at 38, 41; see also *EPA Morale Slips in Wake of Arsenic, Climate Change Decisions*, INSIDE EPA, Apr. 13, 2001, at 1.

65. U.S. ENVTL. PROT. AGENCY, *EPA to Propose Withdrawal of Arsenic in Drinking Water Standards: Seeks Independent Reviews* (Mar. 20, 2001), available at

<http://yosemite.epa.gov/opa/admpress.nsf/b1ab9f485b098972852562e7004dc686/77e59dbb919fdf4785256a150063d6a0?OpenDocument>.

66. Mike Ferulo, *Newly Adopted Standard for Arsenic Challenged as Not Protective Enough*, 33 ENV'T. REP. (BNA) 1402 (Dec. 19, 2001).

67. See Gregg Easterbrook, *Hostile Environment*, N.Y. TIMES, Aug. 19, 2001, at 40, 43.

68. See *Whitman Announces Resignation in Letter to Bush, Citing Wish to Return to New Jersey*, 34 ENV'T REP. (BNA) 1157 (May 23, 2003); see also Francine Kiefer, *Whitman's Tough Path at the EPA*, CHRISTIAN SCI. MONITOR, Mar. 26, 2002, at A1.

nitrogen (“NO<sub>x</sub>”) and mercury.<sup>69</sup> Although the Administration touted the bill as a great leap forward, an EPA analysis prepared for the Vice-President’s Energy Task Force concluded that the existing Clean Air Act programs would reduce power plant emissions nearly twice as fast as the administration’s legislative initiative.<sup>70</sup> Environmental groups pointed out that the bill would not only forestall progress until 2018 but also result in toxic “hot spots” where mercury exposures could reach dangerous levels. Worse, it would do nothing to address the pressing problem of global warming.<sup>71</sup> Preoccupied with terrorism and foreign policy issues, the administration was unwilling to spend political capital on the initiative, and it got nowhere in a Congress that was deeply divided on environmental issues.<sup>72</sup>

When it became clear that the Clear Skies initiative was dead, the Bush Administration attempted to accomplish the same deregulatory goals through the rulemaking process. The electric utility industry was demanding that the administration do something to relieve it of the new source review lawsuits that the Department of Justice had filed toward the end of the Clinton Administration, and the Bush Administration was happy to oblige. After several months of closed-door negotiations with industry lobbyists and officials from the Department of Energy, EPA promulgated two regulations to make the new source review process much easier to avoid.<sup>73</sup> Outraged

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69. *Bush Announces Clear Skies Initiative*, ABOUT.COM (Feb. 14, 2002), available at <http://usgovinfo.about.com/library/weekly/aa021402b.htm>.

70. Margaret Kriz, *King Coal’s Resurgence*, 36 NAT’L J. 2016 (2004); see also Andrew Goldstein, *For Bush, It’s Not Easy Being Green*, TIME, Feb. 25, 2002, at 19.

71. See Margaret Kriz, *A Pro-Industry Tilt*, 36 NAT’L J. 1028 (2004); see also Juliet Eilperin, *U.S. Faces “Pivotal Moment” on Clean-Air Regulations*, WASH. POST, Jan. 27, 2005, at A8.

72. See generally JEFF GOODELL, *BIG COAL: THE DIRTY SECRET BEHIND AMERICA’S ENERGY FUTURE* 141 (2006); see also James A. Barnes, et al., *Out of the Loop*, 35 NAT’L J. 298 (2003).

73. Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Equipment Replacement, Provision of the Routine Maintenance, Repair and Replacement Exclusion, 68 Fed. Reg. 61, 248 (Oct. 27, 2003) (to be codified at 40 C.F.R. pts. 51 & 52), and Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects, 67 Fed. Reg. 80, 186 (Dec. 31, 2002) (to be codified at 40 C.F.R. pts. 51 & 52); see also Thomas O.

environmental activists claimed that the rules would allow thousands of modifications that were clearly covered by the statute to avoid new source review in perpetuity.<sup>74</sup> The first regulation survived judicial review for the most part, but the second did not.<sup>75</sup>

#### D. Enforcement

The Clear Skies initiative and EPA's rulemaking initiatives had a powerful adverse effect on the agency's efforts to take effective enforcement action against companies that had for years unlawfully avoided new source review.<sup>76</sup> In his letter resigning from EPA, the Director of the agency's Office of Regulatory Enforcement complained that the agency was about to "snatch defeat from the jaws of victory" as reports of the agency's largely unsuccessful battles with "a White House that seems determined to weaken the rules we are trying to enforce" caused defendants in existing enforcement actions to walk away from settlement negotiations.<sup>77</sup> The agency's Inspector General issued a report in October 2004 concluding that the proposed changes to the new source review program had "seriously undermined" the agency's ability "to effectively enforce" the statutory new source review requirement.<sup>78</sup>

#### E. Leavitt and Johnson Take Over

Administrator Whitman resigned in May 2003 after a frustrating two years of battling with deregulators in the White House.<sup>79</sup> Her

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McGarity, When Strong Enforcement Is More Effective than Weak Regulation: The EPA/DOJ New Source Review Enforcement Initiative, U. OF MD. L. REV. (forthcoming 2013); Bruce Barcott, *Changing All the Rules*, N.Y. TIMES, April 4, 2004, at A1.

74. See Nash & Revesz, *supra* note 57, at 1703-04.

75. Compare *New York v. E.P.A.*, 443 F.3d 880 (D.C. Cir. 2006), with *New York v. E.P.A.*, 413 F.3d 3 (D.C. Cir. 2005).

76. See DEVINE, BUSH VS. THE ENVIRONMENT, *supra* note 57 at 142-45 (2004); see also Mintz, *supra* note 18, at 10503.

77. Letter to Christine Whitman from Eric V. Schaeffer, GRIST (Feb. 28, 2002), available at <http://grist.org/article/top-epa-offical-resigns/>.

78. Elizabeth Shogren, *EPA is Lax on Coal Power Rule, Report Says*, L.A. TIMES, Oct. 1, 2004, at A16.

79. Pamela Najor, *Whitman Announces Resignation in Letter to Bush, Citing Wish to Return to New Jersey*, 34 ENV'T REP. (BNA) 1157 (2003); see also *Often Isolated, Whitman Quits as E.P.A. Chief*, N.Y. TIMES, May 22, 2003, at A22.



successor, Governor Mike Leavitt of Utah, became a strong advocate for the White House's policies on environmental issues, frequently overruling the EPA staff and its scientific advisory groups in the process.<sup>80</sup> He saw the 2004 elections as a "validation" of the Bush Administration's deregulatory agenda and a mandate to pursue it more vigorously.<sup>81</sup> In early 2005, Leavitt resigned to become Secretary of Health and Human Services and was replaced by Stephen Johnson, a career government employee. Administrator Johnson lacked the gravitas of former governors Whitman and Leavitt, and it soon became clear that he was allowing White House officials in OMB and the Office of the Vice-President to determine the outcome of nearly all of the initiatives that they cared about.<sup>82</sup> Unlike Whitman and Leavitt, Johnson had to deal with a Democrat-controlled Congress that forced him to spend much of his time explaining the administration's controversial actions.<sup>83</sup>

#### *F. Ozone/Particulates*

Not long after Johnson assumed the reins, the staff of EPA's air office initiated the statutorily required 5-year review of the national primary and secondary ambient air quality standards ("NAAQS") for particulate matter and ozone. The staff concluded that the scientific information that had become available after the previous revision of those standards in 1997 supported tightening the primary standards to make them more protective of public health.<sup>84</sup> In the case of ozone, the staff recommended that the agency promulgate a new secondary standard (to protect crops and vegetation) that reflected cumulative

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80. See Stephen Power, *EPA Chief Makes Political Target*, WALL ST. J., Feb. 19, 2008, at A7; see also Tom Hamburger, *EPA Chief Goes to Bat for Bush Policy*, L.A. TIMES, April 2, 2004, at A19.

81. Elizabeth Shogren & Kenneth R. Weiss, *Environment Officials See a Chance to Shape Regulations*, L.A. TIMES, Nov. 10, 2004, at A12.

82. See BUZBEE, *supra* note 61, at 141.

83. Margaret Kriz, *Vanishing Act*, NAT'L J., Apr. 12, 2008, at 18.

84. U.S. ENVTL. PROT. AGENCY, REVIEW OF THE NATIONAL AMBIENT AIR QUALITY STANDARDS FOR OZONE: POLICY ASSESSMENT OF SCIENTIFIC AND TECHNICAL INFORMATION (Jan. 2007), at 6-81 [hereinafter REVIEW OF NATIONAL AMBIENT AIR QUALITY STANDARDS]; see also Juliet Eilperin, *EPA Weighs Lowering Soot Limit*, WASH. POST, July 2, 2005, at A4.

exposures over the entire growing season.<sup>85</sup> The Clean Air Scientific Advisory Committee (“CASAC”), a committee created by statute to provide neutral scientific advice to the Administrator, agreed with the staff.<sup>86</sup> Yielding to pressure from OIRA and, in the case of the secondary standard for ozone, a direct order from President Bush, Administrator Johnson rejected the staff’s recommendations and promulgated standards that only slightly increased the protection afforded to human health.<sup>87</sup> The D.C. Circuit remanded the particulate matter standard to EPA because it arbitrarily failed to protect a sensitive subpopulation of children who were especially subject to irreversible lung damage.<sup>88</sup> Environmental groups also challenged the ozone standard, but they later agreed to a stay of the litigation when the Obama Administration announced that it would reconsider the standard.<sup>89</sup>

### G. Limiting Mercury Emissions

The 1977 Amendments to the Clean Air Act required EPA to prepare a report on the health effects of human exposure to mercury and other toxic air pollutants emitted by power plants and to regulate those emissions as hazardous air pollutants if it found regulation to be “appropriate and necessary.”<sup>90</sup> EPA belatedly made that finding in late 2000, thereby triggering its obligation to promulgate a hazardous air pollutant standard for toxic pollutants reflecting the maximum achievable control technology (“MACT”) within two years.<sup>91</sup> After

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85. See REVIEW OF NATIONAL AMBIENT AIR QUALITY STANDARDS, *supra* note 84, at 8-16.

86. Marc Kaufman, *EPA Chief Proposes Tougher Ground-Level Pollution Standards for Ozone*, WASH. POST, June 22, 2007, at A9.

87. See National Ambient Air Quality Standards for Ozone; Final Rule, 73 Fed. Reg. 16436 (Mar. 27, 2008) (to be codified at 40 C.F.R. pts. 50 and 58); see also Steven D. Cook, *EPA Sets Stricter Standards for Ozone, But at Level Weaker Than Advisers Sought*, 39 ENV’T REP. (BNA) 493 (Mar. 14, 2008); Andrew Childers, *Waxman Memorandum Finds White House Overruled EPA’s Secondary Ozone Standard*, 39 ENV’T REP. (BNA) 990 (May 23, 2008).

88. *Am. Farm Bureau Fed’n v. E.P.A.*, 559 F.3d 512 (D.C. Cir. 2009).

89. National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. 2,938, 2,943 (Jan. 19, 2010).

90. Lisa Heinzerling & Rena Steinzor, *A Perfect Storm: Mercury and the Bush Administration*, 34 ENVTL. L. REP. 10,297, 10,306 (2004).

91. See Regulatory Finding on Emissions of Hazardous Air Pollutants from Electric Utility Steam-Generating Units, 65 Fed. Reg. 79,825-26 (Dec. 20, 2000).

failing to persuade Congress to establish a cap-and-trade program for mercury emissions in its Clear Skies bill, the Bush Administration attempted to accomplish the same result by withdrawing the Clinton Administration “appropriate and necessary” finding and promulgating a legally dubious cap-and-trade program instead.<sup>92</sup> The D.C. Circuit, in an opinion that found EPA’s logic comparable to that of the Queen of Hearts in Lewis Carroll’s *Through the Looking Glass*, vacated the regulations.<sup>93</sup>

#### *H. Global Warming*

Although President George W. Bush had promised to take strong action to reduce emissions of greenhouse gasses during the 2000 campaign, he announced in March 2001 that the administration would disavow the Kyoto Treaty and refuse to regulate carbon dioxide emissions from power plants.<sup>94</sup> Relying heavily on input from the energy and electric utility industries and a tiny group of industry-funded scientists, the White House concluded that carbon dioxide was not a “pollutant” within the meaning of the Clean Air Act, and it urged companies to adopt voluntary approaches to reducing greenhouse gas emissions.<sup>95</sup> The announcement came as a surprise to EPA Administrator Whitman who was busily assuring both the American public and its European allies that the United States would regulate carbon dioxide emissions from power plants.<sup>96</sup>

Not surprisingly, the administration’s Clear Skies bill contained no restrictions on emissions of greenhouse gas emissions, and the

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92. Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606 (May 18, 2005); *see also* Revision of December 2000 Regulatory Finding on Emissions from and Removal of Electric Utility Steam Generating Units, 70 Fed. Reg. 15,994 (Mar. 29, 2005); Eric Pianin, *EPA Announces “Cap and Trade” Plan to Cut Mercury Pollution*, WASH. POST, December 16, 2003, at A35.

93. *New Jersey v. EPA*, 517 F.3d 574, 582 (D.C. Cir. 2008).

94. Amy Goldstein & Eric Pianin, *Hill Pressure Fueled Bush’s Emissions Shift*, WASH. POST, March 15, 2001, at A1; *see also* Andrew C. Revkin, *Despite Opposition in Party, Bush to Seek Emissions Cuts* N.Y. TIMES, March 10, 2001, at A9 (campaign promise).

95. Chris Mooney, *Blinded by Science*, COLUM. JOURNALISM REV., Nov.-Dec. 2004, at 4.

96. Eric Pianin & Amy Goldstein, *Bush Drops a Call For Emissions Cuts*, WASH. POST, March 14, 2001, at A1; *see also* Douglas Jehl, *Whitman Calls for Patience on Environmental Policies*, N.Y. TIMES, April 7, 2001, at A26.

administration vigorously opposed a bill introduced by Senators John McCain and Joe Lieberman that would have rewarded companies for reducing greenhouse gas emissions.<sup>97</sup> In September 2003, EPA announced that it did not have authority under the Clean Air Act to limit greenhouse gas emissions from automobiles because they were not “pollutants” within the meaning of the Clean Air Act.<sup>98</sup> The Supreme Court, however, reversed that determination and remanded the case to EPA to decide whether to make an “endangerment” finding under a correct interpretation of the statute.<sup>99</sup>

Responding to the Supreme Court’s remand, the EPA staff prepared a 300-page draft report concluding that greenhouse gas emissions from mobile sources endangered public health and welfare and should therefore be regulated as pollutants under the Clean Air Act.<sup>100</sup> After the White House rejected that conclusion, Administrator Johnson ordered the staff to prepare a document more to the liking of White House officials. The document that EPA published in July 2008 no longer contained the critical finding, and it stressed the need for more research and voluntary action.<sup>101</sup> Later, Johnson issued a “midnight” interpretation of the Clean Air Act concluding that EPA and the states were not required to consider a source’s potential to emit greenhouse gases in administering the statute’s new source review requirements.<sup>102</sup>

#### IV. SEIZING THE OFFENSIVE IN THE OBAMA ADMINISTRATION

##### A. Introduction

A confluence of crises during the last four years of the George W. Bush Administration put the proponents of regulatory relief on the defensive. The financial meltdown of 2008 and the resulting deep recession demonstrated to the world the consequences of lax

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97. See Elizabeth Shogren, *Warming Up to Reducing Greenhouse Gases*, L.A. TIMES, July 30, 2003, at A15.

98. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (Sept. 8, 2003); *Massachusetts v. E.P.A.*, 549 U.S. 497, 504-11(2007).

99. *Id.* at 534-35.

100. See Kriz, *supra* note 83, at 18.

101. John Shiffman & John Sullivan, *An Eroding Mission at EPA*, PHILA. INQUIRER, December 7, 2008, at A1.

102. Stephen D. Cook, *EPA Says Carbon Dioxide Emissions Not a Consideration for Permit Decisions*, 39 ENV'T REP. (BNA) 2491 (Dec. 19, 2008).

government regulation.<sup>103</sup> Even strong proponents of free markets like former Federal Reserve Board chairman Alan Greenspan conceded that effective government interventions into the marketplace were necessary for a robust economy.<sup>104</sup> The 2008 election of a bright young president who had run on a campaign of hope for the future of a nation suffering from the debilitating effects of the third assault on regulation gave environmental groups every reason to expect that a reinvigorated EPA would reverse many of the Bush Administration policies, complete many long-delayed rulemaking initiatives, and vigorously enforce the regulations that were already in place.<sup>105</sup>

President Obama chose Lisa Jackson, the aggressive Commissioner of New Jersey's Department of Environmental Protection, to be his EPA administrator.<sup>106</sup> Bolstered by a 36 percent budget increase for fiscal year 2010, Jackson and her activist staff hit the ground running with more than 25 major rulemaking initiatives during her first year.<sup>107</sup> EPA also reviewed many of the Bush administration regulations with an eye toward revising or repealing them.<sup>108</sup> Jackson elevated science to a more prominent role in agency decision-making, and she assigned a less prominent role to cost-benefit analysis by placing a prominent critic at the head of the policy office.<sup>109</sup> EPA's enforcement presence also increased substantially during the first two years of the Obama Administration.<sup>110</sup> To the

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103. See ROBERT KUTTNER, *A PRESIDENCY IN PERIL* 219-20 (2010).

104. Edmund L. Andrews, *Greenspan Concedes Error on Regulation*, N.Y. TIMES, Oct. 24, 2008, at B1.

105. John Cranford, *The Renegotiation*, CONG. Q. WEEKLY, January 19, 2009, at 119.

106. Env'tl. Prot. Agency, Administrator Lisa P. Jackson, available at <http://www.epa.gov/aboutepa/administrator.html>.

107. Jenna Greene, *Has Obama Redirected the Regulatory System?*, NAT'L J., Jan. 18, 2010, at 11; Bill Pritchard, *Congress Approves Appropriations Bill With \$10.3 Billion for EPA in Fiscal 2010*, 40 ENV'T REP. (BNA) 2526 (Oct. 30, 2009).

108. See Andrew Childers, *Stronger Air Rules Predicted as EPA Drops Defense of Regulations from Bush Years*, 40 ENV'T REP. (BNA) 2632 (November 13, 2009); see also Stephen D. Cook, *EPA 'Back on the Job,' Jackson Says, in 'Arduous Process of Reexamining Rules,'* 40 ENV'T REP. (BNA) 641 (Mar. 20, 2009).

109. Juliet Eilperin, *EPA Nominee Would Consider Applying Existing Laws to Current Issues*, WASH. POST, January 15, 2009, at A8.

110. See OMB WATCH, *THE OBAMA APPROACH TO PUBLIC PROTECTION: ENFORCEMENT* 25, 28 (2010).

chagrin of environmental advocates, however, the president appointed his former University of Chicago Law School colleague, Cass Sunstein, to head the OIRA.<sup>111</sup> A strong proponent of cost-benefit-based regulatory decision-making and of aggressive White House review of agency regulations, Sunstein retained both the personnel and the review policies of the George W. Bush Administration.<sup>112</sup>

### B. Greenhouse Gases

The administration's top environmental priority was to enact legislation establishing a cap-and-trade regime for greenhouse gas emissions. When the president decided to make health care reform the administration's highest overall legislative priority, however, greenhouse gas legislation moved to the back burner. The House of Representatives passed a bulky cap and trade bill in May 2009 over the unanimous opposition of House Republicans, but the bill proceeded slowly in the Senate where the chairman of the Environmental and Public Works Committee attempted in vain to work out a deal with the Republican leadership.<sup>113</sup> As greenhouse gas legislation languished in the Senate, the U.S. Chamber of Commerce and several grass roots organizations funded by energy interests attacked the House Bill as "cap-and-tax" legislation.<sup>114</sup> By the time that Congress completed the health care bill in March 2010, it was clear that greenhouse gas legislation could not attract the 60 votes needed to end a promised Republican filibuster, and President Obama made no effort to revive the legislative initiative.<sup>115</sup>

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111. RENA STEINZOR & SIDNEY SHAPIRO, *THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC: SPECIAL INTERESTS, GOVERNMENT, AND THREATS TO HEALTH, SAFETY, AND THE ENVIRONMENT* 221 (2010).

112. Ralph Lindeman, *OIRA's Sunstein Seen as Able to Implement Regulatory Changes Without New Order*, 38 ENV'T REP. (BNA) 481 (May 10, 2010); see also *EPA Critic's Move to OMB Spurs Activist Fears Over Opposing Strict Rules*, INSIDE EPA, Dec. 4, 2009, at 1.

113. See Steven Mufson, David A. Fahrenhold & Paul Kane, *In Close Vote, House Passes Climate Bill*, WASH. POST, June 27, 2009, at A1.

114. Julie Kosterlitz, *The Chamber's Summer Offensive*, NAT'L J., July 4, 2009, at 46; Fred L. Smith, Jr. & William Teatman, *Cap and Traitors*, WASH. TIMES, July 9, 2009, at A15.

115. Ryan Lizza, *As the World Burns*, NEW YORKER, Oct. 11, 2010, at 74, 82-83; Juliet Eilperin & Steven Mufson, *Obama Shifting Climate Strategy After GOP Gains*, WASH. POST, Nov. 5, 2010, at A3.

During the period of legislative inactivity, Administrator Jackson made a formal finding that greenhouse gas emissions “endangered” the environment, thereby triggering EPA’s statutory obligation to regulate motor vehicle emissions.<sup>116</sup> EPA and the National Highway Traffic Safety Administration then jointly promulgated regulations limiting greenhouse gas emissions and raising fuel economy standards for sedans, SUVs and pickups.<sup>117</sup> Withdrawing a Bush Administration determination, Jackson concluded that increased emissions of greenhouse gases did trigger the Clean Air Act’s new source review requirements.<sup>118</sup> Soon thereafter, EPA promulgated an ambitious “tailoring” rule requiring states to incorporate greenhouse emissions into their routine reviews of modifications of existing industrial facilities.<sup>119</sup>

### C. Ozone

Not long after Administrator Jackson was sworn in, the agency announced that it would reconsider the 2008 national ambient air quality standards (NAAQS) for ozone based on the information available to the agency in 2008 rulemaking.<sup>120</sup> The D.C. Circuit stayed the pending challenges to the Bush Administration 0.075 parts per million (ppm) ozone standards, and EPA agreed to stay implementation of the those standards while it undertook its reconsideration.<sup>121</sup> In January 2010, EPA published a notice of proposed rulemaking announcing that Administrator Jackson had “serious cause for concern” regarding whether the 2008 standards

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116. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,502 (Dec. 15, 2009).

117. See Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010).

118. Steven D. Cook, *EPA Begins to Phase In Requirements to Control Stationary Source Emissions*, 41 ENV’T. REP. (BNA) 727 (Apr. 2, 2010).

119. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 74 Fed. Reg. 55,292 (Oct. 27, 2009); see Cook, *supra* note 118, at 727.

120. U.S. Env’tl. Prot. Agency, *EPA to Reconsider Ozone Pollution Standards*, (2009), *available* [at http://www.epa.gov/groundlevelozone/pdfs/O3\\_Reconsideration\\_FACT%20SHEET\\_091609.pdf](http://www.epa.gov/groundlevelozone/pdfs/O3_Reconsideration_FACT%20SHEET_091609.pdf).

121. Andrew Childers, *EPA Will Reconsider Air Quality Standards for Ozone Set During Bush Administration*, 40 ENV’T REP. (BNA) 2173 (Sept. 18, 2009).

met the Clean Air Act's requirements.<sup>122</sup> EPA proposed to set the primary standard at some point between 0.060 and 0.070 ppm and to change the form of the secondary standard from an 8-hour average to the more stringent cumulative seasonal form that President Bush had personally rejected.<sup>123</sup>

#### D. Coal Ash

On December 22, 2008, approximately 5.4 million cubic yards of slurry generated by the Tennessee Valley Authority's Kingston fossil fuel power plant poured into the Emory River when a retaining dike at a coal ash impoundment ruptured. The spill inundated more than 300 acres of land, destroyed three homes, and damaged dozens of others.<sup>124</sup> The Kingston catastrophe inspired public demands for greater protection from hundreds of similar impoundments associated with coal-burning power plants that were subject only to uneven state oversight.<sup>125</sup> Soon after the Kingston spill, Congressman Nick Rahall (D-WV) introduced a modest bill authorizing the Department of Interior to promulgate uniform federal standards for new coal ash impoundments throughout the country.<sup>126</sup> Although three congressional committees devoted six hearings to the issue, utility industry lobbyists were able to forestall any legislative action during the 111th Congress.<sup>127</sup>

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122. National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. 2938, 2943 (Jan. 19, 2010).

123. *Id.* at 2938.

124. Disposal of Coal Combustion Residuals from Electric Utilities, 75 Fed. Reg. 35,128, 35,150 (June 21, 2010).

125. Charlotte E. Tucker, *Advocacy Groups Ask EPA to Take Lead on Regulating Coal-Combustion Waste*, 40 ENV'T REP. (BNA) 494 (Mar. 6, 2009).

126. See Charlotte E. Tucker, *Bill Would Require Coal Combustion Waste Regulation Under Surface Mining Control Act*, 40 ENV'T REP. (BNA) 171 (Jan. 23, 2009).

127. See, e.g., *The Tennessee Valley Authority's [hereinafter TVA] Kingston Ash Slide: Evaluation of Potential Causes and Updates on Cleanup Efforts*, Hearings Before the Subcommittee on Water Resources and the Environment of the House Committee on Transportation and Infrastructure, 111th Cong. (2009); *Coal Combustion Byproducts: Potential Impact of a Hazardous Waste Designation on Small Businesses in the Recycling Industry*, Hearing Before the Subcommittee on Rural Development, Entrepreneurship and Trade of the House Small Business Committee, 111th Cong. (2010); *Coal Combustion Waste Storage and Water Quality*, Hearings Before the Subcommittee on Water Resources and the



On the administrative front, Administrator Jackson promised to reevaluate the agency's prior reluctance to regulate coal ash by the end of 2009.<sup>128</sup> The draft notice of proposed rulemaking that Jackson sent to OIRA in October 2009 would have regulated discarded coal ash as a hazardous waste, thereby subjecting it to far more stringent controls than state regulatory requirements, but it would have exempted the beneficial reuse of coal ash in wallboard, concrete, and other products, which accounted for about 37 percent of the coal ash that power plants generated.<sup>129</sup> OIRA held more than 47 meetings with representatives of various interest groups, two-thirds of which were with industry representatives.<sup>130</sup> Environmental groups saw the OIRA meetings as "an opportunity for industry to go into OMB and pre-negotiate the rule before it hits the streets."<sup>131</sup> In May 2010, OIRA sent a heavily revised proposal back to EPA. The original proposal to regulate coal ash as a hazardous waste was now one of three alternatives, the other two of which effectively left coal ash regulation to the states subject to broad EPA oversight.<sup>132</sup> The

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*Environment of the House Committee on Transportation and Infrastructure*, 111th Cong. (2009); *TVA's Kingston Ash Slide: Potential Water Quality Impacts of Coal Combustion Waste Storage*, Hearings Before the House Committee on Transportation and Infrastructure, 111th Cong. (2009); *H.R. 493, Coal Ash Reclamation, Environment, and Safety Act of 2009*, Hearings before the Subcommittee on Energy and Mineral Resources of the House Committee on Natural Resources, 111th Cong. (2009); *Oversight Hearing on the TVA and the Recent Major Coal Ash Spill*, Before the Senate Committee on Environment and Public Works, 111th Cong. (2009).

128. Shaila Dewan, *Administration Plans New Regulations On Coal-Ash Ponds by End of the Year*, N.Y. TIMES, Mar. 8, 2009, at A20; Juliet Eilperin, *Disposal of Coal Ash Rises As Environmental Issue*, WASH. POST, Jan. 16, 2009, at A4.

129. See *Disposal of Coal Combustion Residuals From Electric Utilities*, 75 Fed. Reg. 35,128, 35,151 (June 21, 2010); see also Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 209, 260 (2012).

130. OFFICE OF MGMT. & BUDGET, *Meeting Records*, available at [http://www.whitehouse.gov/omb/oira\\_2050\\_meetings/](http://www.whitehouse.gov/omb/oira_2050_meetings/). See also James Goodwin, *Eye on OIRA: Coal Ash Meetings Up to 42*, CPR BLOG (Apr. 5, 2010), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=CE877002-A1A5-ADAC-34017AC4184F218A>; see also Charlotte E. Tucker, *Meetings at OMB on Coal Ash Proposal Reflect Complexity, Potential Impact of Rule*, 41 ENV'T. REP. (BNA) 163 (Jan. 22, 2010).

131. Tucker, *supra* note 130.

132. *Disposal of Coal Combustion Residuals from Electric Utilities*, 75 Fed. Reg. 35,128, 35,133-34 (June 21, 2010).

OIRA-edited regulatory impact assessment for the rule made it clear that OIRA was greatly influenced by the industries' claim that regulating discarded coal ash as a hazardous waste would "stigmatize" beneficial reuse of coal ash and thereby destroy the secondary market for that product.<sup>133</sup>

## V. THE FOURTH ASSAULT

### A. Introduction

Before the Obama Administration was fully in place, the business community, conservative think tanks and the conservative media echo chamber had launched a fourth assault on federal environmental regulation.<sup>134</sup> As the country struggled with a severe economic recession, they complained that government "red tape" was crippling business and destroying jobs.<sup>135</sup> For example, the Chamber of Commerce hosted a "jobs summit" to bemoan the "tsunami of regulation" that the new administration was creating.<sup>136</sup> President Obama's initial response to this salvo was to mount an aggressive defense of EPA and the other regulatory agencies.<sup>137</sup> He did not, however, seize the offensive by pressing forward with financial reform or climate change legislation, focusing his legislative attention instead on health care reform.

The president's failure to press forward with aggressive financial reform legislation gave the business community an opportunity to redirect public resentment at Wall Street bailouts and huge executive

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133. U.S. ENVTL. PROT. AGENCY, REGULATORY IMPACT ANALYSIS FOR EPA'S PROPOSED RCRA REGULATION OF COAL COMBUSTION RESIDUES (CCR) GENERATED BY THE ELECTRIC UTILITY INDUSTRY 11, Exhibit 6, 187-188, Exhibit 5C-21 (2010), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2009-0640-0003>.

134. See THOMAS O. MCGARITY, FREEDOM TO HARM, ch. 19 (Yale University Press, forthcoming 2013).

135. See James L. Gattuso, Diane Katz & Stephen A. Keen, *Red Tape Rising: Obama's Torrent of New Regulation*, HERITAGE FOUNDATION BACKGROUNDER, Oct. 26, 2010, at 1; see also Steven Pearlstein, *Obama vs. Big Business: The Battle Everyone Can Lose*, WASH. POST, July 7, 2010, at A9.

136. Elizabeth Williamson, *U.S. Business Groups Air Policy Concerns*, WALL ST. J., July 14, 2010, at A1.

137. Peter Baker & David M. Herszenhorn, *Obama Chastises Wall St. In Call to Stiffen Rules*, N.Y. TIMES, April 22, 2010, at A1; see also Henry J. Pulizzi, *Obama Urges CEOs to Rally Behind Business Agenda*, WALL ST. J., Feb 24, 2010, at A1.

bonuses away from corporate America and toward the government. Two groups funded by oil barons Charles and David Koch and Andrew Mellon heir Richard Mellon Scaife, Americans for Prosperity and FreedomWorks, seized on an anti-government rant by CNBC business reporter Rick Santelli to create the Tea Party movement.<sup>138</sup> With financial support and training from the two “grass roots” organizations and continuous coverage on Fox News, the movement rapidly grew into a formidable political force. Although environmental regulation was an unlikely target for a populist movement spawned by an economic downturn, EPA rivaled Obamacare as a target for vilification by Tea Party activists.<sup>139</sup>

As the 2010 mid-term elections approached, the mining and electric utility industries contributed heavily to Republican candidates who took anti-regulatory stances.<sup>140</sup> The Chamber of Commerce devoted \$75 million to attack ads aimed at candidates that it deemed to be supporters of strong federal regulation.<sup>141</sup> FreedomWorks flew 40 local Tea Party leaders to Washington, D.C. for a 3-day “boot camp” where they received special training in how to get out the vote for Tea Party-supported candidates in the November elections.<sup>142</sup> EPA’s greenhouse gas regulations became a campaign issue as Tea Party candidates accused EPA of killing jobs in pursuit of an unproven climate change theory.<sup>143</sup> The elections returned control of the House of Representatives to a Republican Party with a vocal Tea Party faction that was determined to prevent EPA from promulgating more regulations.<sup>144</sup>

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138. See Jane Mayer, *Covert Operations*, NEW YORKER, August 30, 2010, at 45; see also Kate Zernike, *Shaping Tea Party Passion Into Campaign Force*, N.Y. TIMES, August 26, 2010, at A1; Michael M. Phillips, *FreedomWorks Harnesses Growing Activism on the Right*, WALL ST. J., Oct 6, 2009, at A4.

139. Stephen Power, *Not on Ballot, But EPA Chief a Campaign Issue*, WALL ST. J., Oct. 8, 2010, at A4.

140. See, e.g., John M. Broder, *Coal Industry Spending to Sway Next Congress*, N.Y. TIMES, Oct. 30, 2010, at A12.

141. Jim Rutenberg, Don van Natta, Jr. & Mike McIntire, *Offering Donors Secrecy, and Going on Attack*, N.Y. TIMES, Oct 11, 2010, at A1.

142. See Kate Zernike, *Shaping Tea Party Passion Into Campaign Force*, N.Y. TIMES, Aug. 26, 2010, at A1.

143. See John M. Broder, *Skepticism on Climate Change Is Article of Faith for Tea Party*, N.Y. TIMES, October 21, 2010, at A1.

144. See Dan Balz, *GOP Seizes Control of House, As Economy Drives Party Gains*, WASH. POST., Nov. 3, 2010, at A1.

### B. Obama Administration Reaction to the 2010 Election

President Obama reacted to the renewed assault on federal regulation with a peace offering to the regulated industries. Accepting the undocumented premise that federal regulations were destroying jobs, the administration, in a reprise of the Reagan Administration, invited the business community to nominate job-killing regulations for revision or repeal.<sup>145</sup> OIRA Administrator Sunstein assured the business community that his agency would protect its interests while EPA's proposed rules were being finalized.<sup>146</sup> Soon thereafter, President Obama signed a new executive order requiring executive branch agencies to "identify and consider" regulatory approaches that "reduce[d] burdens and maintain[ed] flexibility and freedom of choice" for the affected industries.<sup>147</sup> It also required them to come up with a plan for periodically reviewing their existing regulations with the object of rewriting or repealing regulations that were "outmoded, ineffective, insufficient, or excessively burdensome."<sup>148</sup>

*Ozone*: In the year following the election, a coalition of coal and utility companies spent around \$35 million on television advertising criticizing EPA's proposals for regulating power plants.<sup>149</sup> One ad featured a businessman with a briefcase struggling to stay aboard a bucking bull while the narrator observed that "too many Americans are just trying to hang onto their jobs." The narrator wondered why EPA was "in a rush to push regulations that would saddle Americans with higher energy costs and throw even more of us out of work?"<sup>150</sup> The American Coalition for Clean Coal Energy hit the road with a

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145. Elizabeth Williamson, *Revisiting the Regulations Affecting Business*, WALL. ST. J., July 12, 2010, at A4.

146. Neela Banerjee, *Delays of EPA Rules Seen as Backpedaling*, L.A. TIMES, Dec. 11, 2010, at B4.

147. Exec. Order No. 13,563, 76 Fed. Reg. 3821 §§ 2, 4 (2011).

148. *Id.* § 6.

149. See Daniel J. Weiss, *Poor Little Big Coal Says EPA Smog Standards Too Expensive*, GRIST (Nov 18, 2011), available at <http://www.grist.org/coal/2011-11-17-poor-little-big-coal-says-epa-smog-standards-too-expensive>; see also Anne Palmer & Dave Levinthal, *Energy Wars*, POLITICO (Aug. 9, 2011), available at <http://www.politico.com/politicoinfluence/0811/politicoinfluence74.html> [hereinafter *Energy Wars*].

150. *Americas Power, Rodeo: The EPA Needs to Slow Down*, YOUTUBE (Sept. 9, 2011), available at <http://www.youtube.com/watch?v=xheNqLlhhFc>.

mobile classroom to educate citizens on the virtues of coal-generated electricity at state fairs and other public events.<sup>151</sup>

House Majority Leader Eric Cantor (R-Virginia) identified the ozone standard as one of several “job destroying” regulations that the House would target for elimination during the Fall 2011 session.<sup>152</sup> The affected industries and 93 House members urged EPA to abandon its reconsideration of the 2008 ozone standard and return to the statutory five-year cycle that was scheduled for completion in 2013.<sup>153</sup> Undeterred, Administrator Jackson told a Senate committee that the agency would go forward with the standard – setting process, because the 2008 standards “were not legally defensible given the scientific evidence in the record.”<sup>154</sup>

EPA sent a draft final rule to OIRA in July 2011 that set the level of the 8-hour primary standard at 0.065 ppm and established a separate cumulative, seasonal secondary standard.<sup>155</sup> After meeting with White House Chief of Staff William E. Daley, a former lobbyist for the Chamber of Commerce who President Obama had brought on board to smooth relations with the business community, Jackson offered a compromise that would have set the primary standard at 0.070 ppm.<sup>156</sup> The affected industries put on a full court press to force the agency to withdraw the proposal. The multi-faceted strategy involved a massive lobbying campaign aimed at the White House and Congress, a letter-writing campaign from industry leaders, and an advertising campaign aimed at swaying Washington policymakers.<sup>157</sup>

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151. See *Energy Wars*, *supra* note 149.

152. Juliet Eilperin, *Obama Halts Tighter Rules On Ozone Emissions*, WASH. POST, September 3, 2011, at A1.

153. Letter from 93 members of the House of Representatives to Lisa Jackson, Adm’r, U.S. Env’tl. Prot. Agency 1 (June 22, 2011) (on file with author); see also Andrew Childers, *Industries Oppose Revised Ozone Standards as EPA Asks Advisers for More Guidance*, 42 ENV’T REP. 319 (Feb. 18, 2011).

154. Juliet Eilperin, *Obama Halts Tighter Rules on Ozone Emissions*, WASH. POST, Sept. 3, 2011, at A1.

155. John M. Broder, *Re-election Strategy Is Tied to a Shift on Smog*, N.Y. TIMES, November 17, 2011, at A1; see also Jessica Coomes, *EPA Sends Reconsidered Ozone Standards to White House OMB for Regulatory Review*, 42 ENV’T REP. (BNA) 1569 (July 15, 2011).

156. See Broder, *supra* note 155.

157. Stephen Power, *Business Blasts Ozone Limits: Trade Groups Warn White House That New EPA Curbs Would Choke Off Growth*, WALL ST. J., July 21, 2011, at A3; see Broder, *supra* note 155.

At a meeting with Daley, OIRA Administrator Sunstein, and EPA Assistant Administrator Gina McCarthy in the West Wing of the White House, industry representatives produced a map highlighting the congruence between the states that President Obama had won by narrow margins in 2008 and the states containing areas that would not be in attainment with the new ozone standard. Before an industry spokesperson had a chance to spell out the political implications of the rule, Daley cut him off with a terse “I got that.”<sup>158</sup> When a representative of an environmental group presented polls demonstrating strong public support for clean air at a meeting later that day, Daley cut him off with an expletive.<sup>159</sup>

On September 1, 2011, President Obama summoned Administrator Jackson to the Oval Office where he told her that he had decided against going forward with a more stringent ozone standard because of the cost and uncertainty that it would impose on industry and the states.<sup>160</sup> Despite this embarrassing public repudiation of Jackson and her staff, the president promised in a press release that he would “continue to stand with the hardworking men and women at the EPA as they strive every day to hold polluters accountable and protect our families from harmful pollution.”<sup>161</sup> The formal letter to EPA from OIRA Administrator Cass Sunstein contained an almost verbatim recapitulation of the industry arguments against EPA’s standard.<sup>162</sup> It did not, however, explain how that injunction was consistent with the Clean Air Act’s proscription on considering regulatory costs and burdens in setting NAAQS.<sup>163</sup>

*Coal Ash:* Following the 2010 elections, EPA put the coal ash regulations on indefinite hold. In the meantime, the utility industry

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158. See Broder, *supra* note 155; Jessica Coomes, *White House Chief of Staff Hears Arguments By Industry, Advocacy Groups on Ozone Rule*, 42 ENV’T REP. (BNA) 1919 (Aug. 26, 2011).

159. See Broder, *supra* note 155, at 5.

160. *Id.* at 6.

161. See Barack Obama, Statement by the President on the Ozone National Ambient Air Quality Standards (Sept. 2, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/09/02/statement-president-ozone-national-ambient-air-quality-standards>.

162. Letter from Cass Sunstein, Adm’r, Office of Info. & Regulatory Affairs, to Lisa Jackson, Adm’r, U.S. Env’tl. Prot. Agency, (Sept. 2, 2011) (on file with author).

163. See Matthew Tresaugue, *EPA Alters Smog Rules Again*, HOUS. CHRONICLE, Jan. 8, 2010, at A1.

mounted a public relations campaign urging the agency not to list coal ash as a hazardous waste.<sup>164</sup> As EPA cogitated over the rule, utility companies disposed of more than 112 million pounds of coal ash in slurry ponds in 2010, an increase of 9 percent over the previous year.<sup>165</sup> And the agency identified more than 450 additional coal ash impoundments, 46 percent of which were unlined, to bring the total to 1,161 nationwide.<sup>166</sup>

*Utility MACT:* After environmental groups sued EPA for failing to respond to the D.C. Circuit remand of its mercury rule, EPA agreed to publish a final regulation by November 16, 2011.<sup>167</sup> In March 2011, the agency proposed a new standard for new and existing coal- and oil-fired power plants under its authority to regulate hazardous air pollutants.<sup>168</sup> It proposed to reaffirm its 2000 finding that a hazardous air pollutant standard was “appropriate and necessary” to control emissions of mercury, acid gases, and various other heavy metals.<sup>169</sup> It then proposed stringent emissions limitations for new and existing power plants for fine particulate matter (a surrogate for heavy metals other than mercury), hydrogen chloride (a surrogate for acid gases) and mercury.<sup>170</sup> Having taken a great deal of criticism from environmental groups for the ozone NAAQS withdrawal, the White House supported EPA’s efforts. On December 21, 2011, EPA promulgated a stringent “Utility MACT” rule that required new and existing sources to install the maximum achievable control

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164. See *Meet Coal Ash’s Fake New Chinese Friends: “Big Steamed Bun” and “Handsome Dragon,”* Env’tl. Integrity Project (June 28, 2012) available at [http://www.environmentalintegrity.org/news\\_reports/06\\_28\\_2012.php](http://www.environmentalintegrity.org/news_reports/06_28_2012.php).

165. Anthony Adragna, *Disposal of Coal Ash Metals in Ponds Rose 9 Percent in 2010, Report Says*, 43 ENV’T REP. (BNA) 89 (Jan. 13, 2012).

166. Anthony Adragna, *EPA Releases Data Revealing Hundreds of Additional Coal Ash Impoundments*, 43 ENV’T REP. (BNA) 1759 (July 6, 2012).

167. National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units; Proposed Rule, 76 Fed. Reg. 24,976, 24,986 (2011).

168. *Id.*

169. *Id.* at 24,977-78.

170. *Id.* at 25,027.

technology.<sup>171</sup> Under the statute, the rules had to be implemented within three years, with a possible extension for another year.<sup>172</sup> Administrator Jackson promised to make “very liberal use of the fourth year,” and she suggested that the agency might exercise its enforcement discretion to give some companies a fifth year to bring units into compliance.<sup>173</sup>

### C. Congressional Assault

#### 1. Introduction

Less than a week after the 2010 elections, FreedomWorks hosted a retreat for the 87 Republican freshmen, at which its Chairman, Dick Armey, exhorted them not to stray from the deregulatory principles they had espoused during the campaign.<sup>174</sup> During the first nine months of 2011, coal-mining interests spent \$16.5 million and electric utility interests spent \$78.4 million on lobbying EPA and Congress.<sup>175</sup> A coalition of coal and utility companies spend an additional \$35 million on television advertising criticizing the recent EPA initiatives.<sup>176</sup> Environmental groups responded with their own public relations campaigns.<sup>177</sup>

The House Republican leadership got the message. Promising far more aggressive oversight over the regulatory agencies, the new

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171. *Id.* at 9367-68, Table 3; see also Jessica Coomes & Andrew Childers, *EPA Finalizes Rule to Reduce Mercury, Air Toxics Emissions from Power Plants*, 42 ENV'T REP. (BNA) 2877 (Dec. 23, 2011).

172. National Emission Standards for Hazardous Air Pollutants from Coal, 76 Fed. Reg., at 9367-68, Table 3 (2011).

173. *Id.*

174. Amy Gardner, *FreedomWorks Gathers GOP Lawmakers to Refocus on Tea Party Goals*, WASH. POST, Nov. 12, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/11/AR2010111103512.html>.

175. Manuel Quinones, *Coal Industry Deploys Donations, Lobbying as Its Issues Gain Prominence*, N.Y. TIMES, Oct. 13, 2011, available at <http://www.nytimes.com/gwire/2011/10/13/13greenwire-coal-industry-deploys-donations-lobbying-as-it-45582.html?pagewanted=all>.

176. See Weiss, *supra* note 149; see also *Energy Wars*, *supra* note 149.

177. See, e.g., Env'tl. Defense Fund, *Environmental Leaders to AEP: What's Your Number?* STATES NEWS SERVICE (May 10, 2011) (referencing statements by environmental leaders); *Greenpeace, Fight Big Coal: Tell the EPA to Regulate Mercury Pollution*, STATES NEWS SERVICE (May 26, 2011).



chairman of the House Committee on Oversight and Government Reform asked industry groups to help him assemble still another “hit list” of federal regulations that should be revised or repealed.<sup>178</sup> The National Association of Manufacturers responded with a list that included every major regulation that was currently pending before EPA.<sup>179</sup> During the month of March 2011, EPA Administrator Lisa Jackson testified seven times before House committees, during many of which she endured such intense questioning that the *New York Times* characterized the hearings as “target practice.”<sup>180</sup>

## 2. Climate Change Deauthorizing Legislation

Fully one-half of the newly arrived House Republican freshmen questioned whether human activities were in fact contributing to global warming.<sup>181</sup> In early March 2011, Rep. Fred Upton (R-Mich.) and Senator James Inhofe (R-Okla.) introduced identical bills to prohibit EPA from promulgating any regulation, taking any other action, or even taking into consideration emissions of greenhouse gases to address climate change.<sup>182</sup> The Bill would have retroactively repealed EPA’s original “endangerment” finding and all of the regulations that it had promulgated to implement its greenhouse gas

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178. Jim Puzzanghera, *Rep. Darrell Issa Asks Businesses to Name Onerous Government Regulations*, L.A. TIMES, Jan. 5, 2011, available at <http://articles.latimes.com/2011/jan/05/business/la-fi-issa-business-20110105>; David Herszenhorn, *A G.O.P. Chairman Seeks New Power for Watchdogs*, N. Y. TIMES, Nov. 28, 2010, available at [http://www.nytimes.com/2010/11/28/us/politics/28oversight.html?\\_r=0](http://www.nytimes.com/2010/11/28/us/politics/28oversight.html?_r=0).

179. Letter from Jay Timmons, CEO, Nat’l Ass’n. of Manufacturers to Darrell Issa, Chairman, House Oversight and Gov’t Reform Comm., (Jan. 7, 2011) (on file with author).

180. See Darryl Fears, *EPA Chief Lisa Jackson Perpetually on Capitol Hill Hot Seat*, WASH. POST, Mar. 14, 2011, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/13/AR2011031303813.html>.

181. Margaret Kriz Hobson, *Political Tidal Wave Turns EPA Strategy*, CONG. QUARTERLY WEEKLY, Feb. 14, 2011, at 335.

182. See generally Alexandra B. Klass, *Climate Change and the Convergence of Environmental and Energy Law*, 24 FORDHAM ENVTL. L. REV. 180 (2013) (noting that Congress has limited itself to fixing existing legislation such as CERCLA and the Clean Air Act. While EPA has done what it can during the Obama administration to address GHG emissions from power plants and automobiles, it has been difficult to comprehensively fix climate change without Congressional action).

reduction program.<sup>183</sup> At hearings before a House Energy and Commerce subcommittee, Republican members spent more than two hours berating EPA Administrator Jackson, asserting that the scientific underpinnings of her finding was a hoax, and accusing the Obama Administration of killing jobs.<sup>184</sup> The House easily passed the Upton bill on April 7, 2011, but the Inhofe bill went nowhere in the Democrat-controlled Senate.

### 3. Coal Ash Deauthorization Legislation

In mid-April, 2011, a subcommittee of the House Committee on Energy & Commerce held a hearing on coal ash disposal that differed dramatically from the hearings it held during the 111th Congress.<sup>185</sup> Chastised for discouraging the beneficial reuse of coal ash, EPA Assistant Administrator Mathy Stanislaus tried in vain to explain that the issue concerned the characteristics of coal ash when mismanaged in a retention pond and not its characteristics when put to beneficial uses.<sup>186</sup> The committee reported out a bill in mid-July 2011 that would have divested EPA of authority to regulate coal ash and required states to regulate the disposal of coal ash in containment structures that met various design, groundwater monitoring and location requirements.<sup>187</sup> The full House approved the bill on October 14, 2011.<sup>188</sup>

When it became clear that the Senate would not take up a coal ash bill, its proponents in the House attached it to a “must-pass” bill to

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183. H.R. 910, 112th Cong. 1st Sess. (2011); S. 482, 112th Cong. 1st Sess. (2011).

184. See *The Energy Tax Prevention Act of 2011: Hearing Before the Subcomm. on Energy and Power of the H. Comm. on Energy and Commerce*, 112th Cong. 30-72 (2011); see also John M. Broder, *House Republicans Take E.P.A. Chief to Task*, N.Y. TIMES, Feb. 10, 2011, [http://www.nytimes.com/2011/02/10/science/earth/10emissions.html?\\_r=0](http://www.nytimes.com/2011/02/10/science/earth/10emissions.html?_r=0).

185. See generally *The Recycling Coal Combustion Residuals Accessibility Act of 2011: Hearing Before the Subcomm. on Env't and the Economy of the H. Comm. on Energy & Commerce*, 112th Cong. (2011).

186. *Id.*, at 31-34 (testimony of Mathy Stanislaus, Assistant Adm'r, Office of Solid Waste and Emergency Response, U.S. Env'tl. Prot. Agency).

187. Avery Fellow, *Energy and Commerce Clears Bill To Give States Regulatory Authority Over Coal Ash*, 42 ENV'T. REP. (BNA) 1577 (July 15, 2011).

188. Dean Scott, *House Clears Bill to Strip EPA Authority Over Coal Ash, Give States Primary Role*, 42 ENV'T. REP. (BNA) 2349 (October 21, 2011).

reauthorize essential transportation programs.<sup>189</sup> The Utility Solid Waste Activities Group created a website called “Regulate Coal Ash Right” that appealed to citizens to “tell Congress to include bipartisan coal ash provisions in the surface transportation bill.”<sup>190</sup> Lobbyists for the coal ash and electric utility industries targeted each of the members of the conference committee for special attention.<sup>191</sup> It was all for naught, however, as the Democratic senators on the conference committee refused to go forward with a bill containing the rider.<sup>192</sup>

#### 4. Utility MACT Deauthorization Legislation

In April 2011, Senators Joe Manchin (D-West Virginia) and Rob Portman (R-Ohio) introduced an industry-drafted bill that would have reduced the stringency of the Utility MACT rule and extended the compliance deadlines until at least 2020.<sup>193</sup> Later that month, a subcommittee of the Energy and Commerce Committee held hearings on energy issues that provided an ideal opportunity for industry representatives to issue dire warnings about how the rule would increase electricity rates and cause rolling brownouts.<sup>194</sup> At a hearing two months later before a subcommittee of the Senate Committee on Environment and Public Works, EPA Assistant Administrator Regina McCarthy expressed the agency’s confidence that the electric utility industry could meet the rule’s requirements with widely available pollution reduction technologies without threatening the reliability of

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189. See, e.g., Anthony Adragna, *House Approves Coal Ash Amendment Delegating Regulatory Authority to States*, 43 ENV’T. REP. (BNA) 1014 (Apr. 20, 2012); Anthony Adragna, *81 House Members Urge Conferees to Keep Coal Ash Provisions in Transportation Bill*, 43 ENV’T REP. CUR. DEV. (BNA) 1347 (May 25, 2012).

190. Adragna, *81 House Members Urge Conferees to Keep Coal Ash Provisions in Transportation Bill*, *supra* note 189.

191. *Id.*

192. See Anthony Adragna, *Final Transportation Bill Includes Provisions to Streamline Environmental Review Process*, 43 ENV’T. REP. (BNA) 1694 (June 29, 2012).

193. Amena H. Saiyid, *Industry-Drafted Bill Would Delay Compliance with EPA Rules for Coal-Fired Power Plants*, ENV’T. REP. (BNA) 1002 (May 6, 2011).

194. See Amena H. Saiyid, *Electric Power Industry Airs Differences About Compliance with MACT Regulations*, 42 ENV’T. REP. (BNA) 848 (Apr. 22, 2011).

the national power grid.<sup>195</sup> Neither house of Congress passed a stand-alone Utility MACT deauthorization rule during the 112th Congress.

### 5. The 2011 Continuing Resolution

Recognizing that it would be difficult to persuade the Democrat-controlled Senate to enact any deauthorizing legislation, and conscious of the possibility of a presidential veto of such legislation, the regulated industries pursued an alternative strategy of attaching environmental riders to must-pass legislation.<sup>196</sup> The first opportunity was the continuing resolution that Congress had to pass at the outset of the 112th Congress to appropriate funds for the government agencies for the remainder of the 2011 fiscal year.<sup>197</sup> The House bill contained many riders preventing EPA from expending any of the appropriated funds on a number of regulatory initiatives, including promulgating or enforcing regulations limiting emissions of greenhouse gases, classifying coal ash as a hazardous waste, and revising the national ambient air quality standards for coarse particulate matter.<sup>198</sup> The showdown came in the Senate, where the environmental riders became a major sticking point in the negotiations over the bill as the clock wound down toward a government shutdown.<sup>199</sup> At the last possible moment, the House leadership agreed to drop the environmental riders from the bill, and both houses passed a continuing resolution to fund the government for the remainder of the fiscal year.<sup>200</sup>

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195. *Oversight: Review of EPA Regulations Replacing the Clean Air Interstate Rule (CAIR) and the Clean Air Mercury Rule (CAMR): Hearing before the Subcommittee on Clean Air and Nuclear Safety of the Senate Committee on Environment and Public Works, 112th Cong. (2011) (testimony of Regina McCarthy, Assistant Adm'r for Air and Radiation, U.S. Evtl. Prot. Agency).*

196. *See Industry Groups Ask House, Senate Leaders to Delay EPA Rules for Greenhouse Gases*, 41 ENV'T. REP. (BNA) 2676 (2010).

197. *See Senate Democrats Vow to Drop EPA Policy Measures from FY11 Budget Bill*, INSIDE EPA, Feb. 25, 2011, at 3.

198. H.R. 1, 112th Cong., 1st Sess. § 1746 (Feb. 11, 2011); 157 CONG. REC. H1318, 1339, 1342 (2011).

199. *See Carl Hulse, Fiscal Talks Go On But Yield No Deal As Deadline Nears*, N.Y. TIMES, Apr. 7, 2011, available at <http://query.nytimes.com/gst/fullpage.html?res=9401EFDD153FF934A35757C0A9679D8B63&partner=rssnyt&emc=rss>.

200. *Amena H. Saiyid, EPA Riders Are Out of Spending Bill, But Analysts Say Battle is Far From Over*, 42 ENV'T. REP. (BNA) 816 (Apr. 15, 2011).

## 6. The 2012 Appropriations Bill

The FY 2012 appropriations bill for EPA provided the next opportunity for deregulatory riders. The bill reported out of the House Appropriations Committee contained even more riders than the continuing resolution.<sup>201</sup> Representative Mike Simpson (R-Idaho) explained that the riders were necessary because “[m]any of us think that the overregulation from E.P.A. is at the heart of our stalled economy.”<sup>202</sup> In a reprise of President Clinton’s showdown with Newt Gingrich, President Obama threatened to veto the bill if it contained anti-environmental riders.<sup>203</sup> After much disputation, the FY 2012 appropriation bill was passed at the end of the year without the riders.<sup>204</sup>

## CONCLUSION

Measured by the changes it has induced in the environmental statutes, the Fourth Assault on regulation has thus far been a failure. None of the statutes has been amended, and even riders in appropriations bills have thus far run aground. The Fourth Assault has, however, had a discernable impact on EPA’s efforts to implement those statutes under Administrator Lisa Jackson. The White House stopped the ozone rulemaking dead in its tracks, and several other rulemaking initiatives, like the coal ash rule, have slowed down considerably. The “look back” exercise required by President Obama’s executive order, like similar exercises required by nearly all of his predecessors, diverted precious time and resources away from the agency’s primary mission and did little to mollify skeptical companies.

The 2012 elections did little to change the political dynamic underlying the Fourth Assault. The Tea Party faction of the

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201. H.R. 2584, 112th Cong., 1st Sess. §§ 431, 434, 454 (2011); H. Rept. No. 112-151, 112th Cong., 1st Sess. 116 (2011).

202. Leslie Kaufman, *Republicans Seek Big Cuts in Environmental Rules*, N.Y. TIMES July 28, 2011, available at <http://www.nytimes.com/2011/07/28/science/earth/28enviro.html>.

203. *Despite Veto Threat, House Limits on EPA Policy May Survive Senate Debate*, INSIDE EPA, July 29, 2011, at 1.

204. H.R. REP. NO. 112-331, Military Construction and Veterans Affairs and Related Agencies Appropriations Act, 2012, Conference Report to Accompany H.R. 2055, 112th Cong., 1st Sess. (2011).

Republican Party was somewhat less in evidence during the 2012 elections than in the 2010 elections, but Republican candidates throughout the country were especially careful not to stray far from the Tea Party line. This almost certainly contributed to the Republican Party's failure to regain control of the Senate in a year in which more Democratic seats were open than Republican seats. The fact that the Republican Party retained control of the House of Representatives, combined with the fact that Tea Party advocates make up a significant proportion of that majority, should guarantee that the Fourth Assault will continue in the House for at least another two years. Whether the assault will be as aggressive in the House as it was during the 112th Congress will depend on whether the Republican leadership feels sufficiently chastised by the outcome of the presidential and Senate races to attempt to moderate the tone of the vocal EPA critics in the membership.

The battered occupants of the Federal Triangle Complex (the site of EPA's headquarters) have survived three powerful assaults from the business community and its allies in Congress, conservative think tanks, the conservative echo chamber, and at times even from within its own walls. In 2009, it seized the offensive with a number of major rulemaking efforts, some of which (like the greenhouse gas initiative) have become law, but many of which remain bottled up within the administration. With the vote of confidence that the administration received in 2012, EPA should remain on the offensive by completing important regulatory initiatives, like the coal ash disposal regulations and the new source performance standards for fossil fuel-fired power plants, while the forces aligned against it are in some disarray. There are few indications that the business community and its allies plan to moderate the Fourth Assault in light of the 2012 elections. EPA and its allies should meet it head on with new and stronger protections to allow the environment upon which we all so greatly depend to flourish.