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COMMITTEE ON OVERSIGHT AND  
GOVERNMENT REFORM,  
U.S. HOUSE OF REPRESENTATIVES,  
WASHINGTON, D.C.

DEPOSITION OF: JASON BURNETT

Thursday, May 15, 2008

Washington, D.C.

The deposition in the above matter was held at Room 2247  
Rayburn House Office Building commencing at 11:15 a.m.

1       Appearances:

2

3

4

5       For COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM:

6       HENRY A. WAXMAN, CHAIRMAN OF THE COMMITTEE

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17

18      For THE WITNESS:

19      LEONARD O. EVANS III, ESQ.

20      CRAIG ENGLE, ESQ.

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1           Mr. Baran. This is a deposition of Jason Burnett  
2 conducted by the House Committee on Oversight and Government  
3 Reform. This deposition is part of the committee's  
4 investigation into three matters: First, the Environmental  
5 Protection Agency's denial of a request by the State of  
6 California for a waiver to enforce regulations to reduce  
7 greenhouse gas emissions from motor vehicles; second, EPA's  
8 response to the Supreme Court decision in Massachusetts  
9 versus EPA; third, EPA's recently revised national ambient  
10 air quality standards for ozone.

11           Mr. Burnett, will you please state your full name for  
12 the record.

13           The Witness. Jason Kestrel Burnett.

14           Mr. Engle. This is Craig Engle, counsel for the  
15 witness. I would like the record to also reflect that as  
16 part of the negotiations that have occurred over the last  
17 several days and this morning that the witness is entitled to  
18 leave the room if he feels as though he is being asked a  
19 question that may be beyond the bounds of instructions that  
20 he has received or commentary that he has received from the  
21 EPA and that we will return to the room, after leaving it,  
22 with an answer of what the instruction is.

23           Mr. Baran. Thank you.

24           You are Mr. Burnett's private counsel, representing him  
25 personally and not the Agency; is that correct?

1           Mr. Engle. That's correct.

2           Mr. Baran. Do you have co-counsel here as well?

3           Mr. Engle. I do. His name is Leo Evans, also with  
4 Arent Fox.

5           Mr. Baran. Thank you.

6           Well, Mr. Burnett, thank you for joining us today.

7           We want to note for the record that you are appearing  
8 voluntarily. The person transcribing the deposition is a  
9 House reporter and a notary public, authorized to administer  
10 oaths.

11           The reporter will now place you under oath.

12           [Witness sworn.]

13           Mr. Baran. My name is Jeff Baran. I am majority  
14 counsel for the committee. Accompanying me are Greg Dotson,  
15 Alexandra Teitz, Erik Jones, and Kristin Amerling, also  
16 majority counsel.

17           Would counsel for the minority like to introduce  
18 themselves.

19           Mr. Ausbrook. I'm Keith Ausbrook, minority staff.

20           Ms. Moore. Kristina Moore.

21           Ms. Bennett. Brooke Bennett.

22           Mr. Baran. Before beginning with the questioning, I  
23 would like to go over some standard instructions and  
24 explanations regarding the deposition. The deposition will  
25 proceed as follows:

1           I will ask you questions for approximately 1 hour  
2 regarding the subject matter of the committee's  
3 investigation. When I am finished, minority counsel will  
4 have the opportunity to ask you questions for approximately  
5 1 hour. Additional rounds of questioning, alternating  
6 between majority and minority counsel, may then follow until  
7 the deposition is completed.

8           An official reporter will be taking down everything you  
9 say, and will make a written record of the interview, so you  
10 need to give verbal, audible answers. You are under oath and  
11 are required to answer questions truthfully.

12           If I ask you about conversations or events in the past  
13 and you are not able to recall the exact words of details,  
14 you should testify to the substance of such conversations or  
15 events to the best of your recollection. If you recall only  
16 a part of a conversation or event, you should just give us  
17 your best recollection of the parts you do recall.

18           Do you understand?

19           The Witness. I do.

20           Mr. Baran. Please let us know at any time if you would  
21 like to take a break or if you would like to consult with EPA  
22 counsel, who is waiting outside the room.

23           Do you understand these ground rules?

24           The Witness. I do, and I also understand I can confer  
25 with my private counsel at any point.

1 Mr. Baran. Absolutely, at any time.

2 Do you have any questions before we begin?

3 The Witness. I do not.

4 Mr. Baran. Great. Then let's get started.

5 EXAMINATION

6 BY MR. BARAN:

7 Q What is your current position at the U.S.  
8 Environmental Protection Agency, or EPA?

9 A I am the Associate Deputy Administrator.

10 Q How long have you held this position?

11 A A little less than 1 year.

12 Q How long have you worked at EPA total?

13 A I have worked at EPA on two separate occasions.

14 The first time was a little less than 2 years, this time a  
15 little less than 1 year, in total, a little less than  
16 3 years.

17 Q What other positions have you held at EPA?

18 A I started at EPA with the title of, I believe,  
19 Policy Advisor -- or Senior Policy Advisor -- to the  
20 Assistant Administrator for the Office of Air and Radiation.  
21 That is the only other title I have had. I may have had a  
22 promotion from Policy Advisor to Senior Policy Advisor during  
23 that time, but it was effectively the same position.

24 Q Are you a career EPA employee or a political  
25 appointee?

1           A     I have been appointed by the Administrator of EPA.

2           Q     Can you tell us a little bit about your educational  
3 background?

4           A     Yes. I have a bachelor's degree in Economics from  
5 Stanford University and a master's degree in a program called  
6 Earth Systems, an interdisciplinary of a science, policy and  
7 econ program, also from Stanford University.

8           Q     Please generally describe your duties in the office  
9 of the administrator.

10          A     I am generally the administrator's advisor on a  
11 wide range of subjects involving climate change. I have also  
12 advised the administrator on other subject matters, but my  
13 primary focus is on climate issues.

14          Q     I would like to start by asking some questions  
15 about the careful waiver.

16          Ms. Bennett. Jeff, I'm sorry.

17          Mr. Baran. Yes.

18          Ms. Bennett. The reason we are interviewing Mr. Burnett  
19 today is because of the pending ozone area; is that correct?  
20 So I'm curious as to why we're starting with the California  
21 waiver.

22          Mr. Baran. Well, we have a number of issues that we're  
23 going to address today.

24          Ms. Bennett. I appreciate that. Though, should we run  
25 out of time and should have to continue this at another date,

1       wouldn't it make more sense to start with ozone? I mean,  
2       that is the purpose of having the interview between now and  
3       the hearing, correct?

4             Mr. Baran. Correct, and I think we'll be able to cover  
5       everything.

6             Ms. Bennett. Okay.

7             Mr. Baran. Thanks, Brooke.

8                     BY MR. BARAN:

9             Q       When did you first begin working on the California  
10       waiver request?

11            A       I believe that I was aware of the request during my  
12       first time at EPA, but it certainly was not squarely in my  
13       portfolio. It was squarely in my portfolio in my second time  
14       at EPA, and I do not recall the precise date upon my return  
15       for the second time that I became engaged in the California  
16       waiver, but it was early on in my time. Therefore, it must  
17       have been early summer 2007.

18            Q       Please generally describe your role with respect to  
19       California's request for a waiver to enforce regulations to  
20       reduce greenhouse gas emissions from motor vehicles.

21            A       Well, I believe that I had several related roles.  
22       The first is to make sure that the administrator had the  
23       information that he needed to make his decision. I also  
24       advised him as to my recommendation as to what decision I  
25       would recommend he make given that information.



1           Q     Did anyone else in the administrator's office  
2 actively work on the California waiver request?

3           A     The administrator, himself, actively worked on the  
4 California waiver request, and he is, of course, in the  
5 administrator's office.

6           Q     Anyone else in the administrator's office?

7           A     I suppose it depends on one's definition of the  
8 word "active." I think that I was probably the most involved  
9 of the administrator's staff within his office.

10          Q     The committee has obtained documents that indicate  
11 that EPA staff briefed Administrator Johnson about the  
12 California waiver on multiple occasions in 2007. There were  
13 briefings on the California waiver on May 1st, June 5th,  
14 July 17th, September 12th, September 20th to 21st,  
15 October 9th, and October 30th. I would like to begin with  
16 the September 12th briefing.

17          Exhibit A -- we have a number of exhibits. In each  
18 case, we will make sure you have a copy in front of you.  
19 Hopefully, we will have copies for nearly everyone.

20                               [Burnett Exhibit A  
21                               was marked for identification.]

22                               BY MR. BARAN:

23          Q     Exhibit A is an appointment form for the  
24 September 12th, 2007 briefing of Administrator Johnson on the  
25 California waiver. You are listed as one of the

1 participants. Before we do Exhibit B, let me just mention  
2 that you should take as much time as you need to look at the  
3 exhibits whenever we introduce one.

4 A Thank you.

5 Q Exhibit B is next, and we will put it in front of  
6 you at the same time. Exhibit B are the briefing slides for  
7 this briefing.

8 Mr. Engle. These are copies that we will be able to  
9 keep?

10 Mr. Baran. The copies will be returned to the committee  
11 at the end of the deposition. Basically, the way we normally  
12 do it is, whenever we are done asking questions about  
13 exhibits, we will re-collect them, and then if someone has  
14 questions again, we will send them back out. It keeps things  
15 from getting crazy with all of the paper.

16 [Burnett Exhibit B  
17 was marked for identification.]

18 BY MR. BARAN:

19 Q Mr. Burnett, did you attend this briefing?

20 A The document before me would suggest that I did. I  
21 don't have any reason to believe that I did not attend it.

22 Q Okay. Do you have a specific recollection of these  
23 slides or of the briefing?

24 A I simply want to be careful about not overstating  
25 the confidence I have in any information because I have had a

1 number of briefings with the administrator on this subject,  
2 and I can't say for certain that I was in each and every  
3 briefing that the administrator had.

4 Q Do you believe you were at this briefing? We  
5 understand you might not have complete certainty.

6 A I believe I was. The material is certainly  
7 material that I am generally familiar with, and I was  
8 involved in briefings with the administrator during that  
9 general time frame.

10 Q Okay. Do you remember whether you took notes of  
11 what was said at this briefing?

12 A I do not remember.

13 Q As a general practice, when you were in career  
14 briefings with the administrator, are those occasions where  
15 you would generally take notes?

16 A I generally don't take notes, certainly not  
17 significant notes. I don't know whether I did in this case,  
18 but my general practice is to take enough notes to jog my  
19 memory, and I may have done that in this situation.

20 Q Looking at Exhibit B, the slides, did you comment  
21 on or edit these briefing slides as they were being developed  
22 for the administrator?

23 A As I said earlier, one of my roles is to make sure  
24 the administrator has the information that he needs, that he  
25 feels that he needs, to make a decision. In that role, I

1 certainly was involved in making sure he did get the  
2 information that he wanted. I do not know in this particular  
3 case whether I did make any edits or otherwise made any  
4 suggestions for the nature of the briefing. It wouldn't  
5 surprise me if I did.

6 Q Do you know whether Bob Meyers made substantive  
7 edits to the slides?

8 A I do not know.

9 Q Our understanding is that, at this briefing, EPA  
10 staff briefed the administrator on the relevant statutory  
11 criteria for considering the California waiver; is that  
12 correct?

13 A In looking at the materials that you have presented  
14 to me, it appears that that is what this briefing, at least  
15 in part, was intended to convey.

16 Q We also understand that EPA's staff gave the  
17 administrator their view on whether the criteria had been  
18 satisfied; is that correct?

19 A At a meeting, that did occur. I do not know  
20 whether it was at this meeting.

21 Q At the meeting that occurred, did the staff explain  
22 that, in their view the criteria had been met to grant the  
23 waiver?

24 A Yes.

25 Q Can you describe your recollection of how those

1 staff views were provided to the administrator?

2 A My recollection is, in fairly common practice with  
3 the administrator, in an important decision like this, he  
4 receives information. He then asks for the thoughts not only  
5 in interpreting that information but also in what he should  
6 ultimately do with that information, and often will go around  
7 the room, asking the individuals in that room their  
8 recommendation, and that is my recollection of what occurred  
9 for this decision. Again, I do not know whether it was at  
10 this particular meeting or at some other meeting, but it did  
11 occur generally in this time frame.

12 Q We will talk in a moment about the September 21st  
13 briefing, which was the one that follows this September 12th  
14 briefing. It is our understanding that that was the briefing  
15 where there was the kind of around-the-room questioning.

16 A I have a clarifying question.

17 Q Sure.

18 A I assume, if you make a factual statement, that my  
19 silence is not interpreted as either accepting or rejecting  
20 that statement.

21 Q That's absolutely correct.

22 A Thank you.

23 Q Do you have a recollection at these briefings of  
24 any separation where a staff evaluation, a more general staff  
25 evaluation, was conveyed to the administrator verbally about

1           whether or not the criteria to grant the waiver had been met?

2           A     Can you rephrase?  I do not understand the  
3           question.

4           Q     Sure.  So I believe you were describing a situation  
5           where the administrator went around the room and asked  
6           individuals "What is your advice or recommendation about what  
7           I should do?"

8           A     Yes.

9           Q     That was, if I understand how you described it,  
10          kind of an individual-by-individual question; is that  
11          correct?

12          A     Yes, that is my memory of how it occurred.

13          Q     Okay.  Do you remember any separate instances,  
14          either at that same briefing or at the September 12th  
15          briefing, where there was a more generalized presentation of  
16          a general staff evaluation of whether the criteria had been  
17          met to grant a waiver?

18          A     I do not believe that there was -- I am not aware  
19          of a situation in which staff articulated their collective  
20          views other than the materials that were presented to the  
21          administrator, which I understand the committee has.

22          Q     Okay.  Did anyone argue that the criteria required  
23          the administrator to deny the waiver?

24          A     I'm sorry.

25          Q     Did anyone at this briefing or at the September

1 21st briefing argue that the criteria, the statutory  
2 criteria, required the administrator to deny the waiver based  
3 on the information that had been placed in front of him?

4 A No.

5 Q I think we are finished with those exhibits.

6 Do you know whether you attended a pre-briefing with Bob  
7 Meyers and career staff before the September 12th briefing  
8 with the administrator?

9 Mr. Engle. Could you identify Bob Meyers, please?

10 Mr. Baran. Sure.

11 BY MR. BARAN:

12 Q Bob Meyers is the Principal Assistant Administrator  
13 for Air and Radiation; is that correct?

14 A I don't think that is quite his title, but if it  
15 would be helpful --

16 Q Principal Deputy Assistant Administrator? Do you  
17 know his title?

18 A I don't want to try to say what his title is  
19 because I, myself, may not get it right, but I believe that  
20 he is acting as effectively the head of the Office of Air and  
21 Radiation.

22 Q Okay. When the head of the Office of Air and  
23 Radiation, in the event that that person is Senate-confirmed,  
24 that is the Assistant Administrator position, correct?

25 A That is correct.

1           Q     Okay.  So, going back to the question, did you  
2 attend a pre-briefing meeting with Bob Meyers and career  
3 staff before the September 12th briefing we just talked  
4 about?

5           A     I do not remember.

6           Q     Okay.  Let's turn to Exhibit C.

7                                 [Burnett Exhibits C and D  
8                                 were marked for identification.]

9           BY MR. BARAN:

10          Q     Exhibit C is an e-mail exchange.  On  
11 September 11th, 2007, Karl Simon, a division director in the  
12 Office of Transportation and Air Quality, sent an e-mail  
13 explaining that Bob Meyers' Special Assistant, Dana Hyland,  
14 quote, "is fixing the inclusion of staff evaluations.  Note  
15 that Bob dropped two slides -- the summary of an air report  
16 and the options summary page.  I am pushing back," end quote.

17                 Christopher Grundler, the Deputy Director of the Office  
18 of Transportation and Air Quality, which we may sometimes  
19 refer to as OTAQ, replied, quote, "What do you mean 'fixing'?  
20 As in deleting?" end quote.

21                 I also bring out Exhibit D.  Exhibit D is another e-mail  
22 exchange also on September 11th.  Mr. Grundler asked  
23 Mr. Simon, quote, "Did you get direction not to convey staff  
24 evaluations or options?" end quote.  Mr. Simon responded,  
25 quote, "Yes.  In a written form, we will be having the



1 conversation, though," end quote.

2 Were you aware that Bob Meyers deleted the options  
3 summary page and staff evaluations from the briefing slides  
4 for Administrator Johnson?

5 A I don't know whether the premise of your question  
6 is correct, and I don't know the answer to the question even  
7 assuming the premise is correct.

8 Q Okay. So, going back to the premise then, just to  
9 be clear, do you know whether Bob Meyers instructed that the  
10 options summary page and staff evaluations be deleted from  
11 the slides?

12 A I don't have any knowledge other than the two  
13 documents that you have presented to me.

14 Q Okay. So do you recall being in any kind of  
15 meeting or pre-briefing with Bob Meyers where he would have  
16 actually said these things orally? Do you have any  
17 recollection of that?

18 A I do not recall.

19 Q Okay. If Bob Meyers did instruct staff to remove  
20 staff evaluations or options, why do you think he would make  
21 such an instruction?

22 A Are you asking me to hypothesize?

23 Q Yes.

24 A I think that it may be more appropriate for you to  
25 ask him that question because my hypothesis is just that.

1 Q Well, let me ask it a different way.

2 Have there been cases in the past on this issue or on  
3 others where you are aware of Bob Meyers' asking staff to  
4 remove career staff evaluations from briefing slides for the  
5 administrator?

6 A I am aware of general Agency practice -- at least  
7 as I am familiar with it -- that the decisionmaker, in this  
8 case the administrator, is presented with a wide range of  
9 options and that staff are encouraged to state or to  
10 otherwise convey the pros and cons and their professional  
11 recommendation of those options. I believe that occurred in  
12 this case.

13 Q In terms of your experience with EPA, is there a  
14 general practice of not including career staff evaluations in  
15 writing on briefing slides to the administrator?

16 A Ultimately, we Agency employees who are not the  
17 decisionmakers understand who the decisionmaker is, and it  
18 has not been my practice to eliminate options but, rather, to  
19 present information and arguments for and against, including  
20 recommendations for and against particular options. That is  
21 what I have tried to do in, really, all of my work. In  
22 particular, that is what I have tried to do in the case of  
23 the California waiver. I would prefer to talk about my  
24 involvement because I think that I am the appropriate person  
25 to talk about my involvement.

1           Q     That is certainly true, but of course, if you are  
2     in meetings with others, you can tell us about, you know,  
3     what those people did or said in those meetings. That is  
4     part of your experience at EPA. So, I guess the question I  
5     have is: In your experience at EPA, have you encountered or  
6     observed any resistance or preference for not including  
7     career EPA staff evaluations in briefing slides for the  
8     administrator?

9           A     My experience is that there is a general effort to  
10    not make decisions for a decisionmaker but, rather, to leave  
11    the decisions to the decisionmaker.

12          Q     Okay. In this case, did you have any conversations  
13    with Mr. Meyers or others as to whether or not staff  
14    evaluations should be communicated verbally or in writing?

15          A     I do not recall.

16          Q     Okay. We are finished with those exhibits.

17                Do you recall whether you had any pre-briefing meetings  
18    or discussions with Administrator Johnson about this  
19    September 12th briefing?

20          A     I don't specifically recall whether there was a  
21    pre-briefing for the September 12th briefing.

22          Q     Were there sometimes smaller briefings among  
23    political appointees of the administrator's before a larger  
24    career staff briefing?

25          A     Yes.

1 Q So that wasn't uncommon?

2 A That was not uncommon. I wouldn't be surprised if  
3 that occurred in this situation, but I don't know whether or  
4 not it did.

5 Q Okay. Do you recall discussing this briefing with  
6 the administrator after the briefing was completed?

7 A I also don't recall the specifics. I will say that  
8 often that would occur, and I wouldn't be surprised if that  
9 occurred in this situation.

10 Q Okay. Maybe it makes sense to move on to the  
11 September 21st, 2007 briefing. Exhibit E is next.

12 [Burnett Exhibits E and F  
13 were marked for identification.]

14 BY MR. BARAN:

15 Q Exhibit E is an appointment form for the September  
16 21st, 2007 briefing of Administrator Johnson on the  
17 California waiver. You are listed as one of the  
18 participants. Exhibit F I will let you see at the same time.  
19 Exhibit F are the briefing slides for this briefing.

20 Feel free to take a second and review the slides.

21 A I have reviewed this exhibit.

22 Q Do you know whether or not you attended this  
23 briefing?

24 A Again, you're asking about a specific meeting on a  
25 specific day a number of months ago, so I want to be cautious

1 about not overstating my confidence, but I believe that I did  
2 attend this briefing.

3 Q Okay. We understand we are just getting your best  
4 recollections. Do you know whether you took notes of what  
5 was said at this briefing?

6 A I do not know.

7 Q Looking at these slides, the slides that are  
8 Exhibit F, did you comment on or edit the briefing slides,  
9 these briefing slides, as they were being developed?

10 A I generally tried to work with staff to develop a  
11 wide range of options for requests that the administrator had  
12 of me, and this briefing presents a wide range of options. I  
13 believe that the wide range presented here is, in part, due  
14 to my efforts.

15 Q Just so I understand, was it the case that an  
16 earlier draft of these slides included fewer options than the  
17 ones that appear here?

18 A I don't know that.

19 Q Okay. Do you know whether Bob Meyers made any  
20 substantive edits to the slides as they were being developed?

21 A I do not know.

22 Q This was an options briefing, correct?

23 A It is titled as such.

24 Q Did EPA career staff communicate to the  
25 administrator that they believed that the statutory criteria

1 for granting the waiver request had been met?

2 A I think that's an important question. Can you say  
3 it again, please?

4 Q Sure.

5 At this briefing, did EPA career staff communicate to  
6 the administrator that they believed that the statutory  
7 criteria for granting the waiver request had been met?

8 A To the best of my recollection, yes.

9 Q At this briefing, did EPA career staff communicate  
10 to the administrator that they believed that denying the  
11 waiver posed a significant litigation risk?

12 A I do not know whether that was conveyed at this  
13 briefing.

14 Q Do you know whether it was conveyed at any briefing  
15 with the administrator?

16 A Yes.

17 Q Yes, it was communicated?

18 A It was communicated that denying the waiver had  
19 certainly more legal risk than granting the waiver. The  
20 strength of that statement -- I do not remember the precise  
21 strength of that statement.

22 Q It is our understanding that at the end of this  
23 briefing, the September 20th-21st briefing, that  
24 Administrator Johnson went around the room and asked  
25 individuals for their advice or recommendations about whether

1 he should grant the waiver. Do you know if that's correct?

2 A I know that, at some meeting, the administrator  
3 went around the room and asked for recommendations.

4 Q So you have a specific recollection of that  
5 happening, but you're not sure if it was at this briefing?

6 A That is correct.

7 Q Okay. When he went around the room and asked  
8 people for recommendations, did you offer a recommendation?

9 A Yes, I did.

10 Q What was your recommendation?

11 A To grant the California waiver.

12 Q In full?

13 A Yes.

14 Q What was EPA General Counsel Roger Martella's  
15 recommendation if you remember?

16 A I do not remember precisely what his recommendation  
17 was.

18 Q Do you have any recollection of what he said when  
19 it was his turn to say something?

20 A I recall that he stated that the legal risk was  
21 higher with denying the waiver and that the legal risk was  
22 lowest with granting the waiver.

23 Q Do you know whether he was the only person at the  
24 briefing who made a comment similar to that about the legal  
25 jeopardy of a denial?

1           A     I want to be careful about my own ability to  
2     remember specific events many months ago. I believe that  
3     others expressed a similar notion of the legal risk.

4           Q     Did Bob Meyers give a recommendation?

5           A     I do not believe that he did at that meeting.

6           Q     Do you know whether he was asked for a  
7     recommendation at that meeting?

8           A     I believe that he was not asked for a  
9     recommendation at that meeting. Again, my memory could be --

10          Q     Please speak up. Sorry.

11          A     Again, my memory is with the understanding that it  
12     was a number of months ago.

13          Q     Did the career employees at the briefing offer  
14     recommendations of their own?

15          A     Yes.

16          Q     Did anyone recommend denying the waiver?

17          A     No.

18          Q     So everyone who offered an opinion recommended  
19     granting the waiver in full or in part?

20          A     Yes.

21          Q     We are finished with those exhibits.

22                 Do you know whether you had any pre-briefing meetings or  
23     discussions with Administrator Johnson about this  
24     September 20th-21st briefing?

25          A     I do not remember.



1 Q Do you know whether you discussed the briefing with  
2 the administrator after the briefing was completed?

3 A Yes.

4 Q What did he say?

5 Ms. Bennett. I'd like to remind the witness that, to  
6 the extent he feels it is necessary to consult with Agency  
7 counsel or with his own personal counsel, he should feel more  
8 than welcome to take as much time he needs to do that.

9 BY MR. BARAN:

10 Q Do you recall what the administrator said?

11 A I recall that there was continued interest in  
12 exploring options between a full grant and a full denial.

13 Q So, in your conversation, Administrator Johnson  
14 expressed interest in exploring a partial grant-type option?

15 A Yes.

16 Q Was he favoring such an option or did he simply  
17 want more information about such an option?

18 A Answering that question, I think, would require --  
19 I think you are best asking him that question.

20 Q Fair enough. Let me ask this:

21 You just mentioned that he had interest or expressed an  
22 interest in exploring a partial grant option. In what he  
23 said to you, did he express a preference at that time or a  
24 leaning toward a particular option?

25 A As I said earlier, he had a longstanding request of

1 me to help develop an array of options for him to consider.

2 Q Okay, but that doesn't answer my question.

3 My question is: Did the administrator express to you a  
4 preference at that time for a particular option?

5 Will the record reflect that Mr. Burnett is consulting  
6 with his counsel.

7 [Witness confers with counsel.]

8 Mr. Baran. The record should just reflected that  
9 Mr. Burnett and his counsel consulted for a few minutes.

10 BY MR. BARAN:

11 Q I don't know if you would like me to restate the  
12 question.

13 A Please.

14 Mr. Engle. Please restate.

15 Mr. Baran. Sure.

16 BY MR. BARAN:

17 Q You mentioned that, after the September 20th to  
18 21st briefing, you had discussion with the administrator. My  
19 question for you is -- and I asked what he said. My specific  
20 question was: Did Administrator Johnson at that time express  
21 a preference for a partial waiver option?

22 A I do not recall.

23 Q Do you have a specific recollection of what was  
24 said during that conversation with the administrator?

25 Ms. Bennett. What is the date of the conversation that

1 we're talking about by the way?

2 Mr. Baran. We should ask.

3 BY MR. BARAN:

4 Q So this was after the September 21st briefing -- or  
5 do you know whether the conversation we're talking about  
6 happened that day right after the briefing or whether it was  
7 later than that?

8 A I don't -- what I tried to say is that I remember  
9 that we talked about that briefing after it occurred.

10 Q Okay.

11 A I did not mean to suggest that I knew of a specific  
12 time and place where that conversation occurred.

13 Q Okay. So there was a conversation at some point  
14 after that briefing. Do you have a specific recollection of  
15 that conversation?

16 A I remember that he continued to express interest in  
17 middle ground options and in his desire that I continue to  
18 explore middle ground options.

19 Q Was this a conversation between just you and he or  
20 were others involved in this conversation?

21 A I think there is some confusion. You're asking as  
22 if I'm remembering a particular conversation. I don't. I  
23 simply remember that we had conversation -- conversations,  
24 plural. After the briefing, we talked about the briefing.

25 Q As part of an ongoing process?

1 A Right.

2 Q Okay. Let's move on to Exhibit G.

3 [Burnett Exhibit G  
4 was marked for identification.]

5 BY MR. BARAN:

6 Q Exhibit G is an appointment form for an  
7 October 9th, 2007 briefing of Administrator Johnson on the  
8 California waiver. You are listed as one of the  
9 participants. Did you attend this briefing?

10 A I do not remember.

11 Q Maybe we can help refresh your recollection.

12 Our understanding is that the October 9th briefing was a  
13 briefing -- really, more of a meeting -- that was called by  
14 the administrator where he posed questions to EPA staff and  
15 where he basically asked them to provide more information on  
16 these questions.

17 Do you have a recollection of such a briefing or a  
18 meeting?

19 A Yes.

20 Q But you are not sure whether that was the  
21 October 9th meeting?

22 A That is correct. I am not sure about the precise  
23 date.

24 Q Did you attend the meeting where the administrator  
25 tasked the staff with providing additional information on

1 certain questions related to the waiver?

2 A I believe that I did, yes.

3 Q Okay.

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1        RPTS JURA

2        DCMN MAGMER

3        [12:10 p.m.]

4                    BY MR. BARAN:

5            Q        Was one of the issues that the administrator wanted  
6            to know more about the extent to which California met the  
7            compelling and extraordinary conditions criteria?

8            A        I know that he was interested in understanding more  
9            about that particular criterion. I don't know whether that  
10           interest of his was stated at this particular meeting.

11           Q        Okay. We are finished with that exhibit.

12                    I understand it is sometimes difficult with all the  
13           timing, but do you recall whether you had any pre-briefing  
14           meetings or discussions with the administrator about the  
15           October 9th briefing?

16           A        I do not.

17           Q        And did you discuss this briefing with the  
18           administrator after the briefing was completed?

19                    Mr. Engle. Could you repeat the question, please?

20                    Mr. Baran. Sure.

21                    BY MR. BARAN:

22            Q        Did you discuss this briefing with the  
23            administrator after the briefing was completed?

24            A        I do not recall whether I had a subsequent  
25            discussion with the administrator about that particular

1 briefing, but throughout the course of this process I had  
2 many discussions with the administrator about a wide range of  
3 topics.

4 Q Maybe it would make sense to just ask more a  
5 general question then so we get a better understanding of the  
6 process or your involvement in the process.

7 So there are these larger briefings with the  
8 administrator with career staff on different dates. How  
9 often were you personally talking with the administrator  
10 about this issue?

11 A It may not have been daily, but it was not -- but  
12 it was not far from that.

13 Q And were those conversations typically just you and  
14 the administrator, or were they meetings with more people?

15 A I had discussions with the administrator where I  
16 was the only other person, and I had discussions with the  
17 administrator where there were others involved in the  
18 discussions.

19 Q So is it fair to say that these larger briefings  
20 with career staff were just a small fraction of the total  
21 conversations you had with the administrator about the  
22 California waiver?

23 A I am not sure if I would characterize them as a  
24 small fraction. They were an important part of the process  
25 in terms of the time spent in those briefings versus time

1 spent -- the administrator spent a lot of time on this, and I  
2 spent a lot of time working with him on it.

3 Mr. Baran. Let's move on to Exhibit H.

4 [Burnett Exhibit No. H  
5 was marked for identification.]

6 Mr. Baran. Exhibit H is an appointment form for an  
7 October 30, 2007, briefing of Administrator Johnson on the  
8 California waiver. You were listed as one of the  
9 participants.

10 Exhibit I is the briefing slide for this briefing.

11 [Burnett Exhibit No. I  
12 was marked for identification.]

13 Mr. Baran. I think they are actually large enough to be  
14 read.

15 I should mention there is an e-mail cover page, and then  
16 the attachment is the cover slides. Take a minute just to  
17 refresh your recollection, and just let me know whenever you  
18 are ready.

19 We could just stop here before we deal with these  
20 slides, and then you can take a little extra time.

21 Ms. Bennett. How much time do you anticipate? It looks  
22 like this is --

23 Mr. Baran. We are happy to stop here if that is easier.  
24 Okay. So maybe, rather than have you review those now, we  
25 will turn it over to minority to ask their questions for a



1 while, and then we can get back to this.

2 [Recess.]

3 Ms. Moore. We are going on record. My name is Kristina  
4 Moore. I am counsel for the minority, and I am going to ask  
5 you some questions about the ozone decision.

6 The Witness. Okay.

7 EXAMINATION

8 BY MS. MOORE:

9 Q First off, what was your level of -- actually, what  
10 percentage of your portfolio was the ozone NAAQS?

11 Mr. Engle. May I take a minute to consult with the  
12 witness?

13 Ms. Moore. Sure.

14 Mr. Engle. Thank you.

15 Ms. Moore. No problem.

16 BY MS. MOORE:

17 Q What percentage of your portfolio did the ozone  
18 NAAQS standard setting decision comprise, approximately?

19 A Of course at different times I spent different  
20 fractions of my time on different issues. For a period of  
21 time, the ozone NAAQS represented a significant fraction of  
22 my portfolio.

23 Q Could you say what period of time?

24 A I did not get substantively involved in the  
25 proposal because I had just recently come back to the agency.

1 I was involved in the process leading to the final rule  
2 decision.

3 Q I wanted to ask one clarifying question. You have  
4 been with EPA at two different points in your career. What  
5 was -- the 2-year period that was your first, what years were  
6 those?

7 A It was early 2004 to late 2006. I believe I said  
8 it was somewhat less than 2 years.

9 Q And then beginning again in early 2007?

10 A June of 2007.

11 Q Okay. Thanks.

12 So you became more substantively involved in the final  
13 rule making. And could you give me an approximate time when  
14 that became a major part of your portfolio?

15 A From late 2007 through March 12.

16 Q Okay. And, in comparison, or can you compare your  
17 work on the ozone rule to your work on California waiver?  
18 Was it equally intense for the period of time that you were  
19 focused on it?

20 A I was -- I saw both as squarely in my portfolio,  
21 and I devoted the resources to each that I thought they  
22 warranted.

23 Q Okay. Could you describe for us then -- albeit you  
24 weren't there during the preliminary stages, but I am  
25 assuming and please clarify if you were not -- the stages

1 that the rule went through, from the beginning with the  
2 formation, the criteria document, the staff paper, the  
3 proposed rule, the final rule. And then also, as you are  
4 doing that, if you could also describe the involvement of  
5 CASAC, the Clean Air Science Advisory Committee.

6 Mr. Engle. Do you understand the question?

7 The Witness. I do. We will see whether others  
8 understand the answer.

9 The NAAQS process is being modified at the agency. The  
10 ozone standard was the last NAAQS to completely go through  
11 the process using the old process. That process generally  
12 consists of the following elements --

13 BY MS. MOORE:

14 Q The old process?

15 A The old process, right -- and therefore the process  
16 that the ozone decision went through. Beginning in earnest  
17 with a criteria document that is produced by EPA's Office of  
18 Research and Development and as reviewed by CASAC, then --

19 Q If I could pause there. So what was CASAC's  
20 involvement or what was the result of their review of the  
21 criteria document?

22 A I do not have any information about that, other  
23 than what is in the public record.

24 Q Okay. So the staff created the criteria document,  
25 which is then reviewed by CASAC, and then I interrupted you.

1 So go on.

2 A The next document I believe was produced was the  
3 risk assessment.

4 Q Okay.

5 A And that I believe is a joint effort between two  
6 offices within EPA. I am not sure whether that was published  
7 as a separate document or not, but I generally think of the  
8 criteria document and the risk assessment as being separate  
9 but related documents.

10 Q Okay.

11 A The next document is the staff paper, which is  
12 produced by the Office of Air and Radiation and within that  
13 the Office of Air Quality Planning and Standards. It is my  
14 understanding that CASAC reviews, comments on, and the agency  
15 responds to the review and comment on each of those three  
16 pieces of work.

17 Q And are you familiar --

18 Mr. Engle. Could we have a minute, please?

19 Ms. Moore. Sure.

20 BY MS. MOORE:

21 Q Are you familiar at all with the comments or  
22 interaction between CASAC and the agency with respect to the  
23 staff paper?

24 A I do not have any information, other than I am  
25 aware of letters that have been received from CASAC on

1 documents.

2 Q Okay. Do you know if CASAC -- if their rule -- if  
3 the way they approached their rule in reviewing the staff  
4 paper was the same in this instance as it was in other NAAQS  
5 settings? Did they take a different approach at all?

6 A I don't have any information either way.

7 Q You mentioned that the process by which NAAQS are  
8 set had been modified by the agency. Were you involved at  
9 all -- and, actually, let me back up one step. Was it indeed  
10 Marcus Peacock that was the lead in terms of changing or  
11 modifying the NAAQS setting process? Is that correct?

12 A It is my memory that Marcus Peacock sent a letter  
13 to Bill Wehrum and George Gray asking them to investigate  
14 options for improving and updating the NAAQS.

15 Q That was Bill Wehrum?

16 A I believe that is correct. That was at least a  
17 couple years ago.

18 Q Okay. To investigate options. And is it safe to  
19 conclude that the current policy is a result of the  
20 recommendations that Bill Wehrum and George Gray made?

21 A Yes. The agency has updated the NAAQS review  
22 process and will be using that process in full for upcoming  
23 NAAQS for the years.

24 Q And were you involved at all in that process?

25 A Yes, I was.

1 Q Could you describe in what way?

2 Mr. Engle. Do you understand the scope of the question?

3 The Witness. I understand it as an open question, a  
4 broad question.

5 BY MS. MOORE:

6 Q It is a broad question. The purpose of the  
7 question is to get a sense for your familiarity with the  
8 process through which EPA and CASAC, the manner in which they  
9 proceeded in forming the new rules. So I just wanted to get  
10 a sense of whether or not you would have personal knowledge  
11 of that process.

12 A I was involved in working to develop options for  
13 consideration for updating the NAAQS process. If I recall  
14 correctly, the final decisions in what options to take were  
15 made after my departure from the agency, that is to say my  
16 departure in the fall of 2006, and were made while I was not  
17 an employee of the agency.

18 Q Okay.

19 A I am sorry. It is my recollection that there were  
20 several iterations that we went through, and I was involved  
21 in some of the earlier iterations. And my previous statement  
22 was with regard to the final iteration, if you will.

23 Q And when you say that we worked on several  
24 iterations, is that just internal to EPA, or did EPA work  
25 with CASAC in setting the procedures?

1           A     Both.  There were certainly an internal work group  
2 process that was put in place to address Marcus Peacock's  
3 request.

4           Q     And internal work group, that is just EPA?

5           A     Yes.

6           Q     Okay.

7           A     At some point in the process, the agency went out  
8 to CASAC and I think the public at large for comments on the  
9 process, although I don't recall whether I was at the agency  
10 during that stage.

11          Q     Okay.  Do you recall when the new process was  
12 finalized and presented to CASAC and the public at large?  Do  
13 you recall what CASAC's reaction was to the proposal?

14          A     I am hesitant to use your term "finalized," because  
15 CASAC has continued to offer thoughts and suggestions, and  
16 the agency is continuing to evaluate those thoughts and  
17 suggestions and refinements for the process.

18          Q     Okay.  So is it safe to say that the agency is  
19 continuing a dialogue with CASAC --

20          A     Yes.

21          Q     -- to optimize the process?

22          A     To update the NAAQS process.  Yes, we are  
23 continuing a dialogue with CASAC.

24          Q     We will move on from the topic of CASAC right now.  
25                So I know it is a matter of public record, but could you

1 state what the recommended range was in the proposed ozone  
2 rule for the primary standard?

3 A Well, I think that there are two ranges: the range  
4 that CASAC recommended and the range that the administrator  
5 proposed.

6 Q So both then.

7 A Making your questions easy.

8 The CASAC recommended a range for the primary standard  
9 of .060 to .70. The administrator proposed .070 to .075.

10 Q And could you answer that question again but with  
11 respect to the secondary standard?

12 A CASAC recommended a separate secondary standard  
13 based on a cumulative seasonal form. I am paraphrasing their  
14 recommendation, of course. The administrator proposed two  
15 options, one option based on the cumulative seasonal form  
16 called W126 and the second option setting the standard  
17 identical to the primary standard using an 8-hour form.

18 Q And what was the range recommended by CASAC for the  
19 cumulative seasonal form?

20 A I don't remember the precise range. But it was --

21 Q If you don't recall --

22 A I don't recall the precise range.

23 Q That is okay.

24 With respect to the administrator's proposed ranges in  
25 the proposed rule, do you believe the range under both the



1 primary as well as the secondary standard -- do you think  
2 that any points along that range would have been legally  
3 justifiable under your understanding of the Clean Air Act?

4 A Are you asking me for my legal opinion?

5 Q I think -- I understand you are not an attorney, so  
6 I think what I am asking you is how you would -- I am trying  
7 to be careful.

8 Mr. Engle. Could you restate the question in a way that  
9 would allow the witness to answer without expressing a legal  
10 opinion or conclusion?

11 Ms. Moore. Sure.

12 BY MS. MOORE:

13 Q Within your understanding of the Clean Air Act, was  
14 the range for the primary standard that was proposed by the  
15 administrator from .07 parts per million to .075, was that  
16 justified by the science as you understood the science to be?

17 A I understand the science to not provide a bright  
18 line and that, ultimately, the decision for the proposal and  
19 the decision for the final rule is a judgment left in the  
20 Clean Air Act to the administrator.

21 Q You may not have personal knowledge of this, and  
22 that is okay. Just say that you do not. But are you aware  
23 of any other staff, either career or political, that were  
24 expressing an opinion on this proposed range to the  
25 administrator?

1           A     I came back to the agency towards the tail end of  
2 the process for the proposal. I believe that was after the  
3 agency had what we call option selection, where the  
4 administrator made his decision for the proposal. I am not  
5 familiar with the details of the proposed decision.

6           Q     So if I just understand what you said, before you  
7 returned to the agency, the option selection briefing had  
8 already occurred and you weren't present for that?

9           A     I believe that is the case. I certainly felt that  
10 I was coming into the process late and therefore did not get  
11 engaged in a substantive way in the proposed decision.

12          Q     Okay.

13          A     I didn't feel that I had the benefit of the process  
14 that occurred before my return to the agency.

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1           Q     In your answer earlier, you said that with respect  
2 to the proposed range that there is a matter of policy  
3 judgment involved in setting the standard.

4           A     Yes, I believe that is the case.

5           Q     CASAC was a little more -- what is your opinion of  
6 the options expressed or the range expressed by CASAC that  
7 there was unanimous support from CASAC that the primary  
8 standard should be set between the range of .06 and .07? And  
9 my understanding -- please correct me if I am wrong -- is  
10 that CASAC felt that anything outside of that range was not  
11 scientifically justifiable.

12          A     So your question is whether I agree with your  
13 characterization of CASAC's --

14          Q     In the first instance, yes.

15          A     I think it is a matter of public record what CASAC  
16 has said. I don't have any thoughts independent -- thoughts  
17 about what they have said independent from the publicly  
18 available documents.

19          Q     Okay. So I would still like to explore a little  
20 bit the difference between what CASAC was recommending to the  
21 agency and what the agency ultimately proposed. CASAC,  
22 again, the primary being .06 and .07 and the agency being .07  
23 to .075. And I guess what I am asking you to opine on or  
24 comment on is what was the source of the disagreement?

25          A     CASAC has two very important roles in the NAAQS

1 review process. The first is to advise on the underlying  
2 science and the second is to make a policy recommendation  
3 based on that science. Their recommended range is a policy  
4 judgment based on their interpretation, view of the science.

5 Q So can you be more specific in where or why their  
6 policy judgment was different than EPA's policy judgment?

7 A I am not trying to be difficult. I am trying to be  
8 precise.

9 Q I understand.

10 A The final preamble -- the final rule explains the  
11 deviation, why the administrator deviated from the range  
12 recommended by CASAC. I am not as familiar with the preamble  
13 for the proposed decision, and your question is about the  
14 proposed decision, I believe. It would be my assumption that  
15 the preamble for the proposed decision also articulates the  
16 reason why the administrator was proposing a different range  
17 than that recommended by CASAC.

18 Q The question was actually about your opinion as to  
19 the difference and why they came to a different policy  
20 recommendation than did EPA.

21 A I think, ultimately, it is a matter of judgment as  
22 to how to interpret both the science as well as the statutory  
23 terms and the embedded policy judgments that, for example,  
24 requisite to protect public health has, as I understand it,  
25 been interpreted by the Supreme Court as either more or less

1 than necessary. Deciding what is not more than necessary and  
2 what is not less than necessary is a judgment call. It is  
3 not something that science can tell you the answer to.

4 Q I am trying to be very respectful to not asking you  
5 too sensitive of questions. What I would like to know is  
6 what are the considerations, to the best of your knowledge,  
7 are the considerations that EPA would consider when making  
8 that policy judgment? Are those dictated by -- would you say  
9 those are dictated by statute and by precedent?

10 A We are certainly guided by the statutory language  
11 and our interpretation of that statutory language.

12 Q And is CASAC similarly bound when they are making  
13 their policy judgments to consider the same factors as EPA  
14 does based on statute and precedent that you are taking into  
15 consideration?

16 A I don't know the bounds of CASAC's discretion or  
17 direction. I do know that they are required by the Clean Air  
18 Act to provide advice on the underlying science and policy  
19 recommendations to the administrator.

20 Ms. Moore. I would like to introduce our first exhibit,  
21 Exhibit 1 for the minority.

22 [Burnett Exhibit No. 1  
23 was marked for identification.]

24 Ms. Moore. Feel free to review the whole document, but  
25 I would direct your attention with respect to comments -- the

1 response to comment 2 and specifically within that, about  
2 two-thirds of the way down, the sentence that begins in  
3 quotes, "in the absence of any information."

4 And while you are doing that, for the record I will say  
5 this is an e-mail from Karen Martin to yourself which  
6 contains an attachment key entitled Key Legal Comments on the  
7 Secondary Ozone Standard.

8 Mr. Burnett. I have read part of this document, the  
9 part you directed me to.

10 Ms. Moore. And my questions will only relate to that.

11 BY MS. MOORE:

12 Q So the sentence that I directed your attention to  
13 says: In the absence of any information regarding a  
14 threshold determination of ozone exposure for vegetation,  
15 staff recognizes that a secondary level is largely a policy  
16 judgment.

17 Is this statement an accurate summary of our earlier  
18 conversation about the role of policy determinations and  
19 setting NAAQS standards, in this case the secondary standard?

20 A This is similar to what I tried to say, and I  
21 generally agree with the statement.

22 Q Could you explain a little further what is meant by  
23 "in the absence of any information regarding a threshold  
24 determination of ozone exposure to vegetation"? Could you  
25 explain what is meant by a threshold determination or what --

1 just maybe in layman's terms explain that sentence?

2 The comment is the first and second page. So the second  
3 comment begins on the second page, and then the response  
4 begins on the third page.

5 A I am sorry. Can you restate your question?

6 Q I am happy to. My question actually was just to  
7 have you explain in layman's terms that phrase: In the  
8 absence of any information regarding a threshold  
9 determination of ozone exposure for vegetation, staff  
10 recognizes the secondary level is largely a policy judgment.

11 A So the definition or what I take the word threshold  
12 to mean?

13 Q Yes.

14 A A level below which there is evidence of a lack of  
15 effects. That is to say, there is a level -- there is a  
16 threshold level above which there are effects and below which  
17 there are not effects.

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1        RPTS SCOTT

2        DCMN MAGMER

3        [1:10 p.m.]

4            A        [Continuing.] In this case, it is talking about  
5 the absence of any information regarding that threshold, so I  
6 think what we are saying is that we don't know whether or not  
7 there is a threshold and, if so, the nature and level of that  
8 threshold.

9            Q        Okay. So to dig a little deeper, the reason why  
10 the lack of a threshold -- and the way I am saying that is  
11 that there is no bright line as to which above it there is an  
12 impact on vegetation and below it there is not? Is that a  
13 simplistic way of understanding?

14          A        I think that is a reasonable way of characterizing  
15 it, yes.

16          Q        Okay. So because there is no bright line, EPA has  
17 a sufficient amount of science to support, theoretically,  
18 even at -- using the example of -- the old standard was .08  
19 parts per million. Even at .01 parts per million,  
20 theoretically, there could be harm to vegetation.

21            I mean, is that what that sentence is saying, that at  
22 any range of permissible ozone levels there could still be  
23 harm to the welfare of vegetation?

24          A        Yes.

25          Ms. Moore. Okay. I'm done with that exhibit.



1 I would like to enter Exhibit 2.

2 [Burnett Exhibit No. 2  
3 was marked for identification.]

4 Ms. Moore. The yellow mark on yours is going to be the  
5 page.

6 BY MS. MOORE:

7 Q Are you ready? These look like they are draft  
8 briefing slides, and this is for the Office of Air Quality,  
9 Planning and Standards. Jason, do you recognize these  
10 briefing slides? Have you seen them before?

11 A I certainly have seen some of them. I am not  
12 certain that I've seen all of them.

13 Q Okay. So you are familiar with the content, but  
14 you're just not sure if you've seen these precise slides?

15 A Yes.

16 Q Okay. Fair enough.

17 Actually, what I would like to direct your attention to  
18 then is the chart on the very last page.

19 A I'm sorry. When I say that I'm certain I've seen  
20 some of them, I'm certain that I've seen some version of some  
21 of them. I don't know whether this is the precise version.

22 Q Okay. Fair enough. Thank you for clarifying.  
23 Have you seen this chart before or a similar version?

24 A I've seen a similar version of this chart, yes.

25 Q It looks familiar?

1 A Yes.

2 Q Excellent.

3 As you might have noticed, there is nothing on here  
4 indicating exactly what part of the process this was used  
5 for. So my first question is: Is this part of the RIA?  
6 What was this developed for? What part of the process was  
7 this used in?

8 A I remember being briefed on displaying the  
9 information in this way. I found it useful, a useful way of  
10 displaying information, and I encouraged the Agency to use  
11 this. There were other ways of displaying the information in  
12 our communications, and I believe I've used a version of this  
13 slide to brief staff members of the House and the Senate.

14 Q Okay. I understand that's an effective way of  
15 communicating information, but my interest lies in where in  
16 the process of EPA's decision-making in finalizing the rule  
17 this was used.

18 A It was not used.

19 Q Okay.

20 A The NAAQS does not allow for the consideration of  
21 costs, and this is the presentation of benefits minus costs.  
22 Therefore, it would not be permissible in the decision-making  
23 process and was not used in the decision-making process.

24 Q Just to be clear then, in your opinion, did the  
25 administrator consider costs when setting either the primary

1 or the secondary standard in the final rule?

2 A I do not believe --

3 Q Maybe I'll try to rephrase.

4 Do you have any reason to believe --

5 A I do not have any reason to believe that he  
6 considered costs.

7 Q Okay. Thank you. We can move that aside. I'm  
8 done with that exhibit. I will go back to the secondary  
9 standard.

10 Just for clarification, I understand that the EPA was  
11 considering or recommended moving to what is called a W126  
12 standard. I understand that this is more of a relevant way  
13 of measuring the impact of ozone on vegetation. Is it  
14 correct to say that the fundamental difference, though,  
15 between the 8-hour standard under which the primary is  
16 measured versus the proposed W126 standard is truly just a  
17 matter of measurement? Is that an accurate statement? If  
18 not, could you correct me?

19 A The difference is a matter of the form level and  
20 averaging time of the standard.

21 Q Those all seem like measurements to me, so maybe  
22 you can explain your understanding of EPA's view.

23 What was the value that EPA saw in this standard? Why  
24 was this standard --

25 A I'm sorry. Which standard?

1 Q The W126 standard. Okay. So moving from -- let me  
2 take that back. So if you are comparing a .07  
3 parts-per-million standard measured under 8 hours and you are  
4 comparing that to the way it impacts vegetation under the  
5 W126 standard, why choose one versus the other?

6 A Well, they're different.

7 Q That's what I'm asking. How are they different?

8 A Depending on the area, for any given level of air  
9 quality measured using an 8-hour form across different areas  
10 or over time for the same level of 8-hour ozone, the level  
11 averaged over a season using a W126 form can vary.

12 Mr. Dotson. Kristina, you have about 3 minutes left.

13 Ms. Moore. Okay. Well, let's move to my next exhibit.

14 Ms. Bennett. Actually, no. Sorry to interrupt you, but  
15 we've got about 12 minutes left. We started at 12:34, I  
16 believe; is that correct?

17 Ms. Moore. That is, I think, what I have written down.  
18 I wrote it down. I started time at 12:35. Actually, that's  
19 what I wrote down.

20 Mr. Dotson. We've got 12:34.

21 Ms. Moore. Is there a difference?

22 Ms. Bennett. Well, we definitely --

23 Mr. Baran. We'll take your word for it.

24 Ms. Moore. I appreciate that.

25 I would like to move to an exhibit. These are briefing

1 slides for EPA's June, 2007, proposal to revise a secondary  
2 NAAQ standard.

3 [Burnett Exhibit No. 3  
4 was marked for identification.]

5 BY MS. MOORE:

6 Q I would direct your attention to what is marked  
7 page 13 from the original slides. The first question, of  
8 course, is have you seen these briefing slides before?

9 A I've seen some version of these slides, yes.

10 Q So on page 13 it says that CASAC recommended a  
11 standard level of 7 to 15 parts per million. Is it per  
12 hours? What I am trying to get at is -- to have a better  
13 understanding of, you know, apples and oranges here. One way  
14 I would like to attempt to do that is to ask you, is there an  
15 equivalent 8-hour range for the W126 standard of, you know,  
16 say 7 parts per million or 15 parts per million?

17 A No.

18 Q There is no equivalent between the two?

19 A That is correct.

20 Q Okay. Could you explain?

21 A It gets back to my earlier inartful explanation  
22 that for any given level of an 8-hour standard across space  
23 and time the equivalent level of the 126 form will vary.  
24 Some places have more peaky air quality. Some places have  
25 more uniform air quality across a season.

1 Q Okay.

2 A Therefore, the forms are different, and there's no  
3 universal formula that can be used for converting one form  
4 into another.

5 Q But I do want to be clear. On the very next page  
6 of the slide, page 14, it says that EPA proposed two  
7 alternatives for the secondary standard. One -- this is  
8 summarizing. One is a W126 standard, and the other is  
9 setting the secondary standard equal to the primary standard.  
10 The clarity I'm just asking for is, I think, obvious, but  
11 that is that EPA, from the beginning of considering this  
12 rule, was always considering both options as being viable  
13 options to set the secondary NAAQ standard.

14 A I think that's generally correct. The Agency  
15 proposed two options and finalized one of them.

16 [Burnett Exhibit No. 4  
17 was marked for identification.]

18 Ms. Moore. Okay. So, moving on to exhibit 4, on the  
19 second to last page, there is a map.

20 The Witness. Do you mind reading the title of the map  
21 so we're looking at the same page?

22 Ms. Moore. I'd be happy to.

23 The title is Counties with Monitors Violating the New  
24 2008 Primary Ozone Standards of .075 Parts per Million and/or  
25 the New Secondary Ozone Standards of 21 Parts per Million per

1       Hours.

2                   BY MS. MOORE:

3           Q     Am I reading that correctly?

4           A     Yes.

5           Q     Okay. We're looking at the same map?

6           A     I believe so, yes.

7           Q     Okay. Have you seen this before?

8           A     Some version of this map, yes.

9           Q     Now, if you will read note 1(c), it reads, "No  
10       counties violate the new secondary ozone standard only."

11           Is this the same thing as saying that if a county is  
12       compliant with a primary standard, then, according to this  
13       graph, they are also going to be compliant with the secondary  
14       standard?

15           A     For the information -- the air quality and the  
16       monitors -- in place during that period, that is the case.

17           Q     That means that -- okay. So using the data  
18       available to EPA -- let me back up one.

19           Given the data that they had been collecting, was EPA  
20       able to substantially convert that data into the W126  
21       standard similarly as they would had this actually been  
22       implemented? Did they have all of the information they  
23       needed?

24           A     It is my understanding that EPA, in working with  
25       States, collects data in enough detail that it can be used to

1 calculate either an 8-hour form or a W126 form, and I believe  
2 that's what the Agency has done in this situation.

3 Q So, given the same data, if the proposal would have  
4 gone forward with a W126, they would have used the same data  
5 set?

6 A Not quite. Designations for a new standard would  
7 be based on -- would not necessarily be based on this 3-year  
8 period of air quality. In fact, I think they likely would be  
9 based on more recent or even future air quality.

10 Q Okay. Fair enough. I think we understand each  
11 other. What I want to be clear on, though, is in tying in  
12 the conversation we just had about the difference between the  
13 W126 measurement and the 8-hour standard. If this chart is  
14 saying that there is no instance where -- how do I phrase  
15 it -- that there is no instance where the county was  
16 compliant with the primary standard, they will also be  
17 compliant with the secondary standard. So there was no peak,  
18 if you will, is, I guess, the way --

19 A Not to be technical, but I think it is the other  
20 way around. There are no counties with such uniform air  
21 quality that they would -- based on historic data, that they  
22 would violate the W126 only --

23 Q Okay.

24 A -- at the level of 21 for the W126 and at the level  
25 of 75 for the 8-hour standard.



1 Q Okay. So is it fair to say that the protection  
2 given by the 8-hour standard at .075 is essentially the  
3 equivalent, though, of the protection that would be given by  
4 the W126 standard set at 21?

5 A It's generally the case that we wouldn't expect  
6 additional areas of nonattainment or additional reductions in  
7 pollution associated with a separate W126 standard, secondary  
8 standard, relative to setting it identical to the primary  
9 standard. That is generally the Agency's judgment based on  
10 air quality information that we have.

11 Ms. Moore. Okay. I think my time is up.

12 Ms. Bennett. Can we knock off 2 minutes before you guys  
13 start?

14 Ms. Moore. We can go off record.

15 Mr. Baran. Do you want to take a brief break?

16 Mr. Evans. I think we will take a brief break.

17 [Recess.]

18 Mr. Dotson. Mr. Burnett, I'm Greg Dotson. I'm  
19 going to be asking questions for this round.

20 EXAMINATION

21 BY MR DOTSON:

22 Q I'm going to turn back to the California waiver.  
23 Are you aware of whether the administrator had any calls,  
24 communications or meetings with anyone at the White House  
25 regarding the California waiver?

1           Mr. Engle. I'm going to have to object to that question  
2 and consult EPA counsel.

3           Mr. Dotson. Please do.

4           [Discussion off the record.]

5           The Witness. We're back.

6           BY MR. DOTSON:

7           Q     Would you like for me to ask the question again?

8           A     Please.

9           Q     Are you aware of whether the administrator had any  
10 calls, communications or meetings with anyone at the  
11 White House regarding the California waiver?

12          A     Yes, I am. I know he had communications.

13          Q     Were there meetings?

14          A     I am aware of what, I think, he has characterized  
15 as routine discussions.

16          Q     Do you know who these communications were with in  
17 the White House?

18          Mr. Engle. I'm going to have to object to that for a  
19 moment to consult with the Agency.

20          Mr. Dotson. Do you know the nature of the objection?

21          Mr. Engle. The nature of the objection would be that  
22 the witness has been asked to consult with Agency counsel on  
23 any question dealing with the identity of individuals outside  
24 of the Agency that the administrator may have communicated  
25 with.

1           Mr. Dotson. Okay. Of course, you are welcome to talk  
2 to the EPA when you would like to, but perhaps we can move to  
3 additional questions, and then we can deal with these.

4           Mr. Engle. I think that is a very good idea.

5           Mr. Dotson. Okay.

6           BY MR. DOTSON:

7           Q     Do you know if the administrator communicated with  
8 someone in the White House prior to the decision -- prior to  
9 the issuance of the final decision with regard to the  
10 California waiver?

11          A     I know that he had communications with people in  
12 the White House prior to his decision.

13          Q     Do you know if the administrator had a preference  
14 on a course of action with regard to the California waiver  
15 prior to communicating with persons in the White House?

16          A     Over the course of several months, when I had  
17 regular conversations with the administrator, I came away  
18 with the understanding that he had different opinions at  
19 different points in time.

20          Q     Did he have a course of action prior to the last  
21 time he communicated to the White House about the matter  
22 before the decision was finalized?

23          Mr. Engle. Do you understand the question?

24          The Witness. Not well enough.

25          BY MR. DOTSON:

1           Q     You have told us that there were communications  
2 with the White House. I assume that there was a  
3 communication at some point prior to the final decision's  
4 being announced. Are you aware of the administrator's having  
5 a preference on how to take action on the California waiver  
6 prior to that communication with the White House and prior to  
7 its being finalized?

8           A     If I understand your question correctly, relatively  
9 early in the process I had the impression that he was quite  
10 interested in and was seriously exploring the objection of  
11 granting the waiver. Later in the process, as previous  
12 questioning has noted, there was a lot of interest in  
13 middle-ground options. His final decision is well-known.

14          Q     By "middle-ground options," I assume you mean a  
15 partial granting of the waiver.

16          A     Yes.

17          Q     Are you aware of whether the administrator  
18 communicated with the White House in between his preference  
19 to do a partial grant and the ultimate decision?

20          A     I believe the answer is yes.

21          Q     Can you tell us the time at which that  
22 communication with the White House occurred --

23           Mr. Engle. I'm going to have to object.

24           Mr. Dotson. On the same grounds?

25           Mr. Engle. On the same grounds.

1 Mr. Dotson. We'll add that to the list of objections.

2 BY MR. DOTSON:

3 Q Did the administrator relate to you the substance  
4 of his communications with the White House on this matter?

5 A Yes, he did.

6 Q Will you tell us the substance of those  
7 communications?

8 Mr. Engle. I have to object on the same grounds.

9 BY MR. DOTSON:

10 Q Do you know if the administrator communicated or  
11 met with the President on this matter?

12 Mr. Engle. Object. Same grounds.

13 BY MR. DOTSON:

14 Q Okay. Did you have communications with White House  
15 staff on this matter?

16 A Yes, I did.

17 Q Did they ever communicate to you a preference or an  
18 expectation regarding the outcome of the California waiver?

19 Mr. Engle. Objection. Same grounds.

20 BY MR. DOTSON:

21 Q Can you tell us who those communications were with?

22 Mr. Engle. Objection. Same grounds.

23 Mr. Evans. Sorry to interrupt here.

24 For my benefit, can you just go through the last two  
25 that are on the list?

1           Mr. Dotson. Yes. The last two were -- we asked, did  
2 White House staff express a preference or an expectation?  
3 What was that expectation? Then the one after that is, who  
4 is the identity of the White House staff?

5           Mr. Evans. Okay. Thank you.

6           Mr. Dotson. You're welcome.

7           Let's turn quickly to Exhibit J.

8   [Burnett Exhibit No. J  
9   was marked for identification.]

10          Mr. Dotson. Take a moment to review it, if you would.

11                               BY MR. DOTSON:

12          Q       This is a chain of e-mails from November 26th,  
13 2007, between Cece Kremer, EPA's Deputy Chief of Staff, and  
14 Charles Ingebretson, EPA's Chief of Staff.

15                   In the middle e-mail, Mr. Ingebretson writes, "Haven't  
16 connected with SLJ or Marcus on endangerment or California  
17 waiver issue." Ms. Kremer responds, "Jason Burnett and Roger  
18 just back from WH meeting with Keith, and seem to be more  
19 positive."

20                   Does the "Roger" in this e-mail refer to Roger Martella?

21           Mr. Engle. Objection.

22           Mr. Dotson. Roger Martella is not at the White House.

23           Mr. Engle. Objection removed.

24           The Witness. Yes, it does.

25                               BY MR. DOTSON:

1 Q Who is Keith?

2 Mr. Engle. Objection.

3 Mr. Dotson. Okay. We will set that aside.

4 Mr. Engle. May I have a moment, please?

5 Mr. Dotson. Yes.

6 [Discussion off the record.]

7 The Witness. Yes.

8 BY MR. DOTSON:

9 Q What was the purpose of this meeting?

10 Mr. Engle. Are you referring to an internal meeting  
11 inside the EPA?

12 Mr. Dotson. I'm referring to the meeting which Jason  
13 Burnett attended at the WH. Actually, we should just  
14 clarify.

15 BY MR. DOTSON:

16 Q "WH" is the White House; is that correct?

17 Mr. Engle. Is that the case?

18 The Witness. Yes, it is.

19 BY MR. DOTSON:

20 Q Okay. Can you tell us what this meeting was about?

21 Mr. Engle. Objection. Same grounds.

22 The witness can answer, though, as to what the general  
23 topic was of the meeting.

24 Mr. Dotson. That would be helpful.

25 The Witness. The California waiver.

1 BY MR. DOTSON:

2 Q Okay. Let's set that exhibit aside then at this  
3 point. We are done with that exhibit. Okay.

4 I would like to now ask you briefly about EPA's response  
5 to Massachusetts versus EPA. What was your role in EPA's  
6 work to respond to the Supreme Court decision?

7 A Helping the Agency respond to the Massachusetts  
8 versus EPA decision was the central responsibility I had at  
9 the Agency, and I considered myself the person in charge of  
10 coordinating that response across the Agency.

11 Q We understand one element of EPA's response to the  
12 Supreme Court decision was the so-called "endangerment  
13 finding." It is our understanding that in December, 2007, a  
14 draft proposed rule, including a finding that greenhouse  
15 gases pose a threat to -- included -- I'm sorry -- included a  
16 finding that greenhouse gases pose a threat to the Nation's  
17 welfare. This conclusion is known as an "endangerment  
18 finding."

19 Did a draft proposed rule include such a finding?

20 Mr. Engle. I have to object. Same grounds.

21 Mr. Dotson. Thank you.

22 BY MR. DOTSON:

23 Q Can you tell us if this -- we have learned from  
24 other EPA interviews with EPA officials that this engagement  
25 finding was transmitted to OMB for review. Do you know if



1 the endangerment finding was transmitted to OMB for review?

2 A Yes, I do.

3 Q Was it transmitted for review?

4 A Yes, it was.

5 Q Do you know who sent it to OMB for review?

6 A Yes, I do.

7 Q Who sent it to OMB for review?

8 A I did.

9 Q Can you tell us how it was transmitted to OMB?

10 A I e-mailed it to OMB.

11 Q We believe this occurred on approximately  
12 December 6th or 7th. Does that seem accurate, to your  
13 recollection?

14 A That is the general time frame.

15 Q Who was it sent to at the White House?

16 Mr. Engle. Objection. Same grounds.

17 BY MR. DOTSON:

18 Q Can you tell us if it was sent for formal or for  
19 informal review?

20 A I've never fully understood the distinction. It  
21 was sent to OMB for review.

22 Q Can you tell us if they were familiar with the  
23 substance of it before it was sent?

24 A Yes.

25 Q Yes, they were familiar with it, with the substance

1 of it?

2 A Yes, I can answer. Yes, they were familiar.

3 Q Did the White House respond to your e-mail? Do you  
4 know if the White House responded to your e-mail?

5 Mr. Engle. Thank you.

6 The Witness. Yes, I do.

7 BY MR. DOTSON:

8 Q Did they respond to your e-mail?

9 A They did respond. They did not e-mail back. I  
10 don't want -- I mean, I'm not saying whether or not they  
11 e-mailed back. By saying, yes, they did respond, I'm just  
12 saying they responded in some form.

13 Q Can you tell us what their response was?

14 Mr. Engle. Objection. Same grounds.

15 BY MR. DOTSON:

16 Q Did you discuss the White House response with the  
17 administrator?

18 A Yes, I did.

19 Q What was his reaction?

20 Mr. Engle. Objection. Same grounds.

21 BY MR. DOTSON:

22 Q Okay. I would like to turn to ozone. Are you  
23 aware of whether the administrator communicated, called or  
24 met with anyone in the White House regarding the ozone  
25 standards?

1 A Yes, I am. Yes, he did.

2 Q Can you tell us who he communicated with in the  
3 White House?

4 Mr. Engle. Objection. Same grounds.

5 BY MR. DOTSON:

6 Q Can you tell us the substance of the conversation?

7 A He had conversations regarding the final decision  
8 for the primary standard and discussions regarding the final  
9 decision for the secondary standard.

10 Q Two separate occasions?

11 A Yes. Sorry. I'm not saying that there were only  
12 two meetings by saying "two separate occasions" but two  
13 different time frames.

14 Q I see. Were you in these meetings? Were you part  
15 of these communications?

16 Mr. Engle. Can we break that down into two questions,  
17 please?

18 Mr. Dotson. Yes. I'm sorry.

19 BY MR. DOTSON:

20 Q So the first one is: There were meetings that took  
21 place with the administrator. Were you part of these  
22 meetings, meetings with the White House?

23 Ms. Bennett. Sorry. Can I just clarify a little bit?

24 In the first instance, you said "communications" with  
25 the White House and now you're saying "meetings."

1           Mr. Dotson. I was following up with what the witness  
2 said, "meetings."

3           Ms. Bennett. The witness did establish there were  
4 meetings, and now we're asking about that; is that correct?  
5 I'm just trying to ensure that everyone is talking about the  
6 same event.

7           The Witness. Well, I would appreciate a clarification.  
8 Communications can take a variety of forms. I'm interpreting  
9 "communications" to be broader than "meetings."

10           BY MR. DOTSON:

11           Q     Okay. I didn't mean to put words in your mouth.

12                     I believe that you used the word "meetings." Were there  
13 meetings?

14           A     I may have. I just want to make sure that we have  
15 a common understanding of the terms that we're using.

16           Q     Right. Okay. Were there meetings?

17           A     Yes, there were.

18           Q     So there were meetings with the administrator and  
19 with people in the White House --

20           A     Right.

21           Q     -- regarding the ozone standards?

22                     Were there multiple meetings?

23           A     Yes.

24           Q     Were there meetings involving the primary standard?

25           A     Yes.

1 Q Were there meetings involving the secondary  
2 standard?

3 A Yes.

4 Q Can you tell us who -- were you in these meetings,  
5 in any of the meetings?

6 A In any of the meetings with the administrator?

7 Q With the administrator.

8 A At the White House, no, I was not.

9 Q Did he relay to you the substance of his meetings?

10 A Yes.

11 Q Can you tell us about what he told you about those  
12 meetings?

13 Mr. Engle. Objection. Same grounds.

14 BY MR. DOTSON:

15 Q Let's focus our discussion about these meetings in  
16 a way so we are more concrete. Can you give us any sense of  
17 the time frame of when the meetings occurred?

18 A A general time frame for the communications and  
19 meetings regarding the primary standard were in January of  
20 2008, if I remember correctly, and, regarding the secondary  
21 standard, March of 2008. Again, that's for the final  
22 decision, the proposed decision. I'm not familiar with that  
23 process.

24 Q Okay. Did the administrator talk with you about  
25 his communications with the White House regarding the primary

1 standards, those communications that happened in January of  
2 2008?

3 A Yes, he did.

4 Q Did he discuss with you the substance of his  
5 communications with the White House regarding the secondary  
6 standard?

7 A Yes.

8 Q Can you tell us the substance of the primary  
9 standard conversation?

10 Mr. Engle. Objection. Same grounds.

11 BY MR. DOTSON:

12 Q Can you tell us the substance of what he told you  
13 regarding the communications with the White House regarding  
14 the secondary standards?

15 Mr. Engle. Objection. Same grounds.

16 BY MR. DOTSON:

17 Q Okay. Can you describe for us the Presidential  
18 role in the outcome of the ozone standard setting process, as  
19 you understand it?

20 Ms. Moore. Greg, I didn't hear the question. Can you  
21 repeat that?

22 Mr. Dotson. I asked if he could describe the  
23 Presidential role in the outcome of the ozone standard  
24 setting process as he understood it, what actually occurred.

25 The Witness. I think, as documents in the EPA's public

1 docket spell out, the President concluded that it is the  
2 policy of his administration to set the standard, not more or  
3 less the requisite. Therefore, it was his judgment that the  
4 standard -- or it was his conclusion that the standard should  
5 be -- that the secondary standard should be set identical to  
6 the primary standard. The precise phrasing of that is in a  
7 memo from Susan Dudley to the administrator, dated  
8 March 12th, and it's in the EPA's public docket.

9 BY MR. DOTSON:

10 Q Just as a small clarification for the record, my  
11 understanding is that that memo was sent on the 12th,  
12 March 12th, but it was actually dated the 13th.

13 A It's my understanding there was a typographical  
14 error, and I was giving the date on which the memo was sent.

15 Q Right. Thank you.

16 I would like to turn quickly to --

17 Mr. Dotson. Oh, I'm sorry -- Exhibit O.

18 [Burnett Exhibit No. O

19 was marked for identification.]

20 BY MR. DOTSON:

21 Q This is an e-mail dated March 7th, 2008. It's an  
22 e-mail that you sent to Roger Martella and to MaryAnn  
23 Poirier. The subject of the e-mail was, quote, "ATA Case."

24 In the e-mail, you state, quote, "Can one of you please  
25 send me the relevant text from Scalia's ATA v. EPA decision

1 regarding consideration of costs of the primary and secondary  
2 standards. I want to forward on to Jim C. after our  
3 discussion this evening," close quote.

4 Can you tell us who you are referring to in this e-mail  
5 when you write, quote, "Jim C"?

6 Mr. Engle. Objection.

7 BY MR. DOTSON:

8 Q Can you tell us for what purpose you wanted to  
9 forward this information regarding the consideration of costs  
10 for the primary and secondary standards?

11 Mr. Engle. May I have a moment with the witness?

12 Mr. Dotson. Sure.

13 [Discussion off the record.]

14 The Witness. If you could repeat your question, please.

15 BY MR. DOTSON:

16 Q For what purpose were you seeking to forward the  
17 information regarding the consideration of costs for the  
18 primary and secondary standards?

19 A In general, I was intending to identify the  
20 relevant sections of the Supreme Court case that found that  
21 costs cannot be considered for setting either the primary or  
22 secondary standards.

23 Q Were officials in the White House under the  
24 impression that costs could be considered?

25 Mr. Engle. Objection.



1 BY MR. DOTSON:

2 Q Did you ever discuss the consideration of costs  
3 with Jim Connaughton of the White House Council on  
4 Environmental Quality?

5 Mr. Engle. Objection.

6 Mr. Dotson. I think at this point it would make  
7 sense -- oh, yes, absolutely. Sorry about that. There is  
8 one more issue I would like to cover.

9 Mr. Baran. We can take that exhibit back.

10 BY MR. DOTSON:

11 Q On March 14th, 2008, an article appeared in the  
12 Washington Post about the Solicitor General's objections over  
13 the way OMB was characterizing the President's decision on  
14 the secondary standard. Do you know anything about any  
15 possible objections by the Solicitor General related to the  
16 secondary standard?

17 A Yes.

18 Q Can you tell us what you know about that issue?

19 Mr. Engle. A moment.

20 [Discussion off the record.]

21 Mr. Engle. We're back.

22 Mr. Dotson. Thank you.

23 Mr. Engle. Objection. Same grounds.

24 Mr. Dotson. Okay. I think, at this point, it would  
25 make sense for us to try and better understand the nature of

1 the objections with these questions that we've asked. If  
2 it's appropriate for you -- does counsel have something he  
3 wants to say?

4 Mr. Engle. Yes. I want to reiterate, as I did in the  
5 beginning of my first objection, that these objections are  
6 not personal in nature or grounded in a legal right of the  
7 witness, but, instead, he is being asked -- or the objection  
8 is being lodged because he is being asked to not answer  
9 certain questions until he has consulted with Agency counsel.

10 Mr. Dotson. Well, that objection is not an objection  
11 that the committee necessarily recognizes. We have the  
12 discretion -- we certainly recognize any privilege claims  
13 that may exist rooted in the Constitution. What you have  
14 described is certainly not that. So, seeing as what you have  
15 described as an objection is not recognized by the committee,  
16 I would like to ask whether you would be willing to answer  
17 those questions.

18 Mr. Engle. Not at this time.

19 Mr. Dotson. Is there a better articulation of these  
20 objections, I mean, other than just EPA has requested that  
21 you not answer them?

22 Mr. Engle. That is the reason for the objection.

23 BY MR. DOTSON:

24 Q To your knowledge, has there been an assertion of  
25 executive privilege on any of the matters that we've

1 discussed today?

2 A Not to my knowledge.

3 Q Has EPA informed you that they are planning on  
4 asserting executive privilege on any of the matters that  
5 we've discussed?

6 Mr. Engle. I'm going to object to that because it calls  
7 for a legal conclusion on behalf of the witness.

8 BY MR. DOTSON:

9 Q Has the EPA informed you that they are asserting an  
10 executive privilege or plan to assert executive privilege?

11 Mr. Engle. Same objection.

12 Mr. Dotson. I think a productive way to move forward  
13 would be for you to consult with EPA outside of the room to  
14 see if they can inform you about an assertion of executive  
15 privilege on any of the matters that we've discussed, and  
16 then we can reconvene.

17 The Witness. Okay. We will do that.

18 Mr. Dotson. Great.

19 Mr. Baran. We will go off the record at this point, and  
20 this will pause our questioning time.

21 Ms. Bennett. Are we clarifying with regard to specific  
22 questions?

23 Mr. Dotson. The questions we just went through.

24 Ms. Bennett. I'm not certain we can go off the record.

25 Mr. Engle. The question that I got from you was we are

1 to consult with the EPA as to whether or not they're  
2 asserting executive privilege.

3 Mr. Dotson. On the matters we discussed.

4 Mr. Engle. On the matters we discussed. Thank you.

5 Mr. Dotson. We are off the record.

6 [Discussion off the record.]

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1       RPTS JURA

2       DCMN HERZFELD

3       [2:52 p.m.]

4             Mr. Dotson. I understand that you have consulted with  
5       EPA outside of this room; is that correct.

6             Mr. Engle. That is correct.

7             Mr. Dotson. And were they prepared to tell you that the  
8       administration is asserting executive privilege over any of  
9       the matters we discussed?

10            Mr. Engle. I would refer the committee to the May 15  
11       letter from the Environmental Protection Agency to Chairman  
12       Waxman, which explains the Agency's position in the matter of  
13       answering questions by this witness.

14            Mr. Dotson. And after your consultation with the EPA,  
15       is Mr. Burnett able to answer any of the questions that you  
16       objected to previously?

17            Mr. Engle. He is not.

18            Mr. Dotson. Under the committee rules, Chairman Waxman  
19       rules on objections raised during a deposition. The  
20       objections that you have raised are not objections that are  
21       generally recognized by this committee. And what we will  
22       plan to do now is take your objections to the Chairman  
23       personally, discuss them with him, and then report back to  
24       you on how he rules on those objections.

25            Mr. Engle. As well as it to be noted that these are

1 objections that I have raised from the Environmental  
2 Protection Agency, and not objections that I have raised as a  
3 personal attorney of the witness.

4 Mr. Dotson. Duly noted.

5 Mr. Ausbrook. Let me understand. When you say these  
6 are not objections that the committee recognized, first that  
7 is the Chairman's decision. But the question about whether  
8 the questions that you raised are potentially subject to the  
9 executive privilege is an objection that the committee does  
10 recognize and would recognize under appropriate  
11 circumstances. And to the extent that these objections are  
12 that kind of objection, and that the witness requires  
13 sufficient time for the questions to be fully analyzed and  
14 for the President to assert executive privilege, that is an  
15 objection that the committee recognizes, and I hope it will  
16 be expressed to the Chairman that way.

17 Mr. Dotson. We will definitely relay those concerns to  
18 the Chairman.

19 I think at this point what we will do is our side will  
20 yield the questions to the Minority.

21 Mr. Ausbrook. We prefer to question.

22 [Discussion off the record.]

23 Mr. Engle. And my last statement for the record is that  
24 the witness has been as full and candid as he possibly can  
25 be, and that is consistent with the letter that was given to

1       you by counsel, and that he remains personally willing and  
2       able to continue with the discussion with the committee  
3       staff.

4             Mr. Dotson. Thank you very much.

5             Off the record.

6             [Discussion off the record.]

7             Ms. Moore. Just to be clear, my understanding is that  
8       this is beginning the second round of 60 minutes of  
9       questioning from the Minority, that the Majority has  
10       concluded their second round, and that we anticipate there  
11       will be a third round of questioning again following the  
12       60-minute rule.

13            So I will continue.

14            Strike the last question.

15            BY MS. MOORE:

16            Q     Back on the record. Jason, were you a  
17       participant -- actually let me back up one more time.

18            So the process of going from a proposed rule to a final  
19       rule, between that there is an interagency process, correct,  
20       an interagency review process?

21            A     Generally for significant rules there is an  
22       interagency process both for the proposed rule and the final  
23       rule. There certainly was one for the final rule. I was not  
24       there involved for the proposed rule.

25            Q     And were you a significant participant in the

1 interagency review process for the final rule?

2 A I think that is a fair characterization, yes.

3 Q Can you explain to us which agencies were the  
4 principal participants in this particular interagency review?

5 A There was interest and generally representation  
6 from a number of agencies and offices within the White House.  
7 The participation and interest varied between the secondary  
8 standard and the primary standard. The primary standard,  
9 USDA, DOE, CEA, CEQ, OMB, others in the White House were all  
10 involved at different points in time. That is not intended  
11 to be an exhaustive list, but my sense of the agencies most  
12 involved.

13 Q And for the secondary standard?

14 A Secondary standard, USDA, OMB, CEQ, others in the  
15 White House were what I would characterize as the primary  
16 players interested in the secondary standard decision.

17 Q As you may know, committee staff has had the  
18 opportunity to review some of the interagency documents that  
19 were relevant to the decisionmaking on the primary and  
20 secondary standard. In those documents there was a  
21 reference, several references, to cross-border emissions.  
22 And I am hoping you can -- first the question is, are you  
23 familiar with what that reference is to? And if you are,  
24 could you explain to us what it is referring to and how it  
25 was part of the overall conversation?



1           A     Do you have a particular document you would like to  
2 point me to?

3           Q     I don't, because we only reviewed it in camera, so  
4 we don't have a document. We were just allowed to view it.

5           A     Without a document, I will by necessity be more --

6           Q     Vague is fine.

7           A     -- general. And in trying to answer your question,  
8 one of the issues that is raised in the ozone NAAQS review is  
9 what we call policy-relevant background. I don't know  
10 whether that is the issue that is -- that you are describing.  
11 If you think it is, I can try to explain what the concept of  
12 policy-relevant background is.

13          Q     Could you maybe give me a brief definition of  
14 policy-relevant background?

15          A     I will do my best.

16                There is some level of ozone that is naturally  
17 occurring, and some increment on top of that that is due to  
18 transport from other countries, whether it be of natural  
19 origin or anthropogenic origin in those other countries.

20          Q     I can tell you right now we are talking about the  
21 same thing. So if you could explain that further, how that  
22 was involved.

23          A     Sure. Well, the standards are generally intended  
24 to protect against what I will call policy-relevant ozone,  
25 and that is ozone that is caused by -- is human caused,

1 anthropogenic ozone, within our borders.

2 I want to be careful about specifying exactly how we  
3 draw that line. I think it is spelled out in our preamble,  
4 and I am not attempting to say anything different than what I  
5 understand is in the preamble. So if there is a difference,  
6 it is because of my poor memory.

7 Q I understand.

8 A There was a debate over what the relevant policy  
9 background is, what the right policy-relevant background is  
10 for ozone, different ways of calculating the policy-relevant  
11 background and come up with different numbers. This  
12 ultimately is most relevant to how one uses the risk  
13 assessment in the standard-setting process, because the risk  
14 assessment estimates risks associated with the  
15 policy-relevant fraction of the ozone exposures and does not  
16 add on generally the risks that are due to natural ozone or  
17 ozone from other countries.

18 Frankly, the ultimate relevance of policy-relevant  
19 background, PRB, depends on how much weight is given to the  
20 risk assessment. CASAC recommended more weight be placed on  
21 the risk assessment than the Administrator judged to be  
22 appropriate in his final decision. The final decision was  
23 primarily based on what we call the evidence-based approach,  
24 not the risk-based approach. And in the evidence-based  
25 approach, it is my understanding that policy-relevant

1 background, that concept is not relevant at all, or at least  
2 certainly not to the degree that it is relevant for the  
3 risk-based approach.

4 Q Could you say that one more time? I just want to  
5 make sure I am understanding.

6 A How much of it?

7 Q Just the last sentence. The difference between --

8 A It is my understanding that the concept of  
9 policy-relevant background and, therefore, the importance of  
10 a debate over what it is the right level of  
11 policy-relevant -- of policy-relevant background for ozone  
12 depends upon whether we are talking about using the  
13 risk-based approach or the evidence-based approach. If we  
14 are talking about the risk-based approach, it is more  
15 important. If we are talking about the evidence-based  
16 approach, it is less important. It may not be important at  
17 all. I want to be careful about that. I don't think that it  
18 comes in play, at least not my understanding of the  
19 evidence-based approach.

20 Given that the Administrator's decision was primarily on  
21 the evidence-based approach, the concept of policy-relevant  
22 background is not an important variable or an important part  
23 of the way he made his decision.

24 Q Now, do you know, is there a precedent or a  
25 preference towards the -- against the risk-based approach and

1       towards the policy-relevant background?

2           A     The two approaches, risk-based approach and  
3       evidence-based approach, the Agency in previous -- I can talk  
4       about ozone and PM. Those are the two NAAQS reviews where  
5       the Agency reached a final decision that I have been involved  
6       in. In both of those, CASAC recommended somewhat more weight  
7       be placed on the risk-based approach than the Administrator  
8       ultimately decided was appropriate in informing his judgment.  
9       So in both those cases, there is a judgment that has to be  
10      applied as to how much weight is placed on each of those two  
11      approaches. They are the basic two approaches that we use.  
12      And his judgment was to place primary emphasis on the  
13      evidence-based approach. CASAC recommended more weight on  
14      the risk-based approach and corresponding less weight on the  
15      evidence-based approach.

16           Q     Ultimately, whose decision is it to determine which  
17      approach should be used, is more appropriate?

18           A     Well, the statute directs or tasks the  
19      Administrator with forming a judgment as to the standard that  
20      is requisite to public health --

21           Q     So the Administrator?

22           A     -- margin of safety. His judgment, in order to  
23      explain why he reached his judgment, we have explained and I  
24      have tried to explain the weight that he put on those  
25      different factors. It was his judgment to put primary weight

1 on the evidence-based approach.

2 Q And that --

3 A That is what informed his decision, and that is  
4 what we have stated.

5 Q And do you view that as a policy choice or a  
6 scientific determination?

7 A I am not sure that it clearly fits into either bin,  
8 if you will. Ultimately it is the form of evidence -- the  
9 form of information that is most compelling for a  
10 decisionmaker, and he found the evidence-based approach more  
11 compelling than the risk-based approach.

12 After you pick a particular approach or pick a  
13 particular weight to give to each of the approaches, there is  
14 then a policy judgment as to what standard to propose or  
15 finalize given those approaches. So he has exercised his  
16 judgment in both regards.

17 Q Can you recall, did CASAC raise any arguments or  
18 put forth any arguments as to why the risk-based approach was  
19 more appropriate?

20 A I believe that they did explain why they put more  
21 weight on the risk-based approach than the Administrator did.  
22 And I believe that we explained in the final preamble why the  
23 Administrator's weight he placed was different than the  
24 weight the CASAC placed. I don't have anything more specific  
25 than that.

1           Q     Fair enough. I hesitate to belabor the point  
2 because I think you have done an excellent job articulating  
3 how the argument fit in. But in reviewing the documents, my  
4 impression or my understanding of what a cross-border  
5 emission was was an emission coming from, say, Mexico into  
6 California or from Canada into Maine, and that this is  
7 essentially outside of the control of anything the United  
8 States can do to control what our neighbors are doing. Is  
9 that within your understanding of cross-border emissions?

10           A     Generally, yes. I will say I have not focused much  
11 on the nuances of that, given the Administrator's decision to  
12 place primary emphasis on an approach for which that is not  
13 directly relevant.

14           Q     Fair enough.

15           A     And can you give a description of the factors considered  
16 in an evidence-based approach?

17           A     I can certainly try.

18           A     The range of studies that the Agency looked at and a  
19 range of types of study that the Agency looked at, studies  
20 include clinical studies, toxicology studies, epidemiological  
21 studies, among others. And the evidence-based approach  
22 basically consists of looking at that full body of evidence,  
23 scientific evidence, about the existence, nature, magnitude,  
24 and significance of effects, including at what levels of air  
25 quality ultimately the Administrator judges to have risks of

1 adverse effects that are deemed to be too many, too severe,  
2 too much confidence in the existence of those effects to be  
3 requisite to protect public health with an adequate margin of  
4 safety; and, to look below that level at levels of air  
5 quality where the certainty of the evidence combined with the  
6 magnitude and severity of the effects is diminished to the  
7 point where the Administrator judges that level to indeed be  
8 requisite to protect public health with an adequate margin of  
9 safety.

10 Q So the greater the uncertainty in terms of the  
11 evidence in a sense weakens the case for a lower standard.  
12 Does that make sense? So --

13 A I understand what you are saying. I don't  
14 necessarily agree with it.

15 Q Okay.

16 A Uncertainty can cut both ways, depending on how one  
17 views the statutory construct and the policy judgments that  
18 one makes flowing from the statutory construct. The notion  
19 of adequate margin of safety is generally recognized, I  
20 think, to allow for the existence of scientific uncertainty,  
21 somewhat a tautology that there is scientific uncertainty.  
22 And uncertainty could be uncertainty about whether there is  
23 an effect. Uncertainty could be about whether there is an  
24 effect of even greater magnitude than previously thought.  
25 And depending on which of those you are in, if you are in the

1 former, that may be viewed towards a higher standard; if you  
2 are in the latter situation, that may lead you towards a  
3 lower standard.

4 Q Fair enough.

5 [Burnett Exhibit No. 5  
6 was marked for identification.]

7 BY MS. MOORE:

8 Q Have you reviewed the comment?

9 A Yes, I have.

10 Q Could you identify or do you know who Erica Sasser  
11 is and her position at EPA?

12 A I know who she is. I couldn't tell you what her  
13 title is.

14 Q And Vicki Sandiford?

15 A I don't know Vicki.

16 Q As you can see, the e-mail says: Also, Bob Meyers  
17 now says that we should assume USDA knows the decision and  
18 potentially put a map in with .075 and W126.

19 And this e-mail is dated on February 22, 2008.

20 Can you confirm that the decision regarding both the  
21 primary and secondary standard had more or less been  
22 finalized or decided upon at EPA by the 22nd of February?  
23 Can that conclusion be drawn?

24 A EPA's final decision was to set the secondary  
25 standard equal to the primary standard.



1 Q Go ahead.

2 A What -- the direction that EPA was headed in during  
3 some earlier period was to set a separate secondary standard  
4 using the W126 form.

5 So, I just want to be clear that ultimately EPA's  
6 decision is to set them identical. So when we talk about a  
7 decision to set them separate, that was not the final Agency  
8 decision.

9 Q It was the direction EPA was leaning, headed  
10 towards? Is that the way to view it? I guess maybe I am  
11 asking, how should we interpret this e-mail?

12 A The Administrator directed staff -- the  
13 Administrator decided to set the primary standard equal to  
14 .075 and the secondary standard equal to 21 PPM hours using a  
15 W126 form. Following a process, ultimately the Administrator  
16 at a later stage and before the final decision decided to set  
17 them identical.

18 Q And looking at the second page of this exhibit,  
19 there is a chart which looks like it is trying to compare.  
20 The title is Cumulative Number of Monitored Counties  
21 Exceeding Various W126 Levels But Meeting Various 8-Hour  
22 Standard Levels. So when I look at this chart, I see that  
23 the W126 standard set at 21, at that level it looks like at  
24 both 8-hour standards of .075 as well as .070, the same  
25 amount of protection was being provided at least as measured

1 by the 126 standard. Is that the correct way of reading this  
2 graph? And, if not, could you give me the correct  
3 interpretation of this graph?

4 A It is similar to the map that I think we discussed  
5 earlier.

6 Q But the map was only .075 that we were looking at  
7 earlier.

8 A Right. And it also, I believe, was 2004 through  
9 2006 air quality data, if I remember correctly. What this is  
10 showing is, I think, a similar thing based on 1 year earlier,  
11 a 3-year average. And what it shows, based on those monitors  
12 and that time period, that a standard of W126 at 21 would in  
13 no case cause a violation where there was not already a  
14 violation of the primary standard set at .075.

15 Q For?

16 A If it is the case for .075, then it is certainly  
17 the case for anything lower.

18 Q Okay. That is all the questions I have for this  
19 document.

20 You can review the whole document, if you would like,  
21 but my questions go to the first page.

22 A Okay.

23 Q Can you identify who Dave McKee is?

24 A I am sorry, I can't.

25 Q Do you know who Lydia Wegman is?

1 A I do.

2 Q And what do you know what her position is at EPA?

3 A I don't know what her title is.

4 Q Do you know what office she works in?

5 A She works in the Office of Air Quality Planning and  
6 Standards, and she is effectively the lead of the team that  
7 helps set national air quality standards.

8 Q Okay. In the middle paragraph it says: I am  
9 afraid that is not going to be responsive to the interagency  
10 folks. Repeating a cite from the EPA document won't fly.  
11 John, can we find something to say that is more accurate?

12 In the subject line it says: Origin of 99 percent of  
13 man-made volatile organic compound emissions.

14 Are you familiar with what this conversation is about?  
15 Do you recall this issue?

16 A No.

17 Q So does this appear to be in response to the  
18 interagency dialogue where OIRA is having a dialogue with EPA  
19 regarding the preamble or the final rule?

20 A I think I am reading the same document that you  
21 are. I don't know anything more about this than what I am  
22 reading.

23 Q I hope you are reading the same document.

24 Okay. So you are not -- maybe is it safe to say that  
25 you are not familiar with the -- would you characterize this

1 as being staff-level correspondence between OIRA, OMB, and  
2 EPA that it was kind of the technical issues being worked out  
3 on the staff level?

4 A The EPA individuals in this document are EPA staff,  
5 and they appear to be discussing what I would characterize as  
6 a technical issue.

7 Q Okay. And would you think this is a typical  
8 conversation that would occur during the interagency review  
9 process, checking sites, making sure studies are peer  
10 reviewed, accurate and all that?

11 Mr. Engle. I am going to object to that.

12 Ms. Moore. On what grounds?

13 Mr. Engle. For the reasons that were stated.

14 The Witness. It is my understanding that at a  
15 particular point in the process, that EPA docket  
16 communication materials from interagency review as part of  
17 what I believe is 307(d) of the Clean Air Act. I believe  
18 that there are many materials docketed for this rule and any  
19 other rule that undergoes a similar process in the public  
20 docket. And I think that a review of that information would  
21 indicate that there are many such technical issues that are  
22 raised by the technical experts across the U.S. Government  
23 during an interagency review process.

24 BY MS. MOORE:

25 Q Would you say it is -- is it EPA policy that

1 references or papers relied on in the rulemaking process,  
2 that those papers be peer-reviewed or withstand some level of  
3 academic scrutiny? Or maybe you could articulate for us what  
4 EPA's policy is in terms of the information used in the  
5 rulemaking process.

6 A EPA and the Federal Government at large, I believe,  
7 have peer-review guidelines. I am not an expert on those  
8 guidelines. We have people at the Agency who are, and I  
9 would direct you to those experts.

10 Q Can you say that, as part of the interagency  
11 process, if another, whether it be OIRA or another agency, if  
12 they were to raise a concern about a document for -- a  
13 document that was by ruled on EPA -- or how would EPA react  
14 to that if basically it was pointed out to them that -- or  
15 pointed out to EPA that the information they were using might  
16 not be accurate?

17 Mr. Engle. Do you understand the question?

18 The Witness. Yes. I believe I do.

19 As part of 307(d), EPA dockets, both the original  
20 preamble as well as subsequent drafts, and the final preamble  
21 is, of course, public information, and I think that a  
22 comparison of earlier drafts with later drafts would  
23 generally illustrate that EPA makes a number of adjustments  
24 to the preamble, many of them technical adjustments, during  
25 the interagency review process.

1 BY MS. MOORE:

2 Q I am done with that document.

3 Were you familiar with the dialogue that occurred  
4 between OIRA and the EPA over both the primary and the  
5 secondary standards?

6 A Yes.

7 Q Okay. Can you characterize the dialogue that  
8 occurred between OIRA and EPA?

9 A The interagency discussions on the secondary  
10 standard occurred after a point in the process when EPA  
11 initiated the docketing as required by 307(d). Therefore,  
12 the documents that the Agency used in --

13 Q The Agency, EPA?

14 A -- that EPA used in and received in the interagency  
15 discussion about the secondary standard are in that docket.  
16 The interagency discussion about the primary standard  
17 occurred before the Agency initiated the 307(d) docketing.

18 Q And the significance of that is it is not in the  
19 docket? I am asking you the significance of that  
20 distinction.

21 A Documents -- all documents that I am aware of that  
22 would fit the definition of 307(d) are docketed. It is my  
23 understanding that the Agency interprets 307(d) to start at a  
24 particular point in the process. So documents before that  
25 process are not required to be docketed, and documents after

1 that are required to be docketed.

2 Q Okay. Given that, as a result of the requirement  
3 of 307(d), much of this information is in docket, the memos  
4 that went in between EPA and OIRA, I am hoping you can  
5 characterize for us what you believe the crux of the argument  
6 was between OIRA and OMB.

7 A Regarding the secondary standards?

8 Q Yes.

9 A The crux of the argument or the debate between EPA  
10 and OIRA was the form to use for the secondary standard.  
11 During that process it was my judgment that the most  
12 appropriate form, the scientifically most defensible form,  
13 the legally most defensible form, was the W126 cumulative  
14 seasonal form. I think, as the documents show, others in the  
15 Agency agreed with that, had the same position. I believe  
16 that the memo from Marcus Peacock to Susan Dudley explains  
17 why we thought that the better choice was a seasonal W126  
18 form.

19 Q And when you say that the most defensible form, do  
20 you believe it was the only defensible form?

21 A Are you asking for my legal judgment?

22 Q Well, you said that -- I am kind of asking you back  
23 what you said to me. You said that you felt it was the most  
24 defensible form, that the W126 was. So --

25 A The Agency will defend its final decision.

1 [Discussion off the record.]

2 [Burnett Exhibit No. 7  
3 was marked for identification.]

4 BY MS. MOORE:

5 Q As you can see, this is a document which is an  
6 e-mail where the text of the e-mail is essentially a  
7 statement by the U.S. EPA Press Secretary Jonathan Shradar,  
8 and this was released on March 14, 2008. And the question I  
9 have is regarding the fourth paragraph, which is an EPA --  
10 quote: EPA is unaware of either Paul Clement or anyone else  
11 in the Solicitor General's office ever stating or advising  
12 that the rules contradicted the EPA's past submissions to the  
13 Supreme Court, as the Washington Post article today asserts.

14 Is this statement consistent with your knowledge of any  
15 interaction that might have occurred between the Solicitor  
16 General's office and the EPA?

17 Mr. Engle. Could you restate the question, please?

18 Ms. Moore. I will be happy to reread it, but I was  
19 reading from it.

20 Mr. Engle. The second half where you posed the  
21 question.

22 Ms. Moore. Sure. I said, is this statement consistent  
23 with your understanding of the interaction that may or may  
24 not have occurred between the Solicitor General's office and  
25 EPA?



1           The Witness. Yes, it is consistent.

2           BY MS. MOORE:

3           Q     And to put a finer point on that, are you aware of  
4     the Solicitor General contacting the Agency on this rule, the  
5     EPA Agency on this rule?

6           A     The question again?

7           Q     The question is are you aware -- did the Solicitor  
8     General's office or Paul Clement get in touch with the EPA  
9     regarding the ozone rule?

10          A     I don't know.

11          Q     If you could answer a hypothetical. If Paul  
12     Clement or someone in the Solicitor General's office were to  
13     have reached out to EPA regarding a rulemaking, is your  
14     position such that you would have been aware or that you  
15     should have been aware of such a contact?

16          A     Not necessarily.

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1       RPTS SCOTT

2       DCMN ROSEN

3       [3:50 p.m.]

4                   BY MS. MOORE:

5           Q     Okay.  Could you explain that answer?

6           A     My assumption would be that if an individual in the  
7       Solicitor General's Office were to reach out to EPA that  
8       individual would likely reach out to someone in our General  
9       Counsel's Office.  I'm not in the General Counsel's Office.

10          Q     But, in any case, no one informed you that there  
11       was an issue that has been referred to in this article that  
12       the Solicitor General has somehow objected?  Nobody brought  
13       that to your attention contemporaneous with the alleged  
14       occurrence?

15          A     Can you repeat the question?

16          Q     The chronology of the questioning was that you said  
17       that you were not aware of whether or not the Solicitor  
18       General had contacted the Agency regarding the rule.  Then I  
19       asked would you have been aware, and you said not  
20       necessarily.  So my third question in the series was to say  
21       nobody had made you aware that this may have occurred --  
22       that's the hypothetical -- but in any case, nobody informed  
23       you of it.  Is that a true statement?

24          A     Of the Solicitor General's Office ever stating or  
25       advising that the rules contradicted EPA's past admissions to

1 the Supreme Court?

2 Q Correct. Well, I mean --

3 A That is correct.

4 Q Okay. Thank you.

5 Do you have any idea what the basis of this news story  
6 would have been?

7 A Yes, I do.

8 Q Could you share that with us?

9 A Let me talk with counsel.

10 Q Sure.

11 [Witness conferred with counsel.]

12 Mr. Engle. Repeat, please.

13 Ms. Moore. Sure.

14 BY MS. MOORE:

15 Q The question was: Do you have any idea what the  
16 basis was of this news story? By "this," I mean about Paul  
17 Clement, the Solicitor General. Do you know what the basis  
18 of this news story was?

19 A Yes.

20 Q You said, "Yes." Then I said can you share.

21 A I think it involved a miscommunication and a  
22 mistake on my part, sharing information that I should not  
23 have shared. The information was -- not sharing information  
24 with the Post but in sharing that information with another  
25 individual that, in turn, was given to the Post, evidently,

1 and, I believe, incorrectly reported by the Post.

2 Q Can you be any more specific with respect to the  
3 information? Before you answer that, let me ask you:

4 Was the person who spoke with the Post authorized to  
5 speak with media?

6 A The person who I made the mistake of talking to was  
7 outside of the Federal Government, and I don't think that  
8 there were any prohibitions against his talking with the  
9 Post. It certainly was not my intent for the information to  
10 go beyond him, but it was a mistake that I shared the  
11 information at all, my mistake.

12 Q Can you tell us what the information was that you  
13 shared?

14 A Yes. The information I shared was that the  
15 Solicitor General's Office, including, I had thought, the  
16 Solicitor General, was looking into issues surrounding the  
17 setting of the secondary ozone, NAAQS.

18 Q Your understanding was incorrect. Am I  
19 interpreting everything correctly?

20 A I think the way it was reported in the Post was  
21 incorrect.

22 Q Is it your present understanding that the Solicitor  
23 General's Office was not looking into this issue?

24 A Can you repeat the question, please?

25 Q Is it presently your understanding that the

1 Solicitor General was not looking into the secondary ozone  
2 standard, into the rule on the secondary ozone standard?

3 A I don't know.

4 Q I'll take that for your answer.

5 Just again to be clear, the report that we all read in  
6 The Washington Post was inaccurate; is that correct?

7 A I don't believe that I have the Post before me, but  
8 it is my understanding, it is my recollection of the Post  
9 article that there were inaccuracies in the Post article,  
10 yes.

11 Q Okay. As it relates to the Solicitor General's  
12 involvement?

13 A Things that I understand to be inaccurate, yes --

14 Q Okay.

15 A -- involving the Solicitor General, yes.

16 Q Okay. Could I just try one of those? I just want  
17 to make sure we are on the same page.

18 I think what I heard you say is that, to the extent  
19 there are inaccuracies in The Washington Post article, they  
20 relate to the reporting on the activities of the Solicitor  
21 General with respect to the secondary standard rule?

22 A There may be other inaccuracies --

23 Q Okay.

24 A -- but I was saying that it is my understanding  
25 that there are inaccuracies in the Washington Post article

1 with regard to the involvement of the Solicitor General.

2 Q Okay. Perfect.

3 Just to be abundantly -- and I believe you said this  
4 before that it was not your intention per the conversation  
5 that you had to have been told to a reporter -- I mean, it  
6 was never your intention to make a news story.

7 A That is correct.

8 Ms. Moore. Okay. We're done.

9 Mr. Engle. Thank you.

10 Ms. Moore. Off the record.

11 [Recess.]

12 Mr. Waxman. I understand some objections have been  
13 raised in responding to questions that had been posed by  
14 majority counsel in the previous round. In describing the  
15 basis of the objection, counsel had noted that he was raising  
16 objections on behalf of EPA and not on behalf of the witness,  
17 and referred us to EPA's May 15 letter which states that EPA  
18 has confidentiality interests, in quotes, in the matters  
19 under discussion in this investigation but which do not  
20 assert any constitutional privilege.

21 On that issue, the objections that have been raised on  
22 behalf of EPA are not a valid basis for refusing to respond  
23 to the questions at issue. These questions concern subjects  
24 important to the committee's investigations of the denial of  
25 the California waiver -- EPA's issuance of ozone standards

1 and EPA's response to the Supreme Court decision,  
2 Massachusetts versus EPA.

3 While the committee may recognize constitutional  
4 privileges, such as executive privilege, the administration  
5 has not asserted executive privilege or any other  
6 constitutional privilege regarding any of the issues at  
7 issue.

8 So the objection that the testimony -- well, therefore,  
9 I would instruct the witness to respond to these questions  
10 since there has not been an assertion of a constitutional  
11 privilege sufficient to refuse to answer those questions.

12 Mr. Dotson. Okay. I think we can proceed to our list  
13 of questions that we had pending from the last round.

14 Mr. Ausbrook. I just want to clarify one thing and make  
15 sure everybody understands that the issues you are raising  
16 with respect to questions that were being asked were  
17 questions about who you talked to at the White House and OMB  
18 about these matters and that, in fact, you are not saying  
19 that those conversations are even potentially subject to  
20 executive privilege, but these are issues that EPA, in the  
21 interest of the confidentiality of their deliberations, is  
22 concerned about; is that correct?

23 Mr. Engle. That is correct.

24 In consultation with counsel for the EPA in anticipation  
25 of the ruling of the chairman, we are again instructed to not

1 answer questions that relate to the subject matters that you  
2 have raised in the second round of questioning with the  
3 exception that we can identify some of the names on the  
4 e-mails that you showed us that referred to people by  
5 initials or by one -- their first names or last.

6 Mr. Waxman. Well, unless their objection is based on  
7 executive privilege, I don't see a basis for refusing to  
8 answer the questions.

9 Mr. Engle. We cannot answer these questions at this  
10 time. It would be the hope of the witness that the committee  
11 and the Environmental Protection Agency or the administration  
12 can resolve this question which we believe exists between  
13 these two branches of government so that the witness can  
14 proceed in a way which is agreed to.

15 Mr. Waxman. Unless there is an assertion of executive  
16 privilege, I understand from my counsel that there is no  
17 reason not to go forward and answer the questions in this  
18 deposition.

19 Mr. Dotson. The chairman has ruled in this matter. You  
20 are welcome to make objections to his ruling or perhaps there  
21 are members who would like to bring that issue before the  
22 committee. We can note your objections. The witness can  
23 answer the questions, and later, those objections can be  
24 raised in the committee to see if an appeal of the Chair's  
25 ruling is appropriate. At this point, the Chair has



1 instructed you to answer the questions, and I would like to  
2 proceed to the questions.

3 The Witness. Can I speak with my counsel?

4 Mr. Waxman. Certainly.

5 Mr. Engle. Yes.

6 The Witness. Thank you.

7 [Witness conferred with counsel.]

8 Mr. Ausbrook. Before you say anything, if I may, I  
9 would certainly like the opportunity to consult with the  
10 ranking member about the ruling of the Chair. It will take  
11 me a couple of minutes to locate him and to have that  
12 consultation. He may want to appeal the ruling of the Chair.

13 Mr. Waxman. I certainly think you ought to consult with  
14 the ranking member. If he disagrees with my ruling, he can  
15 appeal the ruling of the Chair, but my understanding is that  
16 the witness is still instructed to answer the questions. The  
17 committee would then have to dispose of any appeal of the  
18 decision of the Chair.

19 Mr. Dotson. The chairman is correct. If the objections  
20 are noted for the record, then if the ruling of the Chair is  
21 overruled by a vote of the committee, then the answers that  
22 were objected to will be stricken from the record prior to  
23 its release.

24 Mr. Ausbrook. The rules don't reflect whether the  
25 witness is required to answer the question while an appeal is

1 pending, but if you intend to proceed without giving us the  
2 opportunity to consult with the ranking member, then you  
3 certainly may do so.

4 Mr. Waxman. If you consult with the ranking member and  
5 come back with an objection to my ruling, that will be, as I  
6 understand it, noted in the record and then later must be  
7 disposed of by the committee. We would still go forward and  
8 ask the questions and expect the answers. If you're asking  
9 us to delay asking the questions for you to consult with the  
10 ranking member, I am reluctant to deny you that opportunity,  
11 but I don't see, in terms of the time during this deposition,  
12 that it is going to make any difference.

13 Mr. Ausbrook. I understand. I understand your  
14 position, but I would like to consult with the ranking member  
15 before we proceed.

16 Mr. Waxman. Well then, let's take a recess for  
17 10 minutes.

18 Mr. Ausbrook. It probably won't take that long.

19 Mr. Waxman. Okay. Or even less. Sure.

20 Mr. Ausbrook. Okay.

21 [Recess.]

22 Mr. Dotson. Back on.

23 Mr. Ausbrook. Thank you.

24 The ranking member wants to express his appreciation for  
25 the consultation. At this time, he is not going to appeal

1 the ruling of the Chair on these questions.

2 Mr. Engle. Counsel for the witness has again consulted  
3 counsel for the Agency. Counsel for the Agency has again  
4 told counsel for the witness that he is not authorized to  
5 answer some of the questions that have been posed. Counsel  
6 was also reminded that there are consequences for him to act  
7 outside the scope of his employment, his "employment" being  
8 defined as being able to answer certain questions and not  
9 answer certain questions. Counsel for the witness is also  
10 aware that there are consequences for him to not answer the  
11 questions that have been ordered by the chairman.

12 We are in a situation where we are in a voluntary  
13 process, as we have all discussed, and we are ready, willing  
14 but are temporarily not able to answer these questions.  
15 Given the informality of this meeting but the thoroughness of  
16 it until now, we would ask the -- the Agency has asked for it  
17 to make further consultations within the administration  
18 before we proceed. That is what I have been asked to  
19 communicate.

20 Mr. Waxman. I don't have the timeline in front of me --  
21 maybe counsel can advise us -- but it is my understanding  
22 that the Agency had a great deal of notice that we wanted to  
23 take this deposition and that we wanted to ask certain  
24 questions. We have given them every opportunity to assert  
25 executive privilege. In fact, they have been, as I recall,

1       rather slow in getting the information to us that we have  
2       requested of them, and I don't think that is excusable.

3               The rules, as I understand them, are that they need not  
4       answer any questions if they assert executive privilege, but  
5       if they don't assert a privilege of any sort, I can't accept  
6       that as a reason not to go forward with the deposition and to  
7       instruct the witness not to answer the questions at the  
8       deposition. Under the rules, a witness who refuses to answer  
9       questions during a deposition may be subject to sanctions as  
10      a consequence. I know this is a difficult position for the  
11      witness to be in, but it's not one of our making. It seems  
12      to me that the Agency is suggesting that he not answer  
13      questions, but it has not given us a reason not to insist  
14      upon the questions being answered.

15             Mr. Engle. To follow up on that very last point, I, as  
16      you know, am not a spokesman for the Environmental Protection  
17      Agency or its counsel. I would like to suggest that counsel  
18      for the Agency be asked in this room those direct questions  
19      and give direct answers to this committee about the scope of  
20      the witness's employment and about the negotiations or  
21      discussions that it is currently undergoing.

22             Mr. Waxman. This is a deposition of the witness,  
23      personally. It is not a deposition of the Environmental  
24      Protection Agency. Their discussion of the scope of his  
25      employment doesn't seem to be pertinent to whether he should

1 be required to answer the questions or not.

2 Let me ask our counsel whether there is any  
3 justification for allowing the Environmental Protection  
4 Agency lawyers to come in here and tell us they don't want  
5 one of their employees -- one of their former employees,  
6 whatever the situation may be -- to answer questions because  
7 it, quite frankly, is not up to them. The questions in a  
8 deposition conducted by the Congress of the United States can  
9 compel answers to questions unless there is an assertion of a  
10 reason, a privilege, so that the questions need not be  
11 answered. The fact that they may want more time, the fact  
12 that they don't want him as an employee to answer the  
13 questions does not impress me in any way as a valid assertion  
14 of why we should not go forward with our rights as an  
15 independent branch of government.

16 Let me consult further with my lawyers and see what they  
17 think about it.

18 [Recess.]

19 Mr. Barnett. Let me identify for the record that I am  
20 Phil Barnett, the staff director. The Chair has been called  
21 away. Here is where I understand where we are.

22 An objection was raised. The Chair ruled on the  
23 objection, and found the objection to not have a valid basis.  
24 At this point, there is not an appeal. Although, there could  
25 be an appeal at a later point. So the Chair has directed the

1 questions to be answered.

2 You are here voluntarily, and you have been given  
3 advice, and have consulted with counsel for the Environmental  
4 Protection Agency. Where that leaves this issue at the  
5 moment is on your side whether to answer the questions or  
6 not. There are other questions that we want to have  
7 answered. If you choose to answer these questions now, they  
8 will go on the record, and they can be subject to an appeal.  
9 If you choose not to answer the questions now, there are  
10 other questions. We will ask the questions. You will say  
11 you will not answer them. Then we will ask some other  
12 questions, such as the identity of people involved in the  
13 e-mails, and some other questions that you've thought to  
14 answer.

15 The committee would have the right -- you are not here  
16 under subpoena -- to issue a subpoena to compel you to answer  
17 the questions, which will necessitate another appearance  
18 before the committee at another time if you take the option  
19 of not answering the questions at this time.

20 The Witness. With respect to one part of your statement  
21 about a subpoena, there originally was a subpoena for me to  
22 be here at 9:30 this morning. I appreciate that the  
23 chairman's recognizing that I came voluntarily. He withdrew  
24 the subpoena. I intend to stay voluntarily and/or to return  
25 voluntarily, if you don't have cots here, if we need to take

1       it up on another day.

2               So, from my perspective, a subpoena is not necessary. I  
3 do not see that I would act in any different of a way whether  
4 or not there were a subpoena. Since I'm here voluntarily,  
5 I'd rather let the record reflect that and not have the  
6 stigma of a subpoena, which gives the suggestion of my not  
7 being here voluntarily, and that suggestion would be  
8 incorrect.

9               Mr. Barnett. I didn't want to suggest you were not here  
10 voluntarily. I appreciate that you're here voluntarily, and  
11 I appreciate that you want to cooperate with the committee  
12 voluntarily.

13              The situation from the committee's side of an issue is,  
14 if a witness is there voluntarily and does not answer a  
15 question, it is unlikely that the witness would face any  
16 sanction, from the committee's perspective. There could be a  
17 debate whether the committee would even have the authority to  
18 sanction a witness who is here voluntarily and who refuses to  
19 answer a question. I think the committee would -- I think  
20 Chairman Waxman may take the view that there would be some  
21 authority in this situation, but it is not a realistic -- it  
22 is not the ordinary step in which to proceed, and it is not  
23 the ordinary process.

24              The ordinary process when a witness doesn't answer a  
25 question that the committee has determined should be answered

1 would be then to have the witness appear -- even if the  
2 witness is willing to appear voluntarily, it would be to have  
3 the witness appear under compulsion so that, when you got to  
4 that particular question and we ended up at the same impasse  
5 that we are at now, then the committee would have a broader  
6 array of options available to the committee to enforce the  
7 direction of the Chair.

8 I say that, though, so that you know what our potential  
9 paths are that the committee could move down. We are not at  
10 that point yet. You are here voluntarily. An objection has  
11 been raised. It has been overruled. You are here  
12 voluntarily. That means, essentially, for this proceeding  
13 that it is your decision whether to proceed and answer the  
14 questions. You have some guidance now as to what the  
15 possible next steps are.

16 Other next steps are that the committee could -- that  
17 the deposition could proceed and that the committee could  
18 decide to seek the information from other people rather than  
19 come back to you. There would be different avenues.

20 Mr. Engle. Thank you for that. That is very helpful.

21 Phil, I go back to something that you said a few minutes  
22 ago about the ball's kind of being on our side, were the  
23 words that you used. We don't have a side here. We're in  
24 the unenviable position of explaining the committee to the  
25 Agency and of explaining the Agency to the committee. That



1 is a position that I would like to no longer be in.

2 I would suggest that, given the fact that you mentioned  
3 that we're here under a voluntarily setting, there is more  
4 latitude to not answer questions at this time and that the  
5 committee reserves the right to dial up the process and that  
6 the government -- or the executive branch also reserves the  
7 right to dial up this process, that the committee and the  
8 executive branch have exactly that discussion. Then we will  
9 proceed as to how that is resolved. If it isn't resolved, we  
10 will make a decision as to how we will proceed.

11 Mr. Ausbrook. I guess what I hear you saying is that  
12 perhaps we should proceed with the questions. You can answer  
13 in a voluntary setting and then can come back and see if the  
14 other questions are ones that we as a committee continue to  
15 have a need to have answered. If so, in order to provide the  
16 compulsion that might overcome the Agency's concern in the  
17 position that you find yourselves in, a subpoena might be  
18 appropriate but only with respect to those matters that you  
19 cannot answer at this time.

20 Mr. Engle. We are prepared to answer the questions now  
21 that the Agency's position has been refined somewhat but not  
22 the other ones at this time for the reasons that we suggested  
23 and with the hope that a resolution could occur between the  
24 two sides. That would allow Jason to continue his  
25 voluntary --

1           Mr. Barnett. I think minority counsel has stated that  
2 as you have stated that, and that also reflects the  
3 chairman's view about how we should proceed.

4           We will proceed with the questions. We will get the  
5 answers to the questions that you are able to answer at this  
6 time. On questions you are not able to answer at this time,  
7 the committee will reserve on how to proceed and on what the  
8 next steps will be.

9           Mr. Engle. A minute, please.

10          [Recess.]

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1       RPTS JOHNSON

2       DCMN HERZFELD

3       [4:54 p.m.]

4             Mr. Dotson. We are resuming the deposition of Jason  
5 Burnett.

6                     BY MR. DOTSON:

7             Q     Let's turn to Exhibit J. Exhibit J is an e-mail  
8 that you have previously seen. You have indicated to us that  
9 you would be willing to tell us a bit more about this  
10 exhibit. Specifically, your counsel has indicated you would  
11 be willing to tell us who Keith is referenced to.

12            A     Yes. And to be clear, it wasn't that I was  
13 unwilling before. There was an objection raised that was not  
14 my objection.

15            Q     Right.

16            A     I was willing, I am willing, and Keith is Keith  
17 Hennessey.

18            Ms. Bennett. Keith Hennessey?

19            The Witness. Yes.

20                     BY MR. DOTSON:

21            Q     Keith Hennessey is with the National Economic  
22 Council in the White House; is that correct?

23            A     I believe that is the case. Yes.

24            Q     And did he have views on the California waiver?

25            A     Yes.

1 Q And do you know if he was supportive of the  
2 California waiver?

3 Ms. Bennett. I am sorry, Greg, we can't hear you. Did  
4 he support what?

5 Mr. Dotson. Was he supportive of the California waiver?

6 Mr. Engle. The witness cannot answer that question at  
7 this time. Hopefully, he can, pending further discussions  
8 between the branches.

9 Mr. Dotson. Okay.

10 The Witness. I think you asked earlier what "WH" stands  
11 for, and I think I was in a similar situation.

12 BY MR. DOTSON:

13 Q Yes.

14 A "WH" stands for the White House.

15 Q Right. Okay.

16 We are done with that exhibit. Let's turn to Exhibit O.  
17 Exhibit O is an e-mail that we saw previously. We had asked  
18 who you were referring to when you wrote in your e-mail that  
19 you wanted to forward information to Jim C. Can you tell us  
20 who Jim C is?

21 A Jim Connaughton is the Chairman of CEQ, Council on  
22 Environmental Quality.

23 Q And can you tell us whether he had a view on the  
24 California waiver?

25 A Can you repeat the question?

1 Q Can you tell us did Jim Connaughton have a view on  
2 the California waiver?

3 A Yes.

4 Q Can you tell us whether he had a position  
5 supporting or opposing the waiver?

6 Mr. Engle. The witness cannot answer that question at  
7 this time.

8 The Witness. Can I offer a clarifying statement? I  
9 believe that the e-mail record document before me is not  
10 related to the California waiver. But my answer stands.

11 BY MR. DOTSON:

12 Q Actually, you are correct.

13 Can you tell me if Jim Connaughton had a view on whether  
14 costs could be considered in the setting of National Ambient  
15 Air Quality Standards?

16 A Yes, he had a question about that that I discussed  
17 with him.

18 Q And that was a question that would have been  
19 resolved by sharing the American Trucking case with him?

20 A The intention that I had in citing a Supreme Court  
21 case was to clarify any ambiguity that might have previously  
22 existed.

23 Q Okay. I would like to turn back to the California  
24 waiver. You described to us your understanding of the  
25 Administrator's preference for action on the California

1 waiver. You described that his preference changed over time,  
2 that at one point he was supporting a full grant of the  
3 waiver, and at a later point he supported a partial grant of  
4 the waiver. And I was wondering if you could give us the  
5 time frame that he supported it, to the best of your  
6 knowledge, the full grant of the waiver.

7 A I believe it -- I understand your question, even if  
8 I don't necessarily accept the precise characterization that  
9 you provided in articulating that question.

10 Early in -- late summer, early fall time frame, I was  
11 under the general impression that the Administrator was --  
12 was very interested in a full grant of the waiver.

13 Q This would be 2007?

14 A 2007. August and September time frame generally.  
15 I believe that that included at least one of the large  
16 meetings that you have asked me previously about. And as I  
17 previously testified, my recommendation throughout was to  
18 grant the waiver. I think that he understood the logic  
19 behind that recommendation.

20 Q So it was after September that he became interested  
21 in a partial waiver?

22 A I don't want to suggest that he was not interested  
23 in a partial waiver previously. In fact, all along he asked  
24 for me to explore what I am characterizing as middle-ground  
25 options, options somewhere between a full grant and a full

1 denial. I think that the level of his interest increased in  
2 the -- as time went on following the various meetings that we  
3 had both within the Agency and within other parts of the  
4 executive branch in the option of a partial grant.

5 Q And the time frame for that was post -- towards the  
6 end of the decisionmaking process?

7 A Yes.

8 Q Do you know where he was at the time that he polled  
9 staff as to their recommendations? Do you know what he had a  
10 preference for doing?

11 A I thought you were going to say where he was. He  
12 was in the room. Where he was mentally. I think that he at  
13 that point saw the logic in a full grant. And, as I  
14 previously said, everyone who provided a recommendation  
15 recommended a full grant. And I don't want to put myself in  
16 his position as to how that influenced his thinking.

17 Q Right. We are not asking you to talk about what he  
18 thought, but you are basing your testimony today on you had  
19 many personal interactions with him and --

20 A Correct.

21 Q At some point in the process had he decided that he  
22 wanted to grant a partial waiver?

23 A I think at some point in the process, he thought  
24 that that was the best course of action, the partial grant of  
25 the waiver, as opposed to a grant of a partial waiver.

1 Q Okay. I understand your distinction.

2 Ms. Bennett. I am sorry. Can you repeat what you just  
3 said? You understand his assumption? What did you say?

4 Mr. Dotson. I just said I understood his distinction.  
5 He was saying a grant of a partial waiver as opposed to a  
6 partial grant of a waiver.

7 Ms. Bennett. Okay.

8 The Witness. Right. I thought the question was phrased  
9 as a grant of a partial waiver. I thought that Greg had  
10 intended to say partial -- partial grant of the waiver.

11 BY MR. DOTSON:

12 Q Now, from your previous statements, we know that he  
13 communicated with the White House after he was favoring a  
14 partial grant of the waiver. That's correct, right?

15 A Yes.

16 Q And after his communications with the White House,  
17 did he still support granting the waiver in part?

18 A He ultimately decided to deny the waiver.

19 Q Did he ever tell you about his communications with  
20 the White House and the substance of those communications?

21 A Yes.

22 Q Did he ever relay to you arguments for denying the  
23 waiver?

24 A Ultimately the rationale that the Agency used --  
25 the Administrator used in denying the waiver was a rationale



1 developed by the Agency.

2 Q Did they develop that rationale -- did the Agency  
3 develop that rationale at the request of the Administrator?

4 A Like I said previously, part of my job, as I see  
5 it, is to present the Administrator with a wide range of  
6 options. I think others see their job as in part that also.  
7 So it may very well have been the case that -- and I don't  
8 remember precisely -- but that at certain points in the  
9 process, I encouraged the development of options that I  
10 myself did not support. The Administrator, as I have  
11 previously testified, had requested of me to present him with  
12 a wide range of options. So I think the answer to your  
13 question is yes.

14 Q Okay. And was the rationale that was ultimately  
15 used to deny the waiver developed after the Administrator's  
16 communications with the White House?

17 A There may have been details of it that were  
18 refined, but I think the general notion of denying the waiver  
19 based on finding a lack of compelling and extraordinary  
20 circumstances given the nature of the pollutant was a  
21 concept, as far as I know, developed by Agency staff. Early  
22 on in the process, in fact, I believe one of the  
23 presentations that you have shown me today dated, I believe,  
24 in the September time frame, maybe September 30th, includes a  
25 range of options, including denial, and denial based on that

1 criteria.

2 Q Okay. Were you ever aware of a Bob Meyers  
3 recommendation on the California waiver?

4 A I don't believe I am on the substance of the  
5 waiver. I believe the answer is no.

6 Q Were you aware whether Charles Ingebretson ever had  
7 a view on the waiver?

8 Mr. Engle. Would you identify who he is, please?

9 Mr. Dotson. Charles Ingebretson is the Chief of Staff  
10 of the Administrator.

11 The Witness. I am having difficulty identifying whether  
12 an individual's -- based on my memory was making a  
13 recommendation or was trying to figure out the best way to  
14 accommodate what -- what in this case Charles Ingebretson  
15 thought the Administrator's desires were.

16 BY MR. DOTSON:

17 Q Did the Administrator tell you why he decided to  
18 deny the waiver after previously supporting granting it in  
19 part?

20 Ms. Bennett. Jeff, did we establish that the  
21 Administrator had supported granting in part? Because when I  
22 look back over my notes, I see that he was very interested in  
23 exploring it, he could see the logic behind it. Did we --

24 Mr. Dotson. Yes, we did.

25 Ms. Bennett. Jason, did you establish that the

1 Administrator had decided to grant it in part? Is that  
2 something that you had said?

3 The Witness. I don't know what words I used, so I don't  
4 want to -- I would prefer to try to articulate what I think  
5 the situation was, and that is that the Administrator was  
6 interested in initially a full grant, and became interested  
7 in a partial grant, asked for me and others to explore ways  
8 of making a partial grant work. And I worked very hard to  
9 make a partial grant work.

10 BY MR. DOTSON:

11 Q My notes --

12 A Please.

13 Q My notes indicate you said you believed the  
14 Administrator thought a partial grant was the best course of  
15 action.

16 A Yes.

17 Q Did he explain to you why he ultimately --

18 A I will just confirm I believe that is the case.

19 Q Did the Administrator tell you why his views  
20 changed and he ultimately ended up denying the waiver?

21 A Yes.

22 Q Can you tell us the reason that he -- the reason  
23 that he told you his mind changed?

24 Mr. Engle. The witness is unable to answer that  
25 question at this time.

1           Mr. Dotson. Is this an issue that is covered by the EPA  
2 memo? Is this an issue you consulted with the EPA counsel  
3 about?

4           Mr. Engle. Yes.

5           Mr. Dotson. And they requested that he not answer that  
6 question?

7           Mr. Engle. There are elements of the answer to that  
8 question that are part of our discussions with the EPA. So I  
9 would say that at this time the witness is unable to answer  
10 that question.

11          Mr. Dotson. Okay. We are going to turn to Exhibit H.

12          Mr. Baran. You have previously seen H and I. I will  
13 give you both of those.

14                   BY MR. DOTSON:

15           Q     Why don't we put I out as well.

16                   Okay. Exhibit H is an appointment form for an  
17 October 30th, 2007, briefing of Administrator Johnson on the  
18 California waiver. You were listed as one of the  
19 participants. And Exhibit I is the briefing slides for this  
20 briefing.

21                   Did you attend this briefing?

22           A     I think, as I previously testified, I believe that  
23 I did, although with the usual caveats of the amount of time  
24 that has transpired and the fact that if you are asking me  
25 specifically about this briefing, I can't confirm that this

1 was necessarily the actual final briefing that was used.

2 Q Okay. If you had taken notes of this meeting,  
3 would you have submitted them for production to the  
4 committee?

5 A Yeah.

6 Q Okay. Do you recall if you commented or edited  
7 these briefing slides?

8 A I say I have produced all documents that I believe  
9 would be responsive.

10 Q Okay. With regard to these briefing slides, did  
11 you comment or edit the briefing slides?

12 A I don't think I would have edited. It is not my  
13 normal practice to edit, particularly something that is as  
14 complicated both technically and legally as this. If I did  
15 have concerns, clarifications or comments, I would have  
16 passed those on likely to either a representative of the  
17 Office of General Counsel or a representative of the Office  
18 of Air and Radiation, the two offices of primary expertise  
19 here.

20 Q Do you recall any comments that you made that were  
21 incorporated into these slides?

22 A Yes.

23 Q Can you describe them, please?

24 A Yes. I had a concern that -- or a desire that we  
25 be very clear about what is known and not known about vehicle

1 safety. There have been many studies on the impact on  
2 vehicle safety of vehicle size and vehicle weight and other  
3 vehicle attributes. And there were concerns raised by others  
4 within the Agency, particularly individuals in the Office of  
5 Policy, Economics, and Innovation, about the strength of  
6 statements.

7 Part of my role is to -- in the front office of the  
8 Agency is to help reconcile differences between different  
9 offices. I myself have studied the NAS report on this  
10 subject and was familiar with some of the recommendations in  
11 the NAS report, and I believe that I asked for staff to  
12 clarify whether the NAS report, being the National Academy of  
13 Sciences report, on CAFE -- corporate average fuel economy --  
14 standards and vehicle safety, which I thought that the  
15 National Academy may have useful information, and I wanted to  
16 know when the advice that we were providing was consistent  
17 with the National Academy's advice, and if it departed from  
18 that, why.

19 Q Thank you.

20 One of the issues that the committee has been  
21 examining -- why don't we -- so if you look on slide 43, page  
22 43 --

23 A I should say you asked whether I made any comments  
24 on this briefing, and I identified that one. It is 43 pages  
25 long. I haven't necessarily identified every comment that I

1       may have offered, but I do believe that the comment I  
2       described is the most significant comment that I offered.

3             Q     Okay. Thank you.

4             In earlier drafts of the briefing slides, the "If We  
5       Deny" slide included stronger language. An October 29th  
6       draft provided the following legal prediction if EPA denied  
7       the waiver: EPA likely to lose suit. Was this legal advice  
8       discussed at the prebriefing?

9             A     I don't remember that phrase being discussed at the  
10       prebriefing. Certainly at -- and whether there was a  
11       designated prebriefing at all. But certainly there were a  
12       number of discussions that we had about the legal  
13       vulnerability of different options. And I believe that we --  
14       I believe that my role in part was to ensure that the Office  
15       of General Counsel had ample opportunity to articulate their  
16       legal judgments. And I believe that their legal judgment is  
17       that -- was that denying the waiver had very significant  
18       legal risk.

19            Q     Okay. And just for the record, that was  
20       communicated both through the slide and verbally?

21            A     I believe that it was communicated in several fora,  
22       through this slide, verbally when these slides were presented  
23       to the Administrator, and in multiple meetings that we had,  
24       that Roger Martella, I, and others had, with the  
25       Administrator.

1 Q Okay.

2 Mr. Engle. I did not object to the line of questioning  
3 or the answers because I didn't know where the answers were  
4 going to go. But to the extent that the answers implicate a  
5 confidential attorney-client communication or an attorney  
6 work product, the Agency has instructed us to not answer  
7 questions that implicate those two things.

8 Mr. Dotson. Those both, both attorney-client and  
9 attorney work product, are privileges that the committee has  
10 the discretion to observe or not. And so I encourage you to  
11 note them, and we will be happy to note them for the record  
12 should they arise.

13 Mr. Engle. Uh-huh.

14 BY MR. DOTSON:

15 Q Okay. Do you recall at this briefing did career  
16 EPA staff clearly communicate to the Administrator that they  
17 believed that the compelling and extraordinary conditions  
18 criterion was met?

19 A Yes.

20 Q Did any staff at the briefing provide information  
21 that would support the view that California did not have  
22 extraordinary and compelling conditions?

23 A Can you repeat that?

24 Q Did any staff at the briefing provide information  
25 that would support the view that California did not have



1 extraordinary and compelling conditions?

2 A Yes. Staff provided, I think, in this briefing the  
3 arguments that would be made if the ultimate decision were to  
4 deny the waiver on the grounds of not having compelling and  
5 extraordinary circumstances. And I believe that staff  
6 explained what would need to be said if that were the  
7 ultimate decision. That was the ultimate decision. And I  
8 think the final decision document reflects generally the  
9 approach that is articulated in --

10 Q What I am asking is --

11 A It may not be this briefing, it may be another one  
12 of the briefings around this same time frame that laid out  
13 different options. But ultimately, of course, I think I have  
14 said that all EPA recommendations that I am aware of were to  
15 grant the EPA employee recommendations, whether they be staff  
16 or me or someone in a similar position, were to grant the  
17 waiver. In order to grant the waiver, they have to meet all  
18 three criteria. So, therefore, I think all of those  
19 recommendations are a recommendation that the compelling and  
20 extraordinary criterion was met.

21 Q The committee has also been examining an effort by  
22 the Department of Transportation to contact Members of  
23 Congress and Governors regarding the California waiver. Do  
24 you have any personal knowledge of any communications between  
25 the Department of Transportation and EPA regarding the

1 waiver?

2 A Yes.

3 Q Can you tell us about these contacts?

4 Mr. Engle. The witness is unable to answer that  
5 question at this time.

6 Mr. Dotson. And the objection is?

7 Mr. Engle. The same that has been raised before.

8 Mr. Dotson. Now, this doesn't address -- this is not a  
9 matter that involves the White House. I am asking about  
10 communications between the Department of Transportation and  
11 the EPA.

12 Mr. Engle. That's correct.

13 Mr. Dotson. Is the basis of the objection that there is  
14 White House involvement in those communications?

15 Mr. Engle. The instruction that we were given from the  
16 Agency was to not answer a series of questions related to a  
17 series of topics. And your question touches on -- is a  
18 question about that topic. And once again, we are put in a  
19 position of having to say that we are unable to answer that  
20 question at this time.

21 BY MR. DOTSON:

22 Q Prior to press accounts, did you know that  
23 Department of Transportation officials were calling Members  
24 of Congress and Governors to encourage them to file comments  
25 with EPA opposing the waiver?

1           A     No.

2           Q     Prior to press accounts, did you know whether  
3 Administrator Johnson knew that Department of Transportation  
4 officials were calling Members of Congress and Governors to  
5 encourage them to file comments with EPA opposing the waiver?

6           A     No.

7           Q     Thank you.

8           On December 19th, 2007, Administrator Johnson announced  
9 that he had denied the California waiver request. When did  
10 you learn of his final decision?

11          A     That Monday. I don't recall the date.

12          Q     How did you learn of the decision?

13          A     It must have been the 17th. The Administrator came  
14 into my office and told me.

15          Q     And just so I am clear, is that a day before or is  
16 that several days before the decision?

17          Ms. Bennett. Monday was the 17th of December.

18          The Witness. That's what I thought.

19                BY MR. DOTSON:

20          Q     Two days before. Okay.

21                We understand that during the afternoon of the 19th,  
22 Administrator Johnson summoned a few career staffers to the  
23 conference room to tell them of his decision and to have them  
24 review the letter he was going to send to Governor  
25 Schwarzenegger and his press statement; is that correct?

1 A Yes.

2 Q Were you in the room at that time?

3 A Yes.

4 Q Who else was in the room?

5 A I may have difficulty remembering everybody, but I  
6 believe that the Administrator, Roger Martella, MaryAnn  
7 Poirier, Margo Oge, Carl Simon, John Hannon. I believe  
8 Michael Horowitz, Charles Ingebretson. I cannot confirm with  
9 certainty that all of those individuals were in the room, and  
10 I cannot confirm with certainty that that is an exhaustive  
11 list, but that is the best of my memory.

12 Q Okay. Is it true that someone from the press  
13 office was managing the letter and the Administrator's  
14 statement?

15 A When you mention the press office, I think that  
16 there probably was somebody from our Office of Public Affairs  
17 in the room, but I do not recall who that individual was.

18 Q Okay.

19 A But I am sorry, your question --

20 Q My question was was the press office or someone  
21 from the press office, the Public Affairs Office, managing  
22 the letter and the Administrator's statement?

23 A No, that's not the case.

24 Q Do you know who was managing those documents?

25 A Initially, it was coming out of the Office of Air

1 and Radiation. Bob Meyers is in charge of that office. When  
2 it came to the Administrator's office, I took charge.

3 Q When was the first time you received the letter and  
4 the Administrator's statement?

5 A I believe that I saw a draft the afternoon of the  
6 17th.

7 Q Did Bob Meyers draft the letter and the statement?

8 A I believe so.

9 Mr. Engle. At this point I would like to raise a point  
10 of personal privilege, that the witness's day started at 7:30  
11 this morning, which was 10 hours ago, and in that 10-hour  
12 period he has been working very hard. And the witness would  
13 request that we conclude as quickly as possible today.

14 Mr. Dotson. Okay. Duly noted.

15 Ms. Bennett. With the intention of continuing tomorrow?

16 Mr. Dotson. I think at this point I would have to check  
17 on that.

18 Ms. Moore. I think this is 40 minutes into your third  
19 round, and we haven't had a third round. And now we  
20 definitely want to expedite things. There would be questions  
21 as to how the time would be --

22 Mr. Baran. Would your preference be to continue  
23 tomorrow?

24 Ms. Bennett. I would like to in the first instance ask  
25 the witness. I mean, our interest is ensuring there is an

1       adequate amount of time to ask our questions. So I would  
2       defer --

3             Mr. Engle. The witness is available tomorrow.

4             Mr. Dotson. We are about 40 minutes into our set, I  
5       guess. If you would be agreeable to freezing the clock, I  
6       can look into this. I don't want to lose my time.

7             Ms. Bennett. Oh, no, if you want to --

8             Mr. Dotson. You want to freeze the clock?

9             Ms. Bennett. Okay.

10            Mr. Dotson. Great. Give me a moment.

11            [Recess.]

12            Mr. Dotson. The Majority and Minority have just  
13       consulted regarding the witness's schedule, and what we have  
14       decided to do is Majority is going to discontinue our  
15       questioning session. We asked questions for approximately  
16       40 minutes. Minority is going to have 40 minutes to protect  
17       their rights to ask questions. And we are going to proceed  
18       with that now.

19            BY MS. BENNETT:

20            Q     Hi. Just to refresh, I am Brooke Bennett.

21            A     Hi.

22            Q     I think we met about 5 hours ago. I apologize if  
23       some of the questions come in an unusual order, but I just  
24       wanted to follow up with some of the things that you had been  
25       discussing with Majority counsel earlier, and I am going to

1 basically jump right into it.

2 One of the first things that you mentioned was that you,  
3 if I may paraphrase your words -- your job was to ensure that  
4 the Administrator had the information that he needed to make  
5 his decisions. Is that a correct characterization?

6 A That is one of the responsibilities that I see I  
7 have, yes.

8 Q So in terms of the type of information, on a daily  
9 basis what kind of information would that consist of?

10 A It, of course, depends on the nature of the  
11 decision. And the Administrator makes a wide range of  
12 decisions in his role.

13 Q Well, in terms --

14 A If you are asking about a rulemaking or --

15 Q Right.

16 A -- a decision like the California waiver, he has a  
17 large appetite for information, as the number of briefings  
18 for the California waiver, I think, illustrate. And so I saw  
19 it -- see it -- in the case of the California waiver saw it  
20 as my role to both react to requests for information, but  
21 also anticipate what sort of information he may need in  
22 helping him sort through the relevant factors for him in  
23 making this decision.

24 Q And in your experience specifically with providing  
25 information to assist in the decisionmaking process with the

1 California waiver, what you had mentioned before in terms of  
2 the Administrator's having a large appetite for information,  
3 was that the same case in the California waiver process?

4 A That was the case in the California waiver process,  
5 yes.

6 Q And so it was your -- is it correct to assess that  
7 the Administrator was interested in receiving a wide range of  
8 information, options, discussion?

9 A He asked me and others to make sure that he was  
10 presented with a wide range of options.

11 Q Uh-huh.

12 A I think that we were successful in providing a  
13 range of options. He pushed more on a broader range and a  
14 more detailed characterization of those options, and we tried  
15 to accommodate that. I think that the briefings that have  
16 been discussed today show a wide range of options that the  
17 Administrator considered.

18 Q And one of the issues that we have talked about,  
19 brushed upon today is the varying gradations of legal  
20 defensibility of some of the options that were presented to  
21 the Administrator. Would staff have presented and would the  
22 Administrator have ever accepted an option or a piece of  
23 information or advice that in some way wasn't legally  
24 defensible?

25 A I think that we eliminated from consideration



1 options that were not legally defensible.

2 Mr. Engle. And I will have an objection or comment to  
3 that. If the Agency views that as an attorney-client  
4 communication or attorney work product, they may assert that.

5 Ms. Bennett. Okay. Thank you for marking that. Okay.

6 BY MS. BENNETT:

7 Q One of the questions that was asked of you earlier  
8 today, according to my notes, was whether any staff argued --  
9 whether any of the career staff had argued with the  
10 Administrator whether the criteria presented to him required  
11 him to deny the waiver. At any time was there information  
12 presented to the Administrator which required him to deny the  
13 waiver?

14 A Do you mean required to grant?

15 Q No, deny.

16 A I don't think that career staff would have argued  
17 that he was required to deny the waiver.

18 Q But that was --

19 A Their recommendation was rather to grant the  
20 waiver.

21 Q I understand that. But the question that was asked  
22 was whether or not anything presented to him required him to  
23 deny the waiver. And so --

24 A No.

25 Q No. And just so I am clear, one point that we have

1       been discussing earlier today was in one instance you  
2       referred to the Administrator's early interests in seriously  
3       exploring granting the waiver, and then at another time you  
4       referred to it alternatively as the Administrator's interest  
5       in granting the waiver. Could we just clarify for the record  
6       the interest that the Administrator had expressed to you with  
7       regard to a final disposition of the waiver?

8             If I understood correctly, and please correct me if I am  
9       wrong, because I think perhaps I do misunderstand this, in  
10      the first instance the early interest that he expressed was  
11      in granting the waiver; however, later on in the process  
12      there was an interest in finding a middle ground. Did this  
13      represent his taking a final decision at those varying stages  
14      in the decision process as you had previously discussed, or  
15      was that -- or in the alternative, was it more an issue of  
16      the Administrator just wishing to get more information on  
17      various options? And the reason why I ask is because I think  
18      perhaps I am confused based upon --

19            A     If your question was did he make a final decision  
20      prior to Wednesday, December 19th, I think the answer is no.  
21      His final decision occurs when he puts pen to paper.

22            Q     In your discussion with Majority counsel earlier  
23      today, I was left with the impression that at an early stage  
24      in the decision and consideration process, the Administrator  
25      had favored granting the waiver. That then changed to

1 favoring granting a partial waiver. Is that a correct  
2 characterization? And please clarify however you wish.

3 A I think that's generally fair, that over the course  
4 of a period of months he certainly shifted his focus and his  
5 stated interests to me and others from a full grant to a  
6 partial grant.

7 Q And that's based upon conversations that you had  
8 with the Administrator?

9 A Yes.

10 Q On specific conversations, or your general sense  
11 from a variety of conversations with him?

12 A I am not basing that statement on a specific  
13 conversation, so I think it is based on the weight of the  
14 conversations and other interactions that I had with the  
15 Administrator over the course of that period.

16 Q Okay. I think earlier on you were asked whether  
17 the Administrator had ever told you his rationale for denying  
18 the waiver. And if I recall correctly, your response was  
19 that the rationale for denying the waiver was developed by  
20 the Agency; is that correct? So I may clarify, within the  
21 Agency, within EPA.

22 A The rationale presented in the final decision  
23 document was developed by the Agency.

24 Q Okay. And to clarify, the rationale in the final  
25 decision document is or is not the same as the rationale in

1 the letter that was written to Governor Schwarzenegger on  
2 December 19th?

3 A I think that the rationale is basically the same.  
4 The letter to the Governor was, if I recall correctly, one  
5 and a half pages long. And the rationale in the final  
6 decision document was more on the order of 50 pages. So  
7 there is a lot more in the latter. But I think the general  
8 rationale was the same.

9 Q And so when you mentioned that the rationale for  
10 the decision document was developed by Agency staff, the same  
11 would be the case for the rationale that was included in the  
12 December 19th letter?

13 A Yes.

14 Q Okay. Was there any sort of White House input into  
15 the rationale in the December 19th letter, or, for that  
16 matter, the decision document?

17 A Yes.

18 Q And does that go beyond whatever may or may not  
19 have been discussed at a meeting at the White House which  
20 took place, I believe, before the December 19th letter was  
21 penned?

22 Mr. Engle. The witness is unable to answer that  
23 question at this time.

24 Ms. Bennett. Okay.

25 BY MS. BENNETT:

1           Q     Throughout the course of the questioning today,  
2 there have been questions asked about the advice that was  
3 given by career staff, EPA career staff. Were there staff  
4 from EPA of another nature who either were providing advice  
5 to the Administrator, or who were in a position to be  
6 providing advice to the Administrator?

7           A     I consider myself part of the Administrator's  
8 staff. I am not a career employee of the Agency.

9           Q     And is someone -- strike that.  
10           Is Bob Meyers a career, or is he a political staff  
11 person?

12          A     I don't know whether he is the same schedule  
13 employee as I am.

14          Q     Uh-huh.

15          A     But he is not career --

16          Q     Uh-huh.

17          A     -- staff.

18          Q     Can you help me understand the distinction between  
19 career staff and another category of staff such as yourself?

20          A     I can try.

21                I was asked by the Administrator to join the Agency to  
22 work for him, and that is with an understanding that I am  
23 serving as long as he wants me to serve him, and that I am  
24 not part of the career Civil Service of the Federal  
25 Government. And I am serving him in a particular personnel

1 slot that he has available to fill at his discretion outside  
2 of the normal hiring practices for career employees of the  
3 Agency.

4 Q In your opinion, should the advice of career staff  
5 be treated differently to staff from another category of  
6 employee? Sorry, regarded differently, be that from an  
7 outsider, i.e., in the course of an investigation, or an  
8 insider in the course of the day-to-day activities?

9 A In my experience at the Agency, people of all  
10 stripes try to provide the best advice they can. I certainly  
11 do. And I have confidence that career staff, in the case of  
12 the California waiver, did as well.

13 Q I am struck by the fact that in I think it was one  
14 of the PowerPoints at which we looked today which laid out  
15 the three options, granting, denial, and a partial grant,  
16 that PowerPoint and those recommendations were prepared by  
17 career staff as well as political staff. Is that a correct  
18 assessment?

19 A Ultimately the Agency is run by a political  
20 appointee, the Administrator. And offices are generally run  
21 also by Senate-confirmed political appointees. In the case  
22 of the Office of Air and Radiation, we have a vacancy. But I  
23 guess that I don't -- I see it as a group effort to  
24 ultimately provide the decisionmaker the best advice that we  
25 can. And I could not have provided the advice that I

1 provided without the assistance of career staff. And I would  
2 like to think that I helped them understand the sorts of  
3 questions that I thought the Administrator would benefit from  
4 their advice on. So in that sense I think that, and I  
5 certainly hope that, the roles are complementary and  
6 additive.

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1       RPTS SCOTT

2       DCMN HERZFELD

3       [6:07 p.m.]

4                       BY MS. BENNETT:

5               Q       But that includes also providing the Administrator  
6       with a range of options, some with which career staff --  
7       referring again to career staff -- may not necessarily agree,  
8       but at least it is provided as an option to the  
9       Administrator; is that correct?

10              A       The Agency, the team of us working, presented a  
11       range of options. The Administrator requested a range of  
12       options be produced, and they were produced, and that was a  
13       joint effort of many people across offices and across the  
14       career ranks and the political ranks. I think that we  
15       ultimately did our job of providing him with the information  
16       that he felt that he needed to make a decision.

17              Q       Was the process of providing to the Administrator  
18       options -- and I think you mentioned that option selection  
19       process earlier -- something that was characteristic to be  
20       part of the Administrator's decision on other major  
21       decisions, having this range of options?

22              A       Generally if there are a range of options, the  
23       practice is to present the decisionmaker with that range of  
24       options with associated technical and legal facts and advice  
25       and recommendations, and that's what we did in this case.



1           Q     I'm going to ask you one question now about the  
2           endangerment finding very briefly.

3           You mentioned that the endangerment finding was  
4           transmitted to OMB for review, and I think we established  
5           that you e-mailed that to them.

6           A     Yes.

7           Q     You mentioned that the White House responded to  
8           your e-mail.

9           A     Yes.

10          Q     For the record, we didn't establish who responded  
11          to you; is that correct?

12          A     That is correct.

13          Q     And we did not, for the record, establish what that  
14          response was; is that correct?

15          A     I believe that is correct.

16          Q     Okay. You were also asked whether the  
17          White House -- they, the White House -- were familiar with  
18          the content of the endangerment finding before they had  
19          received that.

20          A     I remember that question.

21          Q     Can you just remind us for the record what your  
22          response to that was?

23          A     I believe my response was "yes."

24          Q     Okay. You also were asked whether you had  
25          discussed the response you had received to your e-mail from

1 the White House -- whether you had discussed that with the  
2 Administrator. Am I correct in recalling that your response  
3 was that you had discussed the White House's response?

4 A I missed a word. I'm sorry.

5 Q I'll start again.

6 You were asked whether you had discussed with the  
7 Administrator the response that you had received from the  
8 White House to your having transmitted to them via e-mail the  
9 endangerment finding.

10 Do I recall correctly that your response to that was  
11 "yes"? Not the nature of the discussion, but just whether  
12 you had discussed it, your response, with the Administrator.

13 Mr. Engle. Could you restate the question, maybe not in  
14 the form of "what your recollection" is, but a direct  
15 question as to what you would like to ask?

16 Ms. Bennett. Sure.

17 BY MS. BENNETT:

18 Q We established that you received a response from  
19 the White House when you transmitted the endangerment finding  
20 to them by e-mail.

21 A Yes.

22 Q Did you discuss that response with the  
23 Administrator?

24 A Yes.

25 Q Okay. Going back to the discussion about the

1 California waiver, you had mentioned that at some point, in  
2 the context of the California waiver, you had had discussions  
3 with White House staff about some matter relating to the  
4 California waiver. My question is: Was it on a day-to-day  
5 basis common, uncommon for you to discuss matters with  
6 White House staff?

7 Mr. Engle. The witness cannot answer that question at  
8 this time.

9 Ms. Bennett. I can restate the question. I can restate  
10 the question.

11 The Witness. Please.

12 BY MS. BENNETT:

13 Q In the course of your day-to-day activities during  
14 your tenure in the Office of the Administrator, do you  
15 consult with the White House, with White House staff?

16 A Yes.

17 Q Can you give an average of whether that would be on  
18 a daily basis, on a monthly basis or on a weekly basis? I  
19 appreciate that that is imprecise, but this is just to get a  
20 sense of whether that is a common activity or an uncommon  
21 activity.

22 A One of my roles is to work with what we call the  
23 "interagency process," working decisions throughout the  
24 executive branch. In that role, for a variety of decisions  
25 and rulemakings, I have routine conversations with my

1 counterparts throughout the executive branch, whether that be  
2 in agencies or in departments or in different offices in the  
3 White House.

4 Q Offices in the White House, I think you just said?

5 A Yes, that's what I tried to say.

6 Q Likewise, in the course of your day-to-day  
7 activities in your current position, do you attend meetings  
8 at the White House?

9 A I have regular meetings at the White House, yes.

10 Q Okay. One question. There is a name that has come  
11 up on several of the documents that we've seen. It's  
12 Christopher Grundler. What is his role within EPA?

13 A He is in the Office of -- in OTAQ, Office of  
14 Transportation and Air Quality, within the Office of Air and  
15 Radiation. I believe that he is the Deputy to Margo Oge, but  
16 I may not have his title correct.

17 Q Was he specifically involved in the decisionmaking  
18 process regarding the California waiver?

19 A I believe he was involved either because it's in  
20 his chain of command and/or because he had substantive  
21 involvement, yes.

22 Q Do you recall?

23 A I believe so.

24 Q I apologize. Do you recall his having attended any  
25 of the briefings with the Administrator that we have

1 discussed today, for example, October the 30th, September the  
2 20th-21st, September the 12th?

3 A I don't recall. I believe that he works and  
4 lives -- or works. I don't know where he lives -- in  
5 Ann Arbor -- or in EPA's Ann Arbor office. Some of our  
6 meetings we have teleconferenced. Some of our meetings we  
7 videoconference. In some of our meetings, we have neither.  
8 So -- and sometimes people from Ann Arbor come to D.C. for  
9 meetings. So that is all to say I don't know.

10 Q Okay. There had been reports in the press that  
11 Margo Oge and Karl Simon had been involved in an effort, I  
12 believe, in which Christopher Grundler had been assigned to  
13 prepare talking points for the former EPA Administrator when  
14 he came to talk with Administrator Johnson, and that these  
15 talking points which were provided to this outside party had  
16 been based upon information that was available to staff.

17 Do you know whether or not this was within Christopher  
18 Grundler's normal day-to-day activities to prepare talking  
19 points for an outside party?

20 A Well, I don't know what his day-to-day activities  
21 are, and I don't know what his duties are. I found it  
22 peculiar when I learned what had transpired.

23 Q On the same point, and in using your word  
24 "peculiar," did you find peculiar that the two individuals  
25 with the primary responsibility for providing the

1 Administrator with the best advice -- and those two  
2 individuals being Margo Oge and Karl Simon -- had been  
3 involved in preparing talking points which were intended to  
4 reach the Administrator outside the normal course of  
5 providing advice to the Administrator?

6 A I'm sorry. What is your question?

7 Q Did you find peculiar not only that it had  
8 happened, but that the two individuals with the primary  
9 responsibility for preparing independent advice with regard  
10 to the disposition of the California waiver were also  
11 involved in that activity? I'm speaking specifically with  
12 regard to their positions and responsibilities.

13 A Yes. I think that that was one of the reasons that  
14 I said I found it peculiar. In my experience, it's often the  
15 case that people who are not involved at all in a decision or  
16 who are only very tangentially involved are more likely to  
17 work through different avenues. That was not the case for  
18 these individuals.

19 Q Okay. I know that I have a handful of minutes  
20 left, and there is one thing that I did want to ask you.

21 What brought you back to EPA?

22 A Well, when I left EPA, I wanted to work on climate  
23 policy. At that point in time, when I looked out at the  
24 landscape, I didn't think that the best opportunities were  
25 within the Agency for working on climate policy.

1           My wife and I had a wonderful time traveling and  
2           spending time together. Literally, the day that I got back  
3           to D.C. -- that we got back to D.C. from those travels -- was  
4           the day the President made a Rose Garden speech announcing  
5           his direction to EPA and other agencies to take the first  
6           steps towards regulating greenhouse gases. It was, in part,  
7           in response to the Supreme Court case. The Supreme Court  
8           case and that announcement profoundly changed the landscape,  
9           in my view, and changed my calculation from the Agency's not  
10          being the place where there's interesting, productive work on  
11          climate policy to an exceedingly interesting place.

12           I was fortunate enough to be invited back by the  
13          Administrator to head up the Agency's climate policy and, in  
14          particular, the response to the Supreme Court and the  
15          associated first-ever Federal regulations of greenhouse  
16          gases. It was a fantastic opportunity and one that I was  
17          very fortunate to have been given by the Administrator.  
18          That's the reason I came back.

19           Q     Okay. I know I have a few minutes left, so I want  
20          to get one question out.

21           I understand -- and you talked about this earlier --  
22          that the December 19th letter was far less explanatory than  
23          the final decision document that came out literally at the  
24          end of February. The decision document on the California  
25          waiver makes a distinction between carbon dioxide and other

1 pollutants, and in a lot of ways it's based upon the global  
2 nature of the carbon dioxide and the diffuse character of  
3 carbon dioxide, et cetera.

4 Is it correct to say that the decision document,  
5 therefore, to deny the waiver was based on a legal  
6 distinction rather than one necessarily supported entirely by  
7 the science? Sorry. Different from previous California  
8 waivers that had been granted.

9 A Well, the Agency and the Administrator have clearly  
10 articulated their -- the Administrator has articulated his  
11 judgment that greenhouse gases are sufficiently distinct from  
12 other pollutants that have been at issue in previous waivers  
13 and to take a different approach. That judgment, as I  
14 understand it, is based on the nature of the air pollution  
15 problem caused by greenhouse gases relative to the  
16 air pollution problem caused by other pollutants such as  
17 ozone precursors.

18 I'm not sure whether I can characterize that as strictly  
19 a scientific distinction or as strictly a legal distinction  
20 or as some combination, but I think that that is the  
21 distinction that the Administrator has made and has  
22 articulated in the decision document.

23 Ms. Bennett. Okay. I think my time is up.

24 Mr. Baran. It was up a few minutes ago.

25 Ms. Bennett. You're right, actually. Thank you for



1 indulging me the extra time. Are we done?

2 Mr. Dotson. Well, this concludes the deposition of  
3 Mr. Burnett. Thank you very much on behalf of the Chairman  
4 and on behalf of the committee for participating today. I'm  
5 sure we'll be in touch on these matters in the future.

6 The Witness. It was my pleasure. I hope that I have  
7 been clear and that you will indulge me where I have not  
8 been. I appreciate the understanding that the Chairman had  
9 in the voluntary nature of my appearance today.

10 Mr. Baran. We should just add that, once the transcript  
11 is prepared, you are welcome to come in and review the  
12 transcript for any transcription errors. We'll let you know  
13 once we have the transcript. Hopefully, that will be as soon  
14 as tomorrow.

15 The Witness. Thank you.

16 Ms. Bennett. Thank you for your time.

17 The Witness. Great. Thanks.

18 [Whereupon, at 6:30 p.m., the deposition concluded.]

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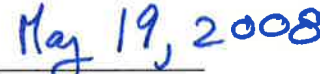
**ERRATA SHEET**

**FOR DEPOSITION OF JASON BURNETT**

<b><u>PAGE</u></b>	<b><u>LINE</u></b>	<b><u>CORRECTION</u></b>
4	3	“Leo” should be “Leonard”
7	7	“econ” should be “economics”
7	15	“careful” should be “California”
7	19	“area” should be “hearing”
32	16	“cover” should be “briefing”
37	14	insert “process” after “NAAQS”
37	23	“NAAQS for the years” should be “NAAQS reviews”
39	1	“were” should be “was”
40	9	“.70” should be “.070”
41	15	“.07” should be “.070”
52	10	insert “at different times” after “or” and delete “over time for the same level of 8-hour ozone”
60	10	“objection” should be “option”
63	7	period should be a question mark
64	24	“engagement” should be “endangerment”
69	22	“decision, the” should be “decision, not the”
71	2	delete comma after “standard”
71	3	“the requisite” should be “than requisite”
83	20	insert “based” after “primarily”
84	22	insert “with an adequate” after “health”
88	1	insert “as leading you” after “viewed”
90	10-11	should read “based on a 1 year earlier 3 year average”
98	25	“admissions” should be “submissions”
100	17	delete comma after “ozone”
113	3	“voluntarily” should be “voluntary”
119	4	insert double dash after “branch”
122	1	“criteria” should be “criterion”
122	20	“Jeff” should be “Greg”
129	14-15	insert “employee” after “EPA” and delete “were to grant the EPA employee recommendations”

I certify that, with the above changes, this is an accurate transcript of the answers given by me to the questions asked by the Committee.

  
Jason Burnett

  
Date

Substantive Clarification

Upon review of the transcript, I would like to clarify my response on page 14, line 18. The response should include the following: "I believe that the heads of individual offices may have stated the views or recommendations of their offices."

  
Jason Burnett

May 19, 2008  
Date