

**States of California, Delaware, Illinois, Maine, Maryland, New Mexico, Oregon,
and Washington, the Commonwealth of Massachusetts, the District of
Columbia, the County of Broward (Florida), and the Cities of Boulder
(Colorado), Chicago (Illinois), New York (New York), Philadelphia
(Pennsylvania), and South Miami (Florida)**

April 26, 2018

Via express mail and submission to Regulations.gov

U.S. Environmental Protection Agency

EPA Docket Center

WJC West Building, Room 3334

1301 Constitution Avenue, NW

Washington, DC 20004

**Attention: Docket ID No. EPA-HQ-OAR-2017-0355
Repeal of Carbon Pollution Emission Guidelines for Existing Stationary
Sources: Electric Utility Generating Units**

**RE: *Supplemental* Comments on EPA Administrator Scott Pruitt's Improper
Prejudgment of Outcome of Proposed Repeal of Clean Power Plan**

The undersigned States and Local Governments¹ respectfully submit these *supplemental* comments on the lack of due process and fairness resulting from Administrator Scott Pruitt's prejudgment of the outcome of the rulemaking to repeal the Clean Power Plan ("CPP")² and the procedural failure of Environmental Protection Agency ("EPA") to disqualify Administrator Pruitt from all aspects of this rulemaking given his closed mind. The States and Local Governments previously submitted a comment letter and exhibits on this subject to this rulemaking docket on January 9, 2018 ("Original Comments").³ These supplemental comments and exhibits add to the record evidence not previously submitted with the Original Comments.⁴

Three months ago the States and Local Governments provided to EPA a wealth of evidence demonstrating that after becoming Administrator, Scott Pruitt has not had an open mind on the facts and law concerning the CPP. Since then, the evidence continues to grow that

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² Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82 Fed. Reg. 48,035 (Oct. 16, 2017).

³ Letter from States and Local Governments to EPA Docket Center, re: Comments on EPA Administrator Scott Pruitt's Improper Prejudgment of Outcome of Proposed Repeal of Clean Power Plan (Jan. 9, 2018), Docket ID No. EPA-HQ-OAR-2017-0355-7861, <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0355-7861> (hereinafter *Original Comments*).

⁴ The States and Local Governments will separately submit comments on the other infirmities of the proposed CPP repeal.

Administrator Pruitt should have been disqualified from participating in this rulemaking before it began. His involvement has irreparably tainted the current administrative process, and as a result, EPA must withdraw the proposed CPP repeal.

Administrator Pruitt continues to prove that he has a closed mind on whether to repeal the CPP and continues to bind himself to President Trump’s repeal promise.

Administrator Pruitt has continued to endorse President Trump’s ironclad commitment to repeal the CPP. The night of the State of the Union Address in January 2018, EPA issued a press release in which Administrator Pruitt is quoted as saying that “[f]rom repealing the Waters of the U.S. rule and the job-killing Clean Power Plan to cleaning up toxic Superfund sites, EPA is implementing President Trump’s agenda”⁵ Last month EPA published a document entitled *Year in Review* touting the repeal of the CPP as a significant accomplishment by Administrator Pruitt and the Agency.⁶ And just last week EPA issued a press release quoting him as saying “the President’s critics are wrong again: one-size-fits-all regulations like the Clean Power Plan . . . are not the solution” to reduce greenhouse gas emissions.⁷

Administrator Pruitt’s public statements over the past three months have also confirmed what the States and Local Governments previously established: EPA will repeal the CPP, regardless of what comments and evidence it receives from the public. In late January 2018 Administrator Pruitt told a conference that the CPP “was overreach that was stayed by the Supreme Court. We’re getting rid of that and providing a substitute.”⁸ Two days later he directed the public to an interview in which he described repealing the CPP as “a very necessary thing. I think withdrawing the deficient 2015 rule, the Clean Power Plan, is absolutely an important thing.”⁹ In another interview endorsed by the *Year in Review*, on February 5, Administrator

⁵ Exhibit D4 (enclosed) (“Ex. D4”): Press Release, U.S. Environmental Protection Agency, EPA Administrator Scott Pruitt Statement on President Donald J. Trump’s State of the Union Address (Jan. 30, 2018), <https://www.epa.gov/newsreleases/epa-administrator-scott-pruitt-statement-president-donald-j-trumps-state-union-address>.

⁶ Ex. D9: U.S. Environmental Protection Agency, EPA Year in Review 2017-2018 (Mar. 2018), 20, 21, 24-25, 32-33, https://www.epa.gov/sites/production/files/2018-03/documents/year_in_review_3.5.18.pdf (hereinafter *Year in Review*). See also Ex. D8: Press Release, U.S. Environmental Protection Agency, EPA Releases Administrator Pruitt’s Year One Accomplishments Report (Mar. 5, 2018), <https://www.epa.gov/newsreleases/epa-releases-administrator-pruitts-year-one-accomplishments-report>; Ex. D7: U.S. Environmental Protection Agency (@EPA), Twitter (Mar. 5, 2018, 2:58 PM) (“[D]uring his first year as Administrator the Agency has achieved a long list of accomplishments:”) (linking to *Year in Review*), <https://twitter.com/EPA/status/970795592304640000>; Ex. D10: Scott Pruitt (@EPAScottPruitt), Twitter (Mar. 7, 2018) (linking to U.S. House Committee on Natural Resources (@NatResources), Twitter (Mar. 7, 2018), <https://twitter.com/NatResources/status/971439250066542593>).

⁷ Ex. D12: Press Release, U.S. Environmental Protection Agency, Latest Inventory of U.S. Greenhouse Gas Emissions and Sinks Shows Continued Progress (Apr. 18, 2018), <https://www.epa.gov/newsreleases/latest-inventory-us-greenhouse-gas-emissions-and-sinks-shows-continued-progress>; see also Ex. D13: Scott Pruitt (@EPAScottPruitt), Twitter (Apr. 18, 2018), <https://twitter.com/EPAScottPruitt/status/986704746126954496> (“top-down regs like CPP . . . aren’t the solution”).

⁸ Ex. E2: Niina Heikkinen, *Pruitt publicly lauds Trump after 2016 criticisms resurface*, E&E News Climatewire, (Feb. 1, 2018), <https://www.eenews.net/climatewire/2018/02/01/stories/1060072579>, (quoting speech made at National Association of State Departments of Agriculture conference in Washington, D.C.).

⁹ Ex. D5: Scott Pruitt (@EPAScottPruitt), Twitter (Feb. 2, 2018, 7:54 AM), <https://twitter.com/EPAScottPruitt/status/959454892351000577> (linking to Interview by Michael Barbaro with Scott

Pruitt repeated his justification for suing EPA as Oklahoma Attorney General because, “They deserved it,” and explained that “the lawsuits that I was a part of, . . . it was all because the Agency didn’t act consistent with statutory authority.”¹⁰ Later in February 2018 he asked the public to watch his discussion at a political conference in which he, as usual, declared the CPP illegal and vowed to repeal it.¹¹ When asked why it was so important to repeal the CPP, Administrator Pruitt explained:

[T]his was an example of an agency . . . using its authority to say, ‘we’re going to act outside of the statute.’ . . . When Congress doesn’t give the EPA the authority to do something, we can’t pinch hit . . . And that’s exactly what happened with the Clean Power Plan. They sat at the Agency and said, ‘what can we do to reimagine authority under the statutes to regulate an area that we are unsure that we can but we’re going to do so anyway?’ And they acted outside of rule of law, and they acted outside of the scope of authority given to them by the U.S. Congress. That’s something we’re getting right. That’s why the President sent a very strong message. . . . [T]he Clean Power Plan is demonstrative of a violation of rule of law, the Court said so. . . . Why did they do that? Because of the likelihood that it was unlawful. Because of the great overreach of the past administration. The President corrected that. We’re in the business of executing upon it.¹²

Pruitt, EPA Administrator, “*The Daily*”: *Talking With Scott Pruitt* (Feb. 2, 2018) (audio available at <https://www.nytimes.com/2018/02/02/podcasts/the-daily/scott-pruitt-epa.html>) (see audio at 16:00-16:36); see also *id.* (audio at 14:12-14:55 (“That’s what’s so fascinating to me about people who say, ‘Oh, you’re, you’re withdrawing the Clean Power Plan, that’s terrible.’ Well, what has the Clean Power Plan achieved for the country? What part of that had any impact on environmental outcomes? Zero. How do we know that? It never went into effect. Why didn’t it go into effect? The Supreme Court, for the first time in history, issued a stay during the pendency of litigation because of its concern about the unlawfulness of the Clean Power Plan adopted in 2015 by the EPA.”)). In another recent interview Administrator Pruitt continued his practice of speculating on what legal grounds the Supreme Court based its stay of the CPP: “[T]he Court recognized that the very objectives of the Clean Power Plan would be realized by the Agency before they ever got a chance really to address the merits, and they thought that it was likely not consistent with the law.” Interview by Major Garrett, CBS News, with Scott Pruitt, EPA Administrator, *The Takeout* (Mar. 2, 2018) (video available at <https://www.cbsnews.com/video/32-the-takeout/>) (see video at 30:15-30:30).

¹⁰ Interview by Bill Frankmore, News-4 Reno, with Scott Pruitt, EPA Administrator (Feb. 5, 2018) (video available at <http://mynews4.com/news/local/exclusive-head-of-epa-scott-pruitt-sits-down-for-in-studio-interview>) (see video at 1:52-2:17). The *Year in Review* also links to an earlier interview with Administrator Pruitt in which he says of the CPP, “that’s going away” in 2018. *Year in Review*, note 6, *supra*, at 29 (linking to [Ex. E1](#): Anna Wolfe, *Trump’s EPA head visits Mississippi, talks deregulation in water, energy*, The Clarion-Ledger (Oct. 13, 2017), <https://www.clarionledger.com/story/news/local/2017/10/13/epa-water-energy-mississippi/757533001/> (“While the case was being litigated, the U.S. Supreme Court intervened to issue a stay, because of their view that it was not consistent with the law. What we’re doing is, that’s going away, and then we are evaluating under section 111 what steps we can take with respect to reduction of pollutants. That will happen in 2018 as well.”)).

¹¹ [Ex. D6](#): Scott Pruitt (@EPAScottPruitt), Twitter (Feb. 23, 2018, 4:56 PM), <https://twitter.com/EPAScottPruitt/status/967201594474459136>.

¹² American Conservative Union, Conservative Political Action Conference (Feb. 23, 2018) (video available at <https://www.c-span.org/video/?441474-1/epa-administrator-pruitt-addresses-cpac&start=265>) (see video at 3:53-6:15).

Finally, today, the last day for the public to submit comments to EPA for consideration in the CPP repeal rulemaking, Administrator Pruitt testified to Congress how that review will come out: “By repealing and replacing the so-called Clean Power Plan, we are ending a one-size-fits-all regulation on energy providers and restoring the rule of law.”¹³

EPA continues to misapply ethical standards to Administrator Pruitt.

Information that has recently come to light shows that EPA’s ethics officials have taken too narrow a view of their responsibilities under federal ethics regulations and been too willing to accommodate Administrator Pruitt’s agenda. The States and Local Governments are aware of no evidence that Administrator Pruitt’s obvious appearance of lack of impartiality in connection with the CPP rulemaking has ever been analyzed as required by 5 C.F.R. § 2635.502(a)(2).

Documents EPA recently produced in response to California’s Freedom of Information Act lawsuit,¹⁴ however, suggest that EPA ethics officials are insufficiently concerned about the appearance of impropriety regarding Administrator Pruitt’s involvement in the CPP repeal rulemaking. Shortly after Administrator Pruitt signed his May 4, 2017, recusal memorandum¹⁵ agreeing not to participate in the CPP litigation, an EPA attorney sought clarification from an EPA ethics official to distinguish what kind of involvement Administrator Pruitt would be allowed to have in any rulemaking to repeal or replace the CPP. The ethics official responded that EPA staff could tell Administrator Pruitt how his decisions in the rulemaking would affect the CPP litigation, and that he could use that information to influence the course of the CPP litigation through the rulemaking process, so long as he did not explicitly direct litigation strategy or tell anyone what to write in court filings. The EPA ethics official advised that, “[i]f the rulemaking is the horse, then the Administrator can certainly direct the horse to go in any direction he wants. That the cart (which is the litigation) follows the horse does not necessarily mean that the Administrator is directing the cart. [H]e can direct the rulemaking even though the cart may follow along behind.”¹⁶ This overly simplistic analogy is totally divorced from the safeguards in federal ethics regulations against the appearance of lack of impartiality, and this interpretation in effect allows Administrator Pruitt consciously to steer both the litigation and the

¹³ *The Fiscal Year 2019 Environmental Protection Agency Budget: Hearing Before H. Comm. on Energy & Commerce, Subcomm. on Environment*, 115th Cong. (Apr. 26, 2018) (testimony of Scott Pruitt, EPA Administrator) (video available at <https://www.c-span.org/video/?444370-1/epa-administrator-pruitt-pressed-concerns-expenses-management&vod>) (see video at 22:08-23:10).

¹⁴ *California v. EPA*, No. 1:17-cv-01626 (D.D.C.) (complaint filed Aug. 11, 2017). EPA will not complete its production of records until after the comment period for the proposed CPP repeal closes on April 26, 2018. EPA has withheld and redacted numerous responsive documents on the basis of Freedom of Information Act exemptions. The case has not yet been resolved.

¹⁵ *Original Comments*, note 3, *supra*, Ex. B8: Memorandum from E. Scott Pruitt, EPA Administrator, to Acting Assistant Administrators, et al., My Ethics Obligations (May 4, 2017), available at <https://foiaonline.regulations.gov/foia/action/public/view/record?objectId=090004d2812efc2b&fromSearch=true> (original version; memorandum updated May 17, 2017 (*Original Comments*, note 3, *supra*, Ex. B9)).

¹⁶ *Ex. D1*: E-mails between Lorie Schmidt, Associate General Counsel, and Justina Fugh, Senior Counsel for Ethics, (May 16-17, 2017).

rulemaking to achieve exactly the same outcome he was seeking as Oklahoma Attorney General.¹⁷

At a minimum, the exchange between EPA staff and ethics officials on the interwoven nature of the CPP litigation and rulemaking shows that there is a reasonable question whether Administrator Pruitt's participation in the rulemaking "would raise a question regarding his impartiality" under 5 C.F.R. § 2635.502(a)(2).¹⁸ Yet EPA never even undertook this analysis. As discussed in the Original Comments, this failure was "so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such error[] had not been made."¹⁹

EPA's failure to consider the impartiality requirements in the context of the CPP repeal rulemaking is not unique. Earlier this month the U.S. Office of Government Ethics advised EPA's Designated Agency Ethics Official to investigate and address possible ethics violations, including the impartiality requirement in 5 C.F.R. § 2635.502(a), due to actions by Administrator Pruitt unrelated to the CPP.²⁰ The House Committee on Oversight and Government Reform is also investigating EPA's compliance with 5 C.F.R. § 2635.502(a).²¹ The evidence of Administrator Pruitt's improper involvement in the CPP repeal rulemaking set forth in the Original Comments and these supplemental comments demand the same treatment.

Conclusion

As previously demonstrated in the State and Local Governments' Original Comments, Administrator Pruitt's closed mind on the legality of the CPP continues to threaten the public's constitutional and statutory rights to due process and fairness in an administrative rulemaking proceeding. In addition, EPA officials, including Administrator Pruitt himself, continue to abuse their discretion in failing to recognize that he lacks the appearance of impartiality federal ethics regulations require of an agency decision maker and in failing to ensure that he is disqualified from participating in this rulemaking. Any rule repealing the CPP as a result of this tainted

¹⁷ Administrator Pruitt's May 4, 2017, recusal memorandum directs both Ryan Jackson, his Chief of Staff, and Sarah Greenwalt, Senior Advisor to the Administrator, to seek assistance from ethics officials if they are uncertain as to whether he may participate in a matter. Ms. Greenwalt worked for Oklahoma Attorney General Pruitt on challenging "an overreaching federal government" and rose to the position of General Counsel. See Ex. D2: U.S. Embassy and Consulates in Italy, *Bologna G7 Ministerial – U.S. Delegation: Sarah Greenwalt*, <https://it.usembassy.gov/bologna-g7-ministerial-u-s-delegation-sarah-greenwalt/> (last visited April 24, 2018). Ms. Greenwalt, too, has an EPA recusal statement preventing her from being involved in certain matters involving the State of Oklahoma, including the CPP litigation, creating confusion as to how she is to serve as an ethical gatekeeper for matters on which she herself is recused. Ex. D3: Memorandum from Sarah Greenwalt, Senior Adviser for Water and Cross-Cutting Initiatives, to Ryan Jackson, Chief of Staff, Recusal Statement (Nov. 8, 2017), available at https://www.eenews.net/assets/2018/03/20/document_gw_16.pdf.

¹⁸ See *Original Comments*, note 3, *supra*, at 25, n.98.

¹⁹ See *id.* at 23 (quoting 42 U.S.C. § 7607(d)(9)(D)).

²⁰ Ex. D11: Letter from David J. Apol, Acting Director and General Counsel, U.S. Office of Government Ethics, to Kevin Minoli, Principal Deputy General Counsel and Designated Agency Ethics Official, EPA (Apr. 6, 2018), <https://oge.app.box.com/v/LettertoEPADAEO>.

²¹ Ex. D12: Letter from Representative Trey Gowdy, Chairman, House Committee on Oversight and Government Reform, to Scott Pruitt, EPA Administrator (Apr. 11, 2018), <https://oversight.house.gov/wp-content/uploads/2018/04/2018-04-11-TG-to-Pruitt-EPA-Travel-Follow-up-due-4-25.pdf>.

process should be struck down on the ground that it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or “contrary to constitutional right, power, privilege, or immunity.” 42 U.S.C. § 7607(d)(9)(A), (B); 5 U.S.C. § 706(2)(A), (B). EPA must therefore withdraw its proposed rule repealing the CPP.

Sincerely,

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Enclosures: Exhibits D1-D13
Exhibits E1-E2

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