

**HEARING ON THE NOMINATION OF DAVID R.
HILL TO BE ASSISTANT ADMINISTRATOR (GEN-
ERAL COUNSEL) FOR THE ENVIRONMENTAL
PROTECTION AGENCY**

HEARING
BEFORE THE
**COMMITTEE ON ENVIRONMENT AND
PUBLIC WORKS**
UNITED STATES SENATE
ONE HUNDRED TENTH CONGRESS
SECOND SESSION

APRIL 10, 2008

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**HEARING ON THE NOMINATION OF DAVID R.
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(GENERAL COUNSEL) FOR THE ENVIRON-
MENTAL PROTECTION AGENCY**

TUESDAY, APRIL 10, 2008

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The full committee met, pursuant to notice, at 9 a.m. in room 406, Dirksen Senate Office Building, Hon. Barbara Boxer (chairman of the full committee) presiding.

Present: Senators Boxer, Inhofe, Barrasso, Bond, Cardin, Carper, Craig, and Whitehouse.

**OPENING STATEMENT OF HON. BARBARA BOXER,
U.S. SENATOR FROM THE STATE OF CALIFORNIA**

Senator BOXER. The Committee will come to order.

We are here today to consider the nomination of Mr. David Hill to be EPA's General Counsel. The General Counsel is EPA's legal conscience, a vital internal check. That check is supposed to ensure that EPA follows the law and fulfills its mandate.

When EPA was created, President Nixon said it should be "a strong independent agency that established and enforced environmental protections and assisted others in combating pollution."

In its first 30 years, Democrats and Republicans worked together to support EPA's progress in cleaning up our Nation's air, water and other resources. EPA's programs were improving the quality of our environment and helping to protect our children from deadly diseases caused by pollution.

I am very distressed to say that EPA today is a shadow of its former self. Our Nation's most important independent protector of public health and the environment has turned into an agency that sadly has not followed the law. This has been pointed out by multiple judges liberal, moderate and conservative.

Let me tell you about a few of the recent court decisions that have found EPA's actions in violation of the law. In *New York v. EPA* in 2006, the D.C. Circuit Court said that EPA's approach to the law would make sense only in a Humpty Dumpty world. In *New Jersey v. EPA* this past February, the same court overturned EPA's rule seeking to weaken controls on mercury emissions, saying "EPA's explanation deploys the logic of the Queen of Hearts, substituting EPA's desires for the plain text of the Clean Air Act."

In *Mossville Environmental Action Now v. EPA* in 2004, the D.C. Circuit rejected EPA's attempt to exempt whole categories of toxic pollutants which it said violated EPA's "clear statutory obligation to set emissions for each listed hazardous air pollutant."

Sadly, there are many more examples and I will place in the record, without objection, a list of these cases which is astounding. We have a long list of court decisions where EPA actions have been overturned. It is a remarkable record of losses, especially for an agency that has always been given great deference by the courts.

Today, we face serious environmental problems that threaten our children's and family's health and the very future of our planet. I do have concerns and questions about the nominee before us today. His past work for polluting industries raises issues. In addition, his participation while at DOE in developing the EPA mercury rule that the court overturned and his work on the EPA rule that weakened air pollution controls for power plants that was also reversed by the court raises significant questions.

I also have concerns about his advocacy for the deeply flawed Yucca Mountain nuclear waste disposal facility and about some of his work on high-level nuclear waste tanks at DOE sites.

Being nominated to serve as the legal conscience of an agency is a very important responsibility. EPA's next General Counsel should have a track record of working to increase protections and open up government, and a demonstrated capacity to stand up to those who advocate ignoring the law.

I hope you understand, Mr. Hill, that my comments are not meant to be personal. They are just based on the record. So I plan to ask Mr. Hill to respond to my concerns.

Senator Craig.

[The prepared statement of Senator Boxer follows:]

STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR
FROM THE STATE OF CALIFORNIA

We are here to consider the nomination of Mr. David Hill to be the Environmental Protection Agency's General Counsel.

The General Counsel is EPA's legal conscience, a vital internal check who is supposed to ensure that EPA follows the law and fulfills its mandate.

When EPA was created, President Nixon said it should be a strong, independent agency that established and enforced environmental protections and assisted others in combating pollution.

In its first 30 years, Democrats and Republicans worked together to support EPA's progress in cleaning up our nation's air, water, and other resources. EPA's programs were improving the quality of our environment and helping to protect our children from deadly diseases caused by pollution.

However, I am distressed to say that EPA is a shadow of its former self; our nation's most important independent protector of public health and the environment is an agency that does not follow the law, as has been pointed out by multiple judges liberal, moderate and conservative.

Let me tell you about just a few of the recent Court decisions that have found EPA's actions in violation of the law: In *New York v. EPA*, in 2006, the D.C. Circuit Court said that EPA's approach to the law would make sense only in a Humpty Dumpty world.

In *New Jersey v. EPA*, this past February, the same court overturned EPA's rule seeking to weaken controls on mercury emissions, saying: EPA's "explanation deploys the logic of the Queen of Hearts, substituting EPA's desires for the plain text" of the Clean Air Act.

In *Mossville Environmental Action Now v. EPA*, in 2004, the D.C. Circuit rejected EPA's attempt to exempt whole categories of toxic pollutants, which it said violated EPA's "clear statutory obligation to set emissions for each listed [hazardous air pollutant]".

Sadly, there are many more examples. We have a long list of court decisions where EPA actions have been overturned. This is a remarkable record of losses, especially for an agency that is given great deference in the courts.

Today, we face serious environmental problems that threaten our children's and families health and the very future of our planet. I have concerns and questions about this nominee. Mr. Hill's past work for polluting industries raises issues. In addition, his participation while at DOE in developing the EPA mercury rule that the court overturned, and his work on the EPA rule that weakened air pollution controls for power plants, and that was also reversed by the court, raise significant questions.

I also have concerns about his advocacy for the deeply flawed Yucca Mountain nuclear waste disposal facility, and about some of his work on high level nuclear waste tanks at DOE sites. Being nominated to serve as the legal conscience of an agency is a important responsibility. EPA's next General Counsel should have a track record of working to increase protections and open up government, and a demonstrated capacity to stand up to those who advocate ignoring the law. I plan to ask Mr. Hill to respond to my concerns.

**OPENING STATEMENT OF HON. LARRY CRAIG,
U.S. SENATOR FROM THE STATE OF IDAHO**

Senator CRAIG. Madam Chairman, thank you.

I came early because I have to leave very quickly, but I did want to be here in support of David. Let me say that I have had a personal working relationship with him.

Madam Chair, I would like you to listen to this. Thank you.

Senator BOXER. I will. I am just trying to figure out something.

Senator CRAIG. All right. Go right ahead.

Senator BOXER. All right.

Senator CRAIG. Thank you.

We have a national nuclear laboratory in Idaho and a substantial amount of buried waste. We also have waste tanks that were used in a waste management process. I must tell you that in my work with David he has been diligent and responsible to the law and to the responsibility of the Nation and very responsive to our State.

Our State and its attorneys and its appointed people who monitor this very closely have had a good working relationship with him. Clean-up is on schedule and on time. Milestones have been met. And here is a person who has been involved in that, and very sensitive to it and responsible in part for it. So I think it is important that the record show that.

I think as somebody who has probably monitored Yucca Mountain since the day the first rotary drill went in the side of the mountain, when you speak of a deeply flawed involvement, you speak, only of an opinion that is expressed by some versus opinions that are expressed by others, that the mountain is stable, sound, geologically capable of doing what it was intended to do.

It is the politics of this issue, in my opinion as somebody who has monitored it very closely, and not the science of it that will make the determination as to its credibility or lack thereof. David has been in my opinion no part of that and DOE has handled it responsibly. We now move to a licensing process for the mountain. It will have to stand on its own credibility with a very critical agency—the Nuclear Regulatory Commission. We will find out whether it stands the test of politics or it stands the test of science. That really is the issue.

Beyond that, I thank you for recognizing that these are issues that spiral around anyone, but it is the individual we ought to look

at and his or her capability to the position nominated. I must tell you if you are frustrated about EPA and how it is or is not being operated, I would suggest that if you look at David's record, there is only one conclusion you can draw from his professional capabilities. That is, he will bring responsibility and integrity to the office that he is being asked to serve in.

Thank you very much, Madam Chair.

Senator BOXER. Thank you so much, Senator. And believe me, we will take it to heart.

I will start with some questions. This may be a brief hearing.

Yes, let's do the statement.

STATEMENT OF DAVID R. HILL, NOMINATED TO BE ASSISTANT ADMINISTRATOR (GENERAL COUNSEL) FOR THE ENVIRONMENTAL PROTECTION AGENCY

Mr. HILL. Thank you, Madam Chairman.

Senator BOXER. By the way, how much time do you want for your statement? Will 7 minutes do it?

Mr. HILL. That will be more than enough.

Senator BOXER. OK. We will give you 7 minutes and you can have what you need.

Mr. HILL. Madam Chairman and members of the Committee, I am honored to appear before you today as the President's nominee to be General Counsel of the Environmental Protection Agency. I thank the Committee and the Chairman for holding this hearing to consider my nomination. I also thank the President for nominating me for this position.

I would like to introduce my wife Kristina who is with me at today's hearing. I also would like to introduce two of our daughters, Anna who is 8 years old and is in third grade, and Margaret, who is 5 years old and is in kindergarten. We decided that our third daughter, Julia, who is 3 years old might enjoy her preschool class today more than this hearing, so she is not here with me this morning.

Senator BOXER. So would I.

[Laughter.]

Mr. HILL. I want to thank all of them for the joy and the support they give me each day.

Since August, 2005, I have served as General Counsel of the U.S. Department of Energy. I served as the department's Deputy General Counsel for Energy Policy from 2002 until the Senate confirmed me as DOE's General Counsel. Before 2002, I was in private practice with Wiley, Rein and Fielding and Wilmer, Cutler and Pickering here in Washington and with the Blackwell Sanders firm in Kansas City, Missouri. I also served on the staff of the House of Representatives Committee on Agriculture.

While at DOE, I have worked closely with Secretary Bodman and other department officials to advance the department's work in its four main mission areas of energy, science, environmental management, and national defense. I have handled legal matters and have supervised attorneys working in all of these areas. It has been and continues to be a real privilege and a real honor for me to work for Secretary Bodman and with other officials at the department.

EPA's primary mission is to protect public health and the environment. If confirmed as the agency's General Counsel, I would seek to help the Administrator and other agency officials develop regulations and make decisions that will advance that mission and be sound and defensible both legally and from the policy perspective. My experience at another Federal agency would help me do that.

I have been a practicing lawyer for almost 20 years, and over time have worked for different clients with different perspectives and different viewpoints. I believe I could successfully make the transition from DOE to EPA and could use my knowledge and experience to help advance EPA's work.

One way in which my prior experience would be useful is that I have worked extensively with senior government officials throughout the Administration and have worked to help craft solutions to difficult problems that often involve competing arguments and viewpoints. I believe I could do the same at EPA.

At DOE, I also have managed and have worked with a large staff of attorneys, virtually all of whom are career Federal employees. Every day, I rely on their expertise and judgment, and they have my deepest respect and admiration. I hope I have earned their respect as well, as being a General Counsel who works hard, evaluates the law carefully, and works toward solutions that best advance the department's mission.

If confirmed as EPA's next General Counsel, I would look forward to working very closely with the career attorneys at EPA and I would rely heavily on their expertise and judgment. While I am aware of some of the legal matters and other challenges currently pending before EPA, I of course am not familiar with all of them. If I am confirmed, I anticipate that one of my first actions at EPA would be to meet individually with each of the Deputy General Counsels and Associate General Counsels to learn more about the issues on which they are working and how I might assist them in addressing those issues.

Madam Chairman and members of the Committee, I recognize that the work of EPA often is controversial. From my experience at DOE, I know that when presented with competing arguments and viewpoints it is difficult, if not impossible, for a decision to be made that makes everyone happy. Nevertheless, I assure you that if I am confirmed as EPA's General Counsel, I would do my best to help advance EPA's mission of protecting human health and the environment in a manner that considers all views and opinions, complies with the law, and serves the public interest.

At DOE, I have sought to do that by dealing with everyone fairly and by respectfully considering competing arguments and viewpoints. I would do the same at EPA if confirmed as that agency's General Counsel.

It would be an honor for me to serve as EPA's General Counsel at this time when so many challenging issues are presented to the country and to EPA. As both a lawyer and as the father of three young children, I would consider it a privilege to serve in this position and work to protect the health, environment and welfare of all Americans in a manner that is both faithful to the law and faithful to the trust placed in me.

Madam Chairman, that concludes my prepared statement. Thank you again for holding this hearing today. I would be glad to answer the Committee's questions at this time.

[The prepared statement of Mr. Hill follows:]

STATEMENT OF DAVID R. HILL NOMINATED TO BE ASSISTANT ADMINISTRATOR AND
(GENERAL COUNSEL) FOR THE ENVIRONMENTAL PROTECTION AGENCY

Madam Chairman, Senator Inhofe, and members of the Committee, I am deeply honored to appear before you today as the President's nominee to be an Assistant Administrator and General Counsel of the United States Environmental Protection Agency. I thank the Committee for holding this hearing today to consider my nomination. I also thank the President for nominating me for this position.

My wife Kristina is here with me today, along with our three beautiful daughters—Anna who is 8, Margaret who is 5, and Julia who is 3. I want to thank all of them for their patience and support, particularly during my 6 years of service at DOE, when the hours often have been long and I have not been able to spend as much time with them as I, or they, have wanted. I also thank my parents, Ronald and Shirley Hill, for the support and the opportunities they gave me growing up in Smithville, Missouri, and which allowed me to be here today.

I currently serve as General Counsel of the United States Department of Energy. I was confirmed by the Senate and appointed by the President to that position almost 3 years ago, and have served as DOE's General Counsel since August 2005. From March 2002 until I became the General Counsel, I served as DOE's Deputy General Counsel for Energy Policy. Before coming to the Department in March 2002, I spent most of my career in private practice, with Wiley, Rein & Fielding and Wilmer, Cutler & Pickering in Washington, DC, and with the Blackwell Sanders firm in Kansas City, Missouri.

As the Department of Energy's General Counsel, I am professionally responsible for the work of more than 250 attorneys throughout the country, and I directly supervise a staff of about 150 Federal employees in Washington. I work on the broad range of legal and policy matters that come before the Department, and often represent DOE in discussions or negotiations with colleagues in other executive branch agencies as the Administration considers significant rulemakings or policy matters. I also work with Members of Congress and their staffs on matters affecting the Department and its programs—in the Senate, particularly with the staff of the Energy and Natural Resources Committee and the Appropriations Committee. If confirmed as EPA's General Counsel, I would look forward to working with this Committee and its staff on the many important matters that come before the agency.

During my almost 20 years as a practicing lawyer, much of my work has been devoted to matters that have had significant energy or environmental components. Energy and environmental issues often are intertwined, both in terms of law and policy. As a result, both at DOE and in private practice I often have had the occasion to consider and evaluate both energy and environmental issues with respect to particular matters. If I am confirmed as EPA's next General Counsel, I believe this perspective would be useful as I seek to help the agency advance its mission of protecting human health and the environment in a manner that fully complies with the law. Moreover, while I obviously am not familiar with all of the matters currently pending before the EPA General Counsel's Office, I have a substantial amount of experience managing the general counsel's office of an executive branch agency, whose lawyers cover a very broad range of disciplines and substantive areas. I believe this experience would help enable me to effectively carry out the duties of the EPA General Counsel and to manage the legal work of that office.

I am fully aware that EPA and its Office of the General Counsel often handle issues that are controversial and on which there may be significant disagreements. If confirmed as EPA's General Counsel, I believe I could work effectively in that situation, and could help address issues in a manner that serves the public interest.

During my 6 years at DOE and particularly during my time as General Counsel, there have been many times that I have been engaged in the vigorous internal debate that often precedes the Administration or the Department making a particular decision. The public almost never sees this debate, but I have been a part of it many, many times. As I have participated in these discussions, I have worked extensively with both career and non-career attorneys and other officials at the Department of Energy and throughout the Government, as well as with non-governmental parties. I believe that in those dealings, I have earned the reputation of being careful and considerate of all viewpoints, of working hard, and of making and evaluating arguments on their legal, technical and policy merits. I try to deal with

everyone fairly and respectfully, and seek to evaluate and address arguments and issues so that I can make decisions, or advise the Secretary of Energy and other senior officials about their decisions, in a manner that complies with the law and best serves the public interest.

In all of these matters, I view myself as being responsible not simply for presenting issues, problems or analyses, but also for presenting solutions. I encourage the attorneys in DOE's Office of the General Counsel to approach their work in the same way. I believe that attorneys often can be uniquely helpful in crafting solutions to problems in a way that complies with the law while addressing the concerns of interested parties. If confirmed as EPA's General Counsel, I would hope to bring this same sense of purpose to my work at EPA.

The Congress, the President and the American people have entrusted the Environmental Protection Agency with the difficult and vitally important mission of protecting and safeguarding human health and the environment. If confirmed as EPA's General Counsel, I would do my best to help advance that mission in a manner that fully complies with the law and best serves the public interest. As a lawyer and as a senior Government official, it would be a great honor for me to serve in this position at this time, when so many challenging issues are presented to the country and to the EPA. As the father of three young children who will live for many decades with the consequences of decisions we make today, it would be my privilege and my duty to do what I can to effectively advance EPA's mission in a manner that is faithful to the law and to the trust that has been placed in both the EPA and in me.

I want to again thank President Bush and Administrator Johnson for the trust they have expressed in me by nominating me for this position. I thank the Committee for holding this hearing and considering my nomination to be EPA's next General Counsel. It would be an honor and a privilege for me to serve the American people in this position.

Madam Chairman, that concludes my prepared statement. I would be glad to answer the Committee's questions at this time.

RESPONSES OF DAVID R. HILL TO ADDITIONAL QUESTIONS
FROM SENATOR BOXER

Question 1a. In April 2007 the V.S. Supreme Court held in *Massachusetts v. EPA* that greenhouse gases (GHGs) are "pollutants" under the Clean Air Act and subject to regulation by EPA.

Have you participated in any EPA discussions, reports, rulemakings (including proposed, final, and advanced notices of proposed rulemaking) or other activities concerning GHGs? Describe in detail all such activities and the nature of your involvement in each.

Response. On May 14, 2007, and in response to the Supreme Court's decision in the *Massachusetts v. EPA* case, the President issued Executive Order 13432, which concerned cooperation among Federal agencies, including the Environmental Protection Agency (EPA) and the Department of Energy (the Department, or DOE), in protecting the environment with respect to greenhouse gas emissions from motor vehicles or the use of motor vehicle fuels, including alternative fuels. Among other things, that Executive Order requires the agencies to coordinate with each other on certain regulatory actions "to ensure the coordinated and effective exercise of the agencies to protect the environment with respect to greenhouse gas emissions from motor vehicles, nonroad vehicles, and nonroad engines, in a manner consistent with sound science, analysis of benefits and costs, public safety, and economic growth." That same day, and in recognition of the Supreme Court's decision in the *Massachusetts v. EPA* case, the President also directed EPA, DOE, and the Departments of Transportation and Agriculture to take the first steps toward regulations that would cut gasoline consumption by motor vehicles, using the President's 20 in 10 plan "as a starting point." Following the issuance of the Executive Order and the President's direction about agency actions, I participated on behalf of the Department of Energy in a number of interagency meetings concerning how the Federal Government should respond to the Supreme Court's decision. These meetings concerned potential regulatory actions and related reports by EPA, as well as by other agencies. In addition, several years ago when I was DOE's deputy general counsel for energy policy, I participated in some interagency and internal DOE discussions concerning EPA's decisions whether it could or would regulate CO₂ emissions under the Clean Air Act. During those meetings and discussions, I represented the Department of Energy and expressed the Department's views on relevant policy or legal matters.

Question 1b. Other than materials already placed in any public rulemaking docket, provide copies of all documents in DOE's or your possession or control relating to your involvement in such activities. (For purposes of these requests, "documents"

include all memos, e-mails, phone logs, calendar entries, notes, and other agency records.)

To the best of my knowledge, I have no documents in my possession or control relating to my involvement in the activities described in response to question 1a. For purposes of this response, what is in my possession or control refers only to what is in my possession or control in my personal capacity. I do not, in my personal capacity, have possession of or control over any official Department of Energy documents or records.

Question 2a. The regulatory docket for EPA's New Source Review rule on Routine Maintenance, Repair and Replacement (Docket OAR-2002-0068) (NSR Rule) includes handwritten edits, comments and inserts that you submitted to EPA.

What role did you play relating to the development of the policies reflected in the NSR Rule?

Response. In 2002, EPA issued a notice of proposed rulemaking concerning the routine maintenance, repair and replacement (RMRR) exclusion to New Source Review requirements. In 2003, EPA issued a final RMRR rule. The President's National Energy Policy, which was developed in early 2001 and issued in May 2001 (before I was appointed to a position in the Department of Energy), called for efforts to "provide regulatory certainty to allow utilities to make modifications to their plants without fear of new litigation." Furthermore, it recommended that EPA, in consultation with other agencies, review NSR regulations and report back to the President "on the impact of the regulations on investment in new utility and refinery generation capacity, energy efficiency, and environmental protection." Subsequently, in June 2001, EPA issued a background paper that reviewed the NSR program, and in June 2002, EPA sent to the President a report concerning the NSR program; that report contained some conclusions concerning needed improvements to the NSR program, including that changes to the program to improve the clarity and scope of the RMRR exclusion would be desirable.

I joined the Department of Energy in March 2002, as deputy general counsel for energy policy; prior to that time I was engaged in the private practice of law. I played no part in the development of the 2001 National Energy Policy or in the June 2001 EPA background paper concerning the NSR program. To the best of my recollection, I also did not play any part in the development of EPA's June 2002 report to the President concerning the NSR program. Again to the best of my recollection, my involvement with the RMRR regulations began in late summer 2002, when I participated along with other DOE personnel in reviewing, during the interagency review process, the draft RMRR notice of proposed rulemaking that had been prepared by EPA. I also participated in the interagency review process leading up to EPA's issuance of the final RMRR regulations in August 2003. My involvement in those processes was premised on the policy choices that had been made by others as to the direction of and policy objectives to be pursued in the RMRR regulations. During those meetings and discussions, I represented the Department of Energy and expressed the Department's views on relevant policy or legal matters, and to the best of my recollection, I was neither asked nor did I volunteer my personal opinion as to the policy direction and policy objectives being pursued.

Question 2.b Were you in support of the policies reflected in the NSR Rule? If so, describe in detail the reasons why you supported it.

Response. The Department of Energy generally supported the policy objectives that were advanced by EPA in the RMRR regulations that EPA proposed in 2002 and finalized in 2003. My participation in the interagency process involved representing, along with other Department officials, DOE's energy policy concerns. I do not recall developing or expressing a personally held view as to the policies reflected in the RMRR regulations, or as to the legal judgment by EPA that its course of action was legally permissible. It is possible I did so, but if so I do not recall it.

Question 2c. Other than materials placed in any public rulemaking docket, provide copies of all documents in DOE's or your possession or control relating to your involvement in each of these matters.

Response. To the best of my knowledge, I have no documents in my possession or control that are responsive to this request. For purposes of this response, what is in my possession or control refers only to what is in my possession or control in my personal capacity. I do not, in my personal capacity, have possession of or control over any official Department of Energy documents or records.

Question 2d. In addition to submitting the written comments on the NSR Rule to EPA included in the docket, did you participate in meetings or calls with Bill Wehrum or others at EPA regarding the rule, or did you in any other way provide views or input on the substance of the NSR Rule through meetings, calls, or otherwise?

Response. As noted in response to Question 2.a., part of my work as deputy general counsel for energy policy at DOE involved participation in the interagency review process for various regulations, including EPA's proposed and final rulemakings on the RMRR regulations. That participation included meetings or calls with Bill Wehrum—a senior official in EPA's Office of Air and Radiation and whose official duties included work on the RMRR regulations—and others at EPA regarding the proposed RMRR regulations that EPA issued in 2002, and the final regulations that the agency issued in 2003.

Question 2e. If you do not have records relating to particular instances of participation, then provide your best recollection of content of any such participation, including but not limited to (a) the issues discussed at each meeting, conversation, or exchange of information, and (b) the dates or over what time period they occurred.

Response. I do not have a specific recollection of particular interagency meetings or particular conversations during the interagency review process for the proposed and final RMRR regulations. That activity took place approximately five or six years ago, from about mid-2002 until EPA issued the final RMRR regulations in 2003. Both in the interagency review process as well as in discussions internally at DOE among Department personnel, I believe that at various times those discussions likely covered the range of energy policy issues addressed in EPA's notice of proposed rulemaking and notice of final rulemaking on the RMRR regulations.

Question 2f. Did you harbor or express any concerns about the legal risks associated with the statutory interpretations advanced by EPA in this rulemaking? If so, what were those concerns and how did you express them?

Response. At various points during the interagency review process for EPA's proposed and final RMRR regulations, I recall that there were discussions concerning the legal grounding for the regulations, and concerning the preamble explanation for the regulations. I, and I believe other executive branch officials participating in the interagency review process, understood and discussed that, despite favorable Supreme Court guidance in the Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), concerning deference to an agency's interpretations in its rulemaking activities of a statute the agency is charged by law to implement, there could be legal challenges to the final rules, and understood that there were legal risks associated with the regulations. I do not recall specific times, dates or content of particular discussions on those matters, but I do remember generally that discussions on those topics occurred. And, of course, there was a public discussion of legal bases for the proposed and final regulations set forth in the preambles for the proposed and final RMRR regulations, and I am sure that I participated in discussions on that text, though again I do not recall specific dates or times.

Question 2g. Do you believe that the legal interpretation advanced by EPA in the NSR rule were defensible? Did you believe that those legal interpretations would prevail? Do you agree with the D.C. Circuit's decision in *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006), including the Court's statutory interpretations and its treatment of EPA's legal arguments?

Response. At the time the proposed and final RMRR regulations were issued by EPA, I was DOE's deputy general counsel for energy policy, and I do not remember being called upon to offer a personally held view on the legal defensibility of those regulations. I also do not recall formulating a personally held view as to their legal defensibility, or about the probability of EPA prevailing in litigation if the regulations were challenged. As noted in response to earlier questions, however, I did participate on DOE's behalf in some discussions on legal and policy aspects of those regulations, and represented the Department and expressed DOE's views on relevant policy or legal matters. As to the question of whether I agree with the decision of the U.S. Court of Appeals for the D.C. Circuit in the case of *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006), which concerned the EPA's RMRR regulations, I have not evaluated the decision for the purpose of deciding whether I personally agree or disagree with the Court. Rather, I have reviewed the opinion to understand the Court's decision and its reasoning, for purposes of guiding future action.

Question 2h. Did you play any role in the administration's discussions and decisions to seek rehearing en banc of the D.C. Circuit's ruling, or to submit a petition for a writ of certiorari to the Supreme Court, in *New York v. EPA*? If so, please describe your role.

Response. In my role as general counsel of the Department of Energy, I did participate in interagency discussions concerning whether the United States should seek rehearing of the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006), and concerning whether the United States should submit a petition for a writ of certiorari to the

Supreme Court with respect to that decision. I had no decisionmaking authority with respect to either decision, as the Office of the Solicitor General at the Department of Justice has the authority to decide whether to seek rehearing and whether to file a petition for a writ of certiorari with the Supreme Court.

Question 3a. The regulatory dockets for EPA's mercury rules (Docket OAR-2002-0056 and legacy Docket ID No. A-92-55) ("Mercury Rules") include handwritten edits, comments and inserts that you submitted on EPA's draft mercury rule proposal. Your comments were submitted by facsimile and e-mail to Bill Wehrum at EPA in December 2003.

What role did you play relating to the development of the policies and legal interpretations reflected in the Mercury Rules?

Response. I joined the Department of Energy in March 2002, as deputy general counsel for energy policy, and prior to that time was engaged in the private practice of law. I did not participate in the development of the 2001 National Energy Policy, which among other things called for an approach to pollutant emissions that "would establish a flexible, market-based program to significantly reduce and cap emissions of sulfur dioxide, nitrogen oxides, and mercury from electric power generators." This multi-pollutant approach to air pollution controls subsequently developed particularly in the form of the Administration's Clear Skies initiative, which I believe was announced in February 2002. I did not play any part in the development of that legislative initiative.

To the best of my recollection, my involvement with the proposed and final Revision of the December 2000 Regulatory Finding concerning the listing of coal-fired and oil-fired electric utility steam generating units under section 112 of the Clean Air Act, and the rule setting performance standards pursuant to section III of the Clean Air Act for new coal-fired electric utility steam generating units and establishing a voluntary cap and trade program for new and existing coal-fired units (together, the "Clean Air Mercury Rule" or "CAMR"), which were proposed by EPA in December 2003 and finalized in March 2005, began in 2003 when I participated along with other DOE personnel in reviewing, during the interagency review process, the draft notice of proposed rulemaking that had been prepared by EPA. I participated in that interagency review process on the proposed rulemaking, as well as the interagency review process leading up to the issuance of the final rulemaking in 2005, and EPA's final action on reconsideration issued in May 2006. My involvement in those processes was premised on the policy choices that had been made by others as to the direction of and policy objectives to be pursued in CAMR. During those meetings and discussions, I represented DOE and expressed the Department's views on relevant policy or legal matters. To the best of my recollection, I was neither asked nor did I volunteer my personal opinion as to that direction and those policy objectives.

Question 3b. Were you in support of the policies and legal interpretations reflected in the Mercury Rules? If so, describe in detail the reasons why you supported them.

Response. The Department of Energy generally supported the policy objectives that were advanced by EPA in the Clean Air Mercury Rule proposed in 2003 and finalized in 2005. CAMR would have reduced utility mercury emissions by nearly 70 percent from 1990 levels. When issuing CAMR, the EPA noted that the rule marked the first time the United States ever had regulated any level of mercury emissions from power plants.

My participation in the interagency review process involved representing, along with other Department officials, DOE's energy policy concerns. I do not recall developing or expressing a personally held view as to the policies reflected in CAMR, or as to the legal judgment by EPA that its course of action was legally permissible. It is possible I did so, but if so I do not recall it.

Question 3c. In addition to submitting written comments on the Mercury Rules to EPA, did you participate in meetings or calls with Mr. Wehrum or others at EPA regarding the rule?

Response. As noted in response to question 3a., part of my work as DOE's deputy general counsel for energy policy, and subsequently as the Department's general counsel, involved participation in the interagency review process for various regulations, including the EPA's proposed and final rulemaking actions on the Clean Air Mercury Rule. That participation included meetings or call with Bill Wehrum—then a senior official in EPA's Office of Air and Radiation and whose official duties included work on the Clean Air Mercury Rule—and others at EPA regarding the proposed and final regulations issued by EPA in 2003 and 2005, respectively.

Question 3d. If you do not have records relating to particular instances of participation, then provide your best recollection of the content of any such participation, including but not limited to (a) the issues discussed at each meeting, conversation,

or exchange of information, and (b) the dates or over what time period they occurred.

Response. I do not have a specific recollection or personal records of particular interagency meetings or particular conversations during the interagency review process for the proposed and final CAMR. That activity occurred several years ago. Both in the interagency review process as well as in discussions internally at DOE among Department personnel, I believe that at various times those discussions likely covered the range of energy policy issues addressed in EPA's notice of proposed rulemaking and notice of final rulemaking on the Clean Air Mercury Rule.

Question 3e Other than documents placed in any public rulemaking docket, provide copies of all other documents in DOE's or your possession or control relating to your involvement in these matters.

Response. To the best of my knowledge, I have no documents in my possession or control that are responsive to this request. For purposes of this response, what is in my possession or control refers only to what is in my possession or control in my personal capacity. I do not, in my personal capacity, have possession of or control over any official Department of Energy documents or records.

Question 4a. Did you provide views or input on the substance of the Mercury Rules during these meetings and calls?

What substantive views or input did you provide? Describe in detail.

Response. See response to Question 3a.

Question 4b. Did you harbor or express any concerns about the legal risks associated with the statutory interpretations advanced by EPA in these rulemakings? If so, what were those concerns and how did you express them?

At various points during the interagency review process for EPA's proposed and final Clean Air Mercury Rule, I recall that there were discussions concerning the legal grounding for the regulations, and concerning the preamble explanation for the regulations. I, and I believe other executive branch officials participating in the interagency review process, understood and discussed that, despite favorable Supreme Court guidance in the Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), concerning deference to agency interpretations in its rulemaking actions of statutes that the agency is charged by law to implement, there could be legal challenges to the final rules, and understood that there were legal risks associated with the regulations. I do not recall specific times, dates, or content of particular discussions on those matters, but I do remember generally that discussions on those topics occurred. And, of course, there was a public discussion of legal bases for the proposed and final regulations set forth in the preambles for the proposed and final Clean Air Mercury Rule, and I am sure that I participated in discussions on that text, though again I do not recall specific dates or times.

Question 4c. Did any other lawyers in DOE's Office of General Counsel submit edits, comments or inserts to EPA with respect to the proposed Mercury Rules, at your direction or with your knowledge or participation?

Response. I do not recall any other lawyers in DOE's Office of the General Counsel submitting edits, comments or inserts to EPA with respect to EPA's proposed Clean Air Mercury Rule, at my direction or with my knowledge or participation. However, there were non-lawyer professionals at the Department of Energy, outside of the Office of the General Counsel, who did so.

Question 4d. If so: (a) identify each such lawyer by name and title and (b) State whether you reviewed such comments prior to transmittal to or discussion with EPA.

Response. See response to Question 4c.

Question 4e. Other than materials placed in any public rulemaking docket, provide copies of all documents in DOE's or your possession or control relating to your involvement in these matters.

Response. To the best of my knowledge, I have no documents in my possession or control that are responsive to this request. For purposes of this response, what is in my possession or control refers only to what is in my possession or control in my personal capacity. I do not, in my personal capacity, have possession of or control over any official Department of Energy documents or records.

Question 5a. Press articles reported that EPA included within the Mercury Rule preambles verbatim passages and similarly worded passages ("language") apparently written or supplied by a utility industry law firm, Latham & Watkins. EPA says those documents—written as EPA preamble text—originated from your office, DOE's Office of General Counsel. A December 10, 2003 email and attachment from

DOE to EPA reveals that Darlene Downing sent the Latham & Watkins language to EPA.

Did you provide Ms. Downing with the Latham & Watkins language, or were you otherwise aware of this language?

Response. I am aware of Washington Post articles in 2004 that asserted that EPA had taken language from a document prepared by the Latham & Watkins law firm and incorporated it into EPA's December 2003 Clean Air Mercury Rule proposal. However, to the best of my knowledge and recollection, I never personally and knowingly took language from a document supplied by Latham & Watkins and provided it to Darlene Downing, an employee of the Department of Energy's Office of the General Counsel in 2003, for transmission to EPA. Nor do I remember ever instructing anyone else to do so or being aware that anyone else at DOE had done so. Please also see the response to Question 5c.

Question 5b. Did anyone else in the DOE General Counsel's office provide Ms. Downing with the Latham & Watkins language?

I do not know whether anyone else in DOE's Office of the General Counsel provided Ms. Downing with language taken from a document supplied by Latham & Watkins. As stated in response to Question 5.a., I do not remember instructing anyone else to submit such language to Ms. Downing, nor do I remember being aware that anyone else at DOE had done so.

Question 5c. Was it you that received the language directly or indirectly from Latham & Watkins? If so, please describe the circumstances of this receipt.

Response. At various times during my service as the Department of Energy's deputy general counsel for energy policy, and as DOE's general counsel, I have met with attorneys from outside law firms, companies, public interest organizations, trade associations, and other stakeholders, and at some of those meetings have received materials supplied by those entities. I do not specifically recall meeting with attorneys from Latham & Watkins concerning EPA's CAMR, but it is possible that I did so. I do recall having meetings with Latham & Watkins attorneys, but do not remember the precise topics. I also do not recall receiving any particular documents from the Latham & Watkins attorneys or what those documents might have addressed, but it is possible that I did receive documents from them during the referenced meetings. Finally, and as noted above in response to Question 5.a., to the best of my knowledge and recollection, I never personally and knowingly took language from a document supplied by Latham & Watkins and provided it to Darlene Downing, an employee of the Department of Energy's Office of the General Counsel in 2003, for transmission to EPA.

Question 5d. If not, who else within the General Counsel's office received it?

Response. Other than myself, I have no knowledge who if anyone within the DOE General Counsel's Office may have met with attorneys from Latham & Watkins concerning EPA's Clean Air Mercury Rule, or who in the General Counsel's Office or in other offices at DOE might have received any documents from that firm.

Question 5e. Did you ask Ms. Downing to send the Latham & Watkins language to EPA? If not, who else within the General Counsel's office so instructed Ms. Downing?

Response. To the best of my knowledge and recollection, I never instructed Ms. Downing to send to EPA any language that I knew had been taken from a document supplied by Latham & Watkins. I have no knowledge of anyone else in the General Counsel's Office instructing Ms. Downing to send any language or documents to the EPA concerning the EPA's mercury rule. I note, however, that I was not the only person at DOE who participated in the interagency review process with respect to EPA's proposed and final Clean Air Mercury Rule. It is quite possible that any language, edits or other materials submitted by Ms. Downing to EPA was comprised of contributions and materials written by or originating from more than one person at DOE, including non-lawyer professionals.

Question 5f. Other than materials placed in any public rulemaking docket, provide copies of all documents in DOE's or your possession or control relating to this process and issue.

Response. To the best of my knowledge, I have no documents in my possession or control that are responsive to this request. For purposes of this response, what is in my possession or control refers only to what is in my possession or control in my personal capacity. I do not, in my personal capacity, have possession of or control over any official Department of Energy documents or records.

Question 6a. As of December 2003:

What position did Ms. Downing hold with DOE's Office of General Counsel, what were Ms. Downing's responsibilities, and to whom did she report?

Response. As of December 2003, Ms. Downing held the position of Paralegal and Administrative Support Specialist within DOE's Office of the General Counsel. Her duties consisted of providing program and administrative support to the organization and performing a variety of non-professional functions to assist the staff. She reported to the deputy general counsel for energy policy.

Question 6b. Did Ms. Downing have discretion to submit her own comments or inserts to EPA without review or approval by a lawyer within the General Counsel's office?

Response. During the time that I served as deputy general counsel for energy policy and as Ms. Downing's direct supervisor, I do not recall authorizing her to submit her own comments or inserts to EPA without review or approval by a lawyer within the Department's Office of the General Counsel or other appropriate Department of Energy official.

Question 6c. If not, who in the General Counsel's office reviewed or approved the language submitted to EPA by Ms. Downing? What role did you play in that process?

Response. During the time that I served as deputy general counsel for energy policy and as Ms. Downing's direct supervisor, I believe Ms. Downing would have submitted information or language to the EPA with respect to a particular rulemaking only in response to direction or authorization from either me or another DOE official who she believed was authorized to ask her to provide such information to EPA.

Question 6d. Were you aware that Ms. Downing was submitting comments or inserts to EPA?

Response. See responses to Questions 5.a. and 6.c.

Question 6e. Provide copies of all documents in DOE's or your possession or control relating to Ms. Downing's role in this time period.

Response. To the best of my knowledge, I have no documents in my possession or control that are responsive to this request. For purposes of this response, what is in my possession or control refers only to what is in my possession or control in my personal capacity. I do not, in my personal capacity, have possession of or control over any official Department of Energy documents or records.

Question 7a. EPA officials have said that including the language from Latham & Watkins in the preamble to the Mercury Rule would not have been included this language had they known it originated with an industry law firm. Do you believe that inclusion of this language in the EPA preamble was inappropriate?

Response. As stated in response to Question 5.a., I am aware of Washington Post articles in 2004 that asserted that EPA had taken language from a document prepared by the Latham & Watkins law firm and incorporated it into EPA's December 2003 CAMR proposal. I recall meeting with attorneys from that law firm at various times since I joined the Department of Energy in March 2002, and while I do not recall the topics of those meetings, it is possible that one or more of them concerned EPA's proposed or final Clean Air Mercury Rule. However, and also as noted in response to questions above, to the best of my knowledge and recollection, I never personally and knowingly took language from any Latham & Watkins document and proposed it to EPA for inclusion in the CAMR notice of proposed rulemaking, nor do I have any knowledge or recollection about any other DOE employee doing so. Regardless, documents received by an agency from outside groups representing parties interested in particular agency actions—including individuals, law firms, companies, public interest organizations, trade associations, and other stakeholders—may be sources of useful information for agency officials. I believe that if an agency finds the language or reasoning in a document supplied by an outside organization to be well-reasoned and persuasive, there is nothing wrong with the agency considering and using language or analysis in that document, particularly when the document has been placed in the public docket for the agency action at issue. Indeed, the purpose of receiving public comment on proposed rules is so that agencies involved in the rulemaking process can learn from non-governmental parties, and use that information as they evaluate relevant policy, legal, technical or scientific information to inform agency decisions.

Question 7b. Did you participate in meetings with lawyers from the firm of Latham & Watkins, or any other private law firm, relating to EPA regulation of air pollution (not limited to mercury) during the period from 2002 through 2007? List all such meetings that you attended. For each meeting, state: (a) the attendees of the meeting, including all executive branch personnel, by name and agency, and (b) the subject matter of the meeting. Provide copies of all documents in your or DOE's possession or control that were provided by Latham & Watkins or any other law

firm relating to EPA rulemaking during this period, and provide all DOE documents that relate to any such meetings.

At various times during my service as the Department of Energy's deputy general counsel for energy policy and as DOE's general counsel, I have met with attorneys from outside law firms, companies, public interest organizations, trade associations, and other stakeholders, concerning numerous matters involving official DOE business, including the interagency review of EPA regulations concerning air pollution. I do not have records of all such meetings nor do I have a complete recollection of all of those meetings, such that I could create and supply the requested list of all such meetings, all attendees of those meetings, and all subjects discussed at such meetings.

With respect to the document request portion of this question, to the best of my knowledge, I have no documents in my possession or control that are responsive to this request. For purposes of this response, what is in my possession or control refers only to what is in my possession or control in my personal capacity. I do not, in my personal capacity, have possession of or control over any official Department of Energy documents or records.

Question 8a. In February 2008, the D.C. Circuit overturned the Mercury Rules.

Do you believe the court erred in its decision, including the Court's statutory interpretations and its treatment of EPA's legal arguments?

Response. On February 8, 2008, the U.S. Court of Appeals issued an opinion in the case of *State of New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), in which the Court held that EPA's removal of electric utility steam generating units from the list under section 112 of the Clean Air Act violated the Act "because section 112(c)(9) requires EPA to make specific findings before removing a source listed under section 112," and EPA had not done so. Because these units therefore remain listed under section 112, the Court stated that EPA could not regulate existing coal-fired electric utility steam generating units under section III of the Clean Air Act. Therefore, the Court vacated both EPA's revision of its December 2000 regulatory finding concerning the listing of these units under section 112, and also the performance standards that were established pursuant to section III and the voluntary cap and trade program for new and existing coal-fired units. I have not evaluated the Court's February 8, 2008, decision for the purpose of deciding whether I personally agree or disagree with the Court. Rather, I have reviewed the decision to understand the Court's decision and its reasoning, for purposes of guiding future action.

Question 8b. Do you believe that the legal interpretations advanced by EPA were defensible? At the time of your involvement with EPA's proposed and final Mercury Rules, did you believe that those legal interpretations would prevail?

Response. At the time the proposed and final CAMR regulations were issued by EPA, I was DOE's deputy general counsel for energy policy, and my participation in the interagency review process involved representing, along with other Department officials, DOE's energy policy concerns. I do not remember being called upon to offer a personally held view on the legal defensibility of those regulations. I also do not recall formulating a personally held view as to their legal defensibility, or about the probability of EPA prevailing in litigation if the regulations were challenged. It is possible I did so, but if so I do not recall it. As noted in response to earlier questions, however, I did participate on DOE's behalf in some discussions on legal and policy aspects of those regulations.

Question 8c. Did you play any role in the administration's discussions and decisions to seek rehearing en banc of the February 8, 2008, decision of the D.C. Circuit's mercury ruling? If so, please describe your role. Other than materials placed in any public rulemaking docket, provide copies of all documents in DOE's or your possession or control relating to this matter.

Response. I played no role in the Administration's discussions and decisions to seek rehearing en banc of the February 8, 2008, decision of the U.S. Court of Appeals for the D.C. Circuit in the case of *State of New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), which concerned the EPA's Clean Air Mercury Rule.

With respect to the document request portion of this question, to the best of my knowledge, I have no documents in my possession or control that are responsive to this request. For purposes of this response, what is in my possession or control refers only to what is in my possession or control in my personal capacity. I do not, in my personal capacity, have possession of or control over any official Department of Energy documents or records.

Question 9a. You testified at the Nomination Hearing on April 11 that you have been involved in issues relating to the proposed Yucca Mountain nuclear waste repository.

Response. What role have you played while at DOE (2002-present) with respect to the radioactive waste storage site at Yucca Mountain and the shipping of radioactive waste from around the country to this site?

As deputy general counsel for energy policy at DOE, my responsibilities generally did not include matters relating to the Yucca Mountain project. As a result, from the time I joined the Department in March 2002 until I became DOE's general counsel in August 2005, I had very limited involvement with matters concerning the Yucca Mountain project or the shipping of radioactive waste from around the country to that site. Since becoming DOE's general counsel, I have participated in a number of Department activities relating to the Yucca Mountain project, including the following: participation in discussions among senior DOE officials concerning various aspects of the Yucca Mountain project; general supervisory responsibility for the DOE lawyers performing work relating to the Yucca Mountain project particularly in connection with the preparation of a license application to file with the Nuclear Regulatory Commission (NRC) relating to the repository; participation in the selection of outside legal counsel to assist the Department in connection with the NRC licensing proceeding for the Yucca Mountain project; participation in the interagency review process for the regulations that EPA must promulgate, pursuant to the Energy Policy Act of 1992, setting a radiation standard for the Yucca Mountain repository; and participation in the development of and interagency review process for Administration legislative proposals relating to the Yucca Mountain project.

Question 9b. In your tenure with DOE has DOE supported the Yucca Mountain project?

Response. In 2002, Congress passed and the President signed a Joint Resolution, enacted as Public Law 107-200, which approved the site at Yucca Mountain, Nevada for the development of a repository for spent nuclear fuel and high level radioactive waste, pursuant to the Nuclear Waste Policy Act of 1982 (NWPA). As a result of that approval, DOE is required by law—specifically, section 114(b) of the NWPA—to prepare and submit to the NRC a license application seeking authority to construct the repository at Yucca Mountain. DOE has been engaged in that effort since Public Law 107-200 was enacted in July 2002. My work at DOE in connection with the Yucca Mountain project has been in furtherance of this obligation which is imposed by law upon the Department of Energy.

Question 9c. List and describe all activities you have been involved in at DOE in support of the Yucca Mountain project.

Response. See response to Question 9.a.

Question 9d. Have you had any involvement in EPA's process for setting standards for radioactive waste disposal at Yucca Mountain? If so, describe in detail all of your activities relating to those standards.

Response. During my time as DOE's general counsel, I have at various points participated in the interagency review process for the regulations that EPA must promulgate, pursuant to the Energy Policy Act of 1992, setting a radiation standard for the Yucca Mountain repository. My involvement has centered on representing the Department of Energy as it seeks to carry out its statutory obligations and policy objectives with respect to the Yucca Mountain repository.

Question 9e. What role have you played in making recommendations or providing comments to EPA, NRC, the White House, or any other executive branch office or staff with regard to the Yucca Mountain radiation standards?

Response. See responses to Questions 9.a. and 9.d.

Question 9f. In your opinion what approach should be taken by EPA regarding Yucca Mountain radiation standards following the D.C. Circuit's decision in *Nuclear Energy Institute, Inc. v. U.S. EPA*, 373 F.3d 1251 (D.C. Circuit 2004).

Response. As I stated at my confirmation hearing before the Environment and Public Works Committee on April 10, 2008, the EPA radiation standard for Yucca Mountain is still under consideration and has not yet been finalized, and as a result it would be inappropriate for me to comment on the discussions and deliberations within the Executive Branch on that matter at this time.

Question 9g. You committed at your nomination hearing before the EPW Committee on April 10, 2008, to determine what documents exist reflecting DOE comments or views that you have been involved with regarding EPA's approach to radiation standards for Yucca Mountain. Provide a list of each such document (including author, recipient(s), ccs, and subject matter) and provide copies of all such documents to the Committee.

Response. I have determined that there are official Department of Energy documents that concern the ongoing rulemaking activity with respect to the regulations that EPA must promulgate, pursuant to the Energy Policy Act of 1992, setting a

radiation standard for the Yucca Mountain repository. However, and as I stated at my confirmation hearing before the Environment and Public Works Committee on April 10, 2008, the EPA radiation standard for Yucca Mountain is still under consideration and has not yet been finalized, and as a result it would be inappropriate to describe or address documents that are the subject of those discussions and deliberations within the executive branch on that matter at this time. Furthermore, to the best of my knowledge, I have no documents in my possession or control that are responsive to this request. For purposes of this response, what is in my possession or control refers only to what is in my possession or control in my personal capacity. I do not, in my personal capacity, have possession of or control over any official Department of Energy documents or records.

Question 9h. In addition to the documents provided in response to question (g) above, provide copies of all documents in DOE's or your possession or control relating to your involvement in the Yucca Mountain matter, other than materials previously placed in any public rulemaking docket.

Response. See response to Question 9.g.

Question 10a. The fiscal year 05 Defense Appropriations Bill included Section 3116, which modified requirements and procedures for addressing disposal of radioactive waste from DOE disposal sites. Section 3116 allowed DOE to "reclassify" high-level radioactive waste as "waste incidental to reprocessing," followed by shallow land disposal at those sites.

Did DOE support Section 3116, and did DOE submit drafts of Section 3116 to Congress?

Response. This question refers to section 3116 of the "FY2005 Defense Appropriations Bill." I assume the question is in error, because it was the fiscal year defense authorization act that contained a section 3116 applicable to waste incidental to reprocessing—specifically section 3116, entitled Defense Site Acceleration Completion, in the Ronald W. Reagan National Defense Authorization Act for FY 2005 (P.L. 108-375, enacted October 28, 2004). Section 3116 authorizes the Secretary of Energy, in consultation with the NRC, to determine that radioactive waste in tanks has been removed to the maximum extent practical and the remaining residual material can be safely disposed of by means other than deep geologic disposal.

During congressional consideration of the fiscal year defense authorization act, I served as DOE's deputy general counsel for energy policy, and my duties generally did not include matters relating to treatment, removal or disposal of radioactive waste at Department of Energy sites. As a result, and to the best of my recollection, I did not have any role nor did I participate in the Department of Energy's activities in connection with Congress's consideration and ultimate passage of section 3116 of the fiscal year defense authorization act. I did hear some discussions concerning that matter, and believe DOE did support section 3116. I also believe DOE officials may have worked with Members of Congress on that provision, but I do not have personal knowledge of who had what conversations with Members of Congress or their staffs on that matter, or what drafts or papers may have been submitted by DOE officials to Members of Congress or their staffs concerning this issue.

Question 10b. Did DOE have meetings or conversations with Members of Congress regarding Section 3116?

Response. See response to Question 10a.

Question 10c. Were you involved in any of the activities relating to Section 3116 addressed in the questions above? If so, describe in detail your role relating to those activities.

Response. See response to Question 10a.

Question 10d. Other than materials placed in any public rulemaking docket, provide copies of all documents in DOE's or your possession or control relating to your involvement in these activities.

Response. To the best of my knowledge, I have no documents in my possession or control that are responsive to this request. For purposes of this response, what is in my possession or control refers only to what is in my possession or control in my personal capacity. I do not, in my personal capacity, have possession of or control over any official Department of Energy documents or records.

Question 11a. As part of Section 3116 and DOE's new authority to reclassify high-level radioactive waste and dispose of it at two DOE sites, Congress explicitly provided for the NRC's monitoring role for the reclassified high-level waste's compliance with low-level waste disposal objectives (10 CFR Part 61). On July 31, 2006 you sent a letter to the Nuclear Regulatory Commission (NRC) on behalf of DOE in which you said that DOE did not agree with NRC's proposed Standardized Review Plan under Section 3116 for consulting and monitoring of DOE's management and

disposal of reclassified high-level radioactive waste. There are numerous press reports about the controversial nature of Section 3116 and of disagreement between the NRC Staff and DOE Staff over the respective roles of the two agencies.

One of the major issues you raised in your letter of July 31, 2006 was that NRC wanted to make documents relating to its consultation with DOE publicly available, and NRC felt its meetings with DOE relating to this should be open to the public. You disagreed with NRC's positions. The press reported that DOE insisted on having closed door meetings to define the scope of NRC's role, over NRC's objection. What is your justification for wanting to shield such important matters from public scrutiny?

Response. The letter that I, on behalf of the Department of Energy, sent to the Nuclear Regulatory Commission (NRC) in July 2006 expressed concerns with certain aspects of the NRC's proposed Standardized Review Plan and how it related to the authorities granted by law to the Department of Energy pursuant to section 3116 of the fiscal year defense authorization act. The letter did not assert that all discussions between DOE and NRC relating to the section 3116 process should occur in "closed door meetings." Rather, the letter expressed DOE's position that it would be appropriate for some discussions between the agencies, concerning the section 3116 process, to occur in a non-public setting. It is perfectly appropriate for executive branch agencies to have discussions on some matters in a non—public setting. In fact, even the Freedom of Information Act itself contains an exemption from disclosure for documents that are predecisional and deliberative or that are developed for use during such deliberations. The justification for the position stated in the July 2006 letter is that it can promote free and frank discussion among government officials if certain discussions are not made in public. This is the substance of what I stated before the Committee on Environment and Public Works, in response to questions concerning this matter, during my confirmation hearing on April 10, 2008.

Question 11b. Do you believe that people have a right to know what their government representatives are discussing when it comes to leaving highly radioactive nuclear waste disposed of in shallow land burial at DOE sites?

Response. I do not believe that any "highly radioactive nuclear waste" should be "disposed of in shallow land burial," either at DOE sites or elsewhere. I have been informed that the tank residue material subject to disposal under section 3116 of the FY 2005 defense authorization act is not highly radioactive, even though its process pedigree once arguably made it "high-level" waste within the normal meaning and understanding of what constitutes "high-level" radioactive waste.

Section 3116 authorizes DOE, in consultation with the NRC, to classify tank waste residues at DOE's sites in South Carolina and Idaho as other than high-level waste, upon making certain determinations, including that the waste "does not require permanent isolation in a deep geological repository." These matters are highly technical and subject to the specialized knowledge and expert judgment of DOE and the NRC. I believe that the public generally has a right to know what the Federal Government is doing with respect to the disposal of radioactive waste at or in connection with DOE sites and operations, but that does not mean it is productive or appropriate for every single discussion among Federal officials on that highly complex and technical subject to occur in public, just as not all discussions among executive branch officials or among Members of Congress, concerning matters of great importance to the general public and to the welfare of the Nation, occur in public. Finally, and while not required by section 3116, I note that DOE has committed to make its draft waste determinations pursuant to section 3116 available for public comment and takes these public comments into account before making final determinations.

Question 11c. In a letter by Scott Flanders of NRC dated January 31, 2008, the NRC stated that there were seeps of radioactive waste from a vault at the Savannah River Site in the Saltstone Disposal Facility. On what date did you become aware of any seeps of radioactive waste from these vaults?

Response. I have no personal knowledge of any seeps of radioactive waste from the vaults containing saltstone that exist at DOE's Savannah River Site. I am informed that this general issue has been well known and a matter of public record for a number of years. I also am informed that there are monitoring protocols in place, corrective actions have been taken, and design changes will be made to address these seeps. I further am informed that DOE's Savannah River Site has determined, and that the State of South Carolina agrees, that there are no significant environmental or human health impacts associated with any seeps from this Facility. Finally, I am informed that disposal actions at the Savannah River Site's Saltstone Disposal Facility are subject to routine oversight by the South Carolina Department of Health and Environmental Control under a state-issued industrial

landfill permit and to monitoring by the Nuclear Regulatory Commission pursuant to section 3116. No legal issue has been brought to my personal attention as the Department's general counsel in connection with these issues or with the ongoing performance of the vaults.

Question 11d. Did the DOE or you produce any internal responsive material or analysis of the leaking vaults?

I have not created, reviewed or produced any internal responsive material or analysis concerning any seeps or leaks of radioactive waste from the vaults containing saltstone that exist at the Savannah River Site. I have been informed that analyses of the seeps have been completed by the Savannah River Site and shared with the NRC and the South Carolina Department of Health and Environmental Control during a recent NRC monitoring. Other than this information and what is described in response to Question 11c. above, I have no personal knowledge whether anyone else at DOE has produced internal responsive material or analysis concerning these seeps.

Question 11e. Has DOE provided that material for the NRC, to the State of South Carolina, or to the National Academy of Science's panel that undertook a review and study of the safety of DOE's efforts to reclassify high-level radioactive waste?

Response. See response to Question 11d.

Question 11f. Has DOE made any of its analysis of the leaking vaults public in any way?

Response. As noted above, I have no personal knowledge of any seeps of radioactive waste from the vaults containing saltstone that exist at the Savannah River Site. I have not created, reviewed or produced any materials concerning the operation of the vaults, nor am I aware of whether any such material exists that has been created by others, or if it exists, whether anyone at DOE has made any of its analysis of the vaults or their performance public in any way. I am informed, however, that the general issue has been briefed to the Savannah River Site's citizen's advisory board, and that this matter is well known to State of South Carolina regulators, non-governmental organizations, and the public. See also responses to Questions 11c. and 11d.

Question 11g. Has the DOE or have you made a determination whether the highly radioactive waste disposed of at the Saltstone Disposal Facility is in compliance with the performance objectives of 10 C.F.R. Part 61.41? On what basis has DOE made that assessment?

Response. As stated in response to Question 11b., I am informed that the material being disposed of at the Savannah River Site pursuant to section 3116 of the fiscal year 5 defense authorization act is not "highly radioactive." Regardless, to the best of my knowledge and recollection, I have made no determination whether the waste disposed of at the Saltstone Disposal Facility at DOE's Savannah River Site is in compliance with the performance objectives of 10 C.F.R. 61.41. I do not know whether or not anyone else at DOE has made such a determination. I am informed, however, that the Saltstone Disposal Facility is a low-level waste facility, and that no high level radioactive waste is disposed of in the Facility.

Question 11h. Please provide all material, analysis, and documents related to the leaking vaults in the Saltstone Disposal Facility.

Response. To the best of my knowledge, I have no documents in my possession or control that are responsive to this request. For purposes of this response, what is in my possession or control refers only to what is in my possession or control in my personal capacity. I do not, in my personal capacity, have possession of or control over any official Department of Energy documents or records.

Question 12. You testified that you were involved with the drafting or review of S. 2589, the "Nuclear Fuel Management and Disposal Act." Describe in detail your role and activities relating to that bill. Identify the positions DOE took in supporting S. 2589, and for each, State whether you agreed with that position. Provide copies of all DOE documents relating to this legislation.

Response. As I testified before the Senate Environment and Public Works Committee at the April 10, 2008, hearing, I was involved in the development of and the interagency review process for the Administration's legislative proposal that Secretary Bodman submitted to the Congress on April 5, 2006 and on March 6, 2007, and that was introduced by Senator Domenici and Senator Inhofe as S. 2589 on April 6, 2006. The Department of Energy supported the Administration's proposal, and as the Department's general counsel, I represented the Department's views on legal and policy matters in the development and interagency review process for the proposal.

To the best of my knowledge, I have no documents in my possession or control that are responsive to this request. For purposes of this response, what is in my possession or control refers only to what is in my possession or control in my personal capacity. I do not, in my personal capacity, have possession of or control over any official Department of Energy documents or records.

Question 13. Provide copies of all testimony that you have provided to congressional Committees, or into which you had substantial input, during your tenure with DOE.

Response. Other than my testimony before the Environment and Public Works Committee on April 10, 2008, concerning my nomination to be the general counsel of the Environmental Protection Agency, I have testified before Congress twice. Once was at my confirmation hearing to be the general counsel of the Department of Energy, which was held before the Senate Committee on Energy and Natural Resources on July 12, 2005. The other was on May 22, 2007, before the Senate Committee on Energy and Natural Resources, concerning several bills then being considered by that Committee. My written and oral testimony on both occasions is publicly available on the website of the Senate Energy and Natural Resources Committee, <http://energy.senate.gov/public/>.

Other than my own testimony, I have on numerous occasions during my more than 6 years at the Department of Energy participated in reviewing, writing, editing or discussing testimony to be delivered to a congressional committee by a DOE official. This testimony has covered a broad range of topics. I do not recall with specificity all of the times that I have had substantial input on testimony since March 2002, and therefore I am unable to supply a list of or copies of all such testimony. I have maintained no personal record of the instances during which I have provided substantial input on testimony.

Question 14. The EPW Committee held a hearing on the Yucca Mountain Project last October. In questions submitted for the record, I asked both DOE and EPA to send copies of all documents related to the agencies' communications regarding the EPA's draft Yucca Mountain radiation standards. In a letter dated January 23, 2008, DOE stated that it was conducting a search for all responsive documents related to this request. Please provide those documents to the Committee.

Response. To the best of my knowledge, I have no documents in my possession or control that are responsive to this request. For purposes of this response, what is in my possession or control refers only to what is in my possession or control in my personal capacity. I do not, in my personal capacity, have possession of or control over any official Department of Energy documents or records.

Question 15. In the January 23 letter mentioned above, DOE said that it will only provide "nonprivileged" documents. What communications between the agencies would be considered "privileged" and why? Provide with your responses a detailed log of all items responsive to my January 23 letter asserted to be privileged, including for each document, the date; author; recipients; ccs; subject matter; attachments; and type of privilege asserted to protect such document from disclosure to this Committee.

Response. I have not personally been involved in conducting the searches for documents responsive to the referenced request and am unable to provide an update on the current status of the Department's response to that request. Moreover, to the best of my knowledge, I have no documents in my possession or control that are responsive to this request. For purposes of this response, what is in my possession or control refers only to what is in my possession or control in my personal capacity. I do not, in my personal capacity, have possession of or control over any official Department of Energy documents or records.

Question 16. List all EPA rulemakings in which you have had any role during your tenure with DOE, and describe your role and the substance of the recommendations or comments you provided for each.

Response. From the time I joined the Department of Energy in March 2002 as deputy general counsel for energy policy, to the present in my capacity as the Department's general counsel, I have participated on behalf of DOE in the interagency process for a number of EPA rulemakings. During these processes, I have represented the Department of Energy and expressed the Department's views on relevant energy policy or legal matters, depending on the substance of the particular rulemaking at issue. The level of my personal participation in connection with these interagency processes has varied greatly from time to time and between different rulemakings, depending on the Department's policy interests and views with respect to the rulemaking activity, competing demands placed on me in connection with other Department of Energy business, and the ability of others at DOE to be involved in the review process. I do not have a complete record or recollection of all

EPA rulemakings in which I might have had “any role” during the last 6 years, but I know that I have been involved in the interagency process for at least the following EPA rulemakings: Clean Air Interstate Rule (70 Fed. Reg. 25162 (May 12, 2005)), Clean Air Mercury Rule (70 Fed. Reg. 28606 (May 18, 2005)), various New Source Review rules (including 67 Fed. Reg. 80186 (Dec. 31, 2002) and 68 Fed. Reg. 61248 (Oct. 27, 2003)), Proposed National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges from Construction Activities (67 Fed. Reg. 78116 (Dec. 20, 2002)), and the proposed radiation standard for the Yucca Mountain repository (70 Fed. Reg. 49014 (Aug. 22, 2005)).

Question 17. Other than your experience participating in inter-agency review of EPA rulemakings such as those discussed in your responses to the questions above, describe each instance in which you have had direct experience in implementing, complying with or enforcing the environmental statutes listed below. For each instance, provide details regarding (a) the client (or provide general company and industry description) you represented, (b) timeframe of activity, and (c) nature of activity. If you do not have, or cannot recall, such direct experience for one or more of the listed statutes, State for each: “NONE.”

- a. Clean Air Act
- b. Coastal Zone Management Act
- c. Comprehensive Environmental Response, Compensation and Liability Act
- d. Emergency Planning and Community Right-to-Know Act
- e. Endangered Species Act
- f. Federal Insecticide, Fungicide, and Rodenticide Act
- g. Federal Water Pollution Control Act
- h. Oil Pollution Act
- i. Resource Conservation and Recovery Act
- j. Safe Drinking Water Act
- k. Solid Waste Disposal Act
- l. Toxic Substances Control Act

Since March 2002, I have been employed at the Department of Energy, first as deputy general counsel for energy policy, and since August 2005, as the Department's general counsel. During my time as general counsel, I have had overall responsibility for all legal matters handled by or affecting the Department, and have been professionally responsible for the work of more than 250 lawyers throughout the country, including the Department's attorneys who handle or are involved with environmental matters.

With respect to the environmental statutes listed above, DOE generally is subject to the major environmental statutes in the same manner as any other regulated entity, with certain limited exceptions (primarily arising due to DOE's responsibilities under the Atomic Energy Act of 1954, or due to the application of the doctrine of sovereign immunity in specific situations). Consequently, DOE primarily is in the posture of complying with, rather than enforcing or implementing, the listed environmental statutes. For example, DOE facilities are subject to the regulatory and permitting provisions of the Clean Air Act, including EPA regulations addressing air emissions of hazardous air pollutants. DOE is also subject to the Clean Water Act's provisions relating to the discharge of dredged and fill material and many DOE facilities have National Pollutant Discharge Elimination System (NPDES) permits. DOE facilities are also subject to the regulatory and permitting requirements of the Resource Conservation and Recovery Act (RCRA), and RCRA provisions with respect to the regulation of solid wastes, hazardous wastes, and underground storage tanks affect DOE operations. In addition, a number of DOE facilities are undertaking cleanups pursuant to RCRA corrective action requirements. DOE site activities must also be consistent with the Emergency Planning and Community Right-to-Know Act, the Endangered Species Act, the Oil Pollution Act, the Safe Drinking Water Act, and the Toxic Substances Control Act. As the Department of Energy's general counsel, I have worked extensively with other DOE attorneys with respect to a wide range of these environmental matters, and particularly with regard to CERCLA and RCRA issues. In addition, these environmental statutes often are implicated in DOE's analyses with respect to the National Environmental Policy Act of 1969 (NEPA), and since 2006 I have had responsibility for the work of the Department's Office of NEPA Policy and Compliance, and have worked with officials in that office and exercised approval authority with respect to certain DOE Environmental Impact Statements and other NEPA documents and analyses. Finally, I have participated in policy discussions relating to the Safe Drinking Water Act, particularly with respect to permitting pursuant to the underground injection control program, and relating to the Coastal Zone Management Act, particularly with respect to appeals to the Secretary of Commerce relating to certain consistency determinations

by State authorities, and also with respect to general CZMA matters relating to the permitting and development of energy-related facilities.

To the best of my knowledge, I do not have any personal records that would provide the requested complete and detailed record of my work while in private practice in connection with the listed environmental statutes. As noted above, I have been employed at the Department of Energy since March 2002, and prior to that date was engaged in private practice and also worked for a time as an associate counsel on the staff of the U.S. House of Representatives Committee on Agriculture. While in private practice I do recall working for some clients in developing and filing certain comments with the EPA or with State authorities relating to the development of State Implementation Plans or Federal Implementation Plans, as well as the development of regulatory actions pursuant to the Clean Air Act. I do not recall all of the specific law firm clients and specific regulatory proceedings for which I might have written or submitted comments or other documents.

RESPONSES BY DAVID R. HILL TO ADDITIONAL QUESTIONS
FROM SENATOR BENJAMIN L. CARDIN

Question 1. Mr. Hill, to better understand your view of the rulemaking process, I'd like to consider the EPA's stormwater provisions: Over the past two decades EPA has recognized the numerous adverse impacts that stormwater pollution has on our nation's waters. These impacts led to passage of the stormwater provisions in the 1987 Clean Water reauthorization. However, I am concerned that EPA may not be taking all appropriate steps under the Clean Water Act to substantially reduce, if not eliminate, this threat to water quality across the fifty states. It is my understanding that EPA's effluent limitation rulemaking, now underway, could set standards to protect water resources from contaminated stormwater discharges from development. However, it appears that instead of issuing a rule to reduce long-term impacts associated with new development, EPA may be instead planning to address construction site discharges only. Doing so will ignore the most significant area of harm to our waters, and do a disservice to the meaningful progress Congress contemplated in 1987.

If the EPA does decide to only address construction site stormwater discharges, it appears that this decision would be inconsistent with best-available science regarding sources of stormwater pollution and the best approaches to reduce it, and is not in the economic interests of my State or the Nation. For example, I understand that EPA's decision to expedite this rulemaking will not allow it to even consider the recommendations of a report on stormwater pollution to be issued by the National Research Council in October 2008—an expert evaluation that EPA funded to provide scientific backing for its stormwater regulatory program. Could you comment on the EPA's approach to rulemaking? How does or should science inform the rulemaking?—What do you conceive your role is in this process?

Response. Several years ago while serving as DOE's deputy general counsel for energy policy, I recall that I had some discussions with DOE and EPA officials in connection with the EPA's consideration of rulemaking activities in connection with stormwater permits for small oil and gas activity sites. However, I have had no involvement in connection with these matters for several years, and I am not personally familiar with the EPA's current stormwater-related activities, or the particular matters referenced in this question in connection with construction stormwater discharges, or with respect to the consideration of a National Research Council report to be issued in October 2008. If confirmed as EPA's general counsel, I would look into these issues.

With respect to the EPA's approach to rulemaking, how science informs rulemaking, and how I conceive of my role as an agency's general counsel in connection with rulemaking, as a general matter I believe lawyers can play a very constructive role in the rulemaking development and writing process. I believe they can do so in several ways—one is with participation in the development of the policy leading up to the rulemaking. Another is the formulation of the actual proposed or final rules issued by the agency. Yet another is in providing legal analysis to assist in both the policy decisions and in the formulation of the proposed or final rules. And finally, lawyers can play a critical role in drafting and reviewing the preamble and rule text set forth in a notice of proposed rulemaking or notice of final rulemaking. I believe that attorneys can best serve the public interest and the interests of their respective agencies when they are clear about what type of advice they are providing—is it legal advice, or is it non-legal policy advice? I believe attorneys earn the greatest respect for their legal opinions when they are careful about discerning for themselves, and explaining to others, exactly what type of advice they are providing. Finally, I believe the value that can be added by attorneys is enhanced, the

earlier an attorney is able to participate in the rulemaking process. For example, an attorney's advice likely will be most valuable to agency decisionmakers if the attorney can be involved in the rulemaking process early and participate with other agency decisionmakers in formulating policies to be pursued. These points are true for agency attorneys in general, and can be particularly true for an agency's general counsel.

In the situation where an agency's rulemaking concerns, or may be informed by, science or scientific judgment, science must play an important role in that regulatory action. Of course, it is possible that the scientific or technical evidence about a particular matter or decision may be inconclusive, there may be disagreements among science experts about that evidence or the conclusions to be drawn from the evidence, or policy assumptions or leanings may be embedded within the views expressed by scientists about the scientific or technical evidence. Moreover, it is possible if not likely that a particular regulatory action does not merely mean translating scientific evidence into regulatory text, but also involves the exercise of policy judgment about what regulatory actions should be taken based on particular scientific evidence about which there may well be differences of opinion. And finally, there may be disagreements about the appropriate policy decision, based on various "non-science" factors relevant to the rulemaking, even if the relevant scientific evidence is clear. In all of these situations, scientific and technical information, and scientific and technical judgment, are important factors to be considered, although they may not always be disposition of the approach to take in a particular regulatory action that has been committed by law to a Federal agency.

Question 2. In your opinion, is it appropriate for the EPA to focus exclusively on construction site discharges rather than the long-term stormwater discharges following the construction of a development?

Response. To the best of my knowledge and recollection, I have had no personal involvement in connection with any decision by EPA to focus any regulatory action in connection with stormwater discharges exclusively on construction site discharges rather than long-term stormwater discharges following the construction of a development. Therefore, at the present time I have formed no opinion on what EPA action on this matter may be appropriate from a legal or policy perspective. If confirmed as EPA's general counsel, I would look into the matter addressed by this question.

Question 3. If EPA fails to set baseline national standards for post-construction impact, how would Maryland or other states ensure that neighboring states adopt protections that would protect the Chesapeake Bay and other waters that are inter-State in nature?

Response. To the best of my knowledge and recollection, I have had no personal involvement in connection with any decision by EPA in connection with setting baseline national standards for post-construction impacts of stormwater discharges. I strongly believe that protection of the Chesapeake Bay is an important national priority. If confirmed as EPA general counsel, I would look into the matter addressed by this question.

RESPONSES BY DAVID R. HILL TO ADDITIONAL QUESTIONS
FROM SENATOR JAMES M. INHOFE

Question 1. At your confirmation hearing, it was asserted that in establishing the Environmental Protection Agency, President Nixon said that he wanted EPA to be a "strong, independent agency." The implication was that President Nixon thought EPA should be independent from the authority of the President. Did President Nixon establish EPA as an "independent" agency? Is EPA an "independent" agency as that term is understood when referring to Federal agencies?

Response. The Environmental Protection Agency is not currently, and never has been, an "independent" agency, as that term is generally understood when referring to those Federal agencies that are largely free from Executive oversight of their decisions in particular cases. In fact, this question was addressed by the U.S. Court of Appeals for the District of Columbia Circuit in the case of *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981). In that case, Judge Wald, writing for the Court, stated as follows.

"The court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. He and his White House advisers surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under our Constitution, after all, is not shared it rests exclusively with the President. The idea of a 'plural executive,' or a President with a council of state, was considered and rejected by the Constitutional Convention. Instead the

Founders chose to risk the potential for tyranny inherent in placing power in one person, in order to gain the advantages of accountability fixed on a single source. To ensure the President's control and supervision over the executive branch, the Constitution and its judicial gloss vests him with the powers of appointment and removal, the power to demand written opinions from executive officers, and the right to invoke executive privilege to protect consultative privacy. In the particular case of EPA, Presidential authority is clear since it has never been considered an 'independent agency,' but always part of the executive branch Of course, it is always possible that undisclosed Presidential prodding may direct an outcome that is factually based on the record, but different from the outcome that would have obtained in the absence of Presidential involvement. In such a case, it would be true that the political process did affect the outcome in a way the courts could not police. But we do not believe that Congress intended that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power."

Question 2. At the hearing, you were asked if you worked for the President. You answered yes. It was implied that because you work for the President, you would be willing to follow the President's orders, even if you disagreed with those orders and the orders were contrary to the law. Would you do that? If confirmed as EPA general counsel, would you follow the orders of the President even if he directed you to act in a way that violated the law, or if he directed you to give a legal opinion that you firmly believed was illegal and not even a reasonable interpretation of the law?

Response. As general counsel of the Department of Energy, my commission signed by the President of the United States states that I serve at the pleasure of the President. Moreover, as an officer of the United States and an executive branch official, I believe there can be no doubt that I work for and ultimately report to the President. However, even if the President directed me to do so, I would not view myself as being bound to violate the law, or to give a legal opinion that I firmly believed was illegal and not even a reasonable interpretation of the law.

In this regard, I believe it is important to distinguish between being directed to pursue particular policy objectives with which one personally may disagree, and being directed to act in a manner contrary to law or as a lawyer to be directed to issue an opinion that the lawyer firmly believes is contrary to law and not a reasonable interpretation of the law. In representing the policy objectives of the President or of a Federal agency, it is possible that, to the extent I have a personal view about the particular policy matter, I do not always personally agree with the policy objectives being pursued. I do not believe that situation is problematic for me or for attorneys in general. Indeed, lawyers working for Federal agencies and lawyers in private practice often may be called upon to work on matters or advocate interests that are not fully consistent with their own personally held views about a policy matter.

On the other hand, as an attorney and as a member of the bar, I have a duty to faithfully uphold the law, and under my oath as an employee of the Federal Government, I have an obligation to uphold the Constitution of the United States. In both capacities, I believe I am bound to follow the law, even if my superiors direct me to act in a manner contrary to law. Never, in my career at the Department of Energy, have I been directed to give a legal opinion that I firmly believed was illegal or not even a reasonable interpretation of the law. In fact, I do not recall any superior ever directing me to personally come to any particular conclusion concerning a legal opinion I was called upon to render. Whether as general counsel of DOE or as general counsel of EPA, if I was directed to violate the law or if I was directed to give a legal opinion that I firmly believed was illegal and not even a reasonable interpretation of the law, I believe I would view myself as being obligated to resign my position rather than follow the orders given to me.

Question 3. At your confirmation hearing, you were asked some questions about EPA's regulations setting a radiation standard for the Yucca Mountain repository. A court's ruling in 2004 that struck down part of EPA's standard was cited as an example of the Bush administration issuing regulations that cannot withstand judicial review. Wasn't the rule issued in 2001, and subsequently partially invalidated, merely finalizing a rule that had been proposed in 1999 by the Clinton administration?

Response. Yes. The EPA radiation standard that was the subject of the 2004 ruling by the U.S. Court of Appeals for the D.C. Circuit was a final rule issued by EPA in 2001. I believe that standard had been proposed by the Clinton administration, in a notice of proposed rulemaking issued in 1999.

Question 4. At your hearing some seemed critical of the Department of Energy's work in seeking to advance the Yucca Mountain project. Didn't Congress in fact, in

2002, approve the Yucca Mountain site as the location at which the Department of Energy was directed to submit to the Nuclear Regulatory Commission a license application for authority to construct a spent nuclear fuel and high level waste repository? Isn't it the Department of Energy's responsibility, under law, to prepare and file this application with the NRC? And isn't that exactly what you and others at DOE have been doing?

Response. In 2002, Congress passed and the President signed a Joint Resolution, enacted as Public Law 107-200, which approved the site at Yucca Mountain, Nevada for the development of a repository for spent nuclear fuel and high level radioactive waste, pursuant to the Nuclear Waste Policy Act of 1982 (NWPA). As a result of that approval, DOE is required by law—specifically, section 114(b) of the NWPA to prepare and submit to the Nuclear Regulatory Commission a license application seeking authority to construct the repository at Yucca Mountain. DOE has been engaged in that effort since Public Law 107-200 was enacted in July 2002. My work at DOE in connection with the Yucca Mountain project has been in furtherance of this obligation which is imposed by law upon the Department of Energy.

Senator BOXER. At this time, I would ask Senator Inhofe if he would like to make an opening statement or place a statement in the record.

**OPENING STATEMENT OF THE HON. JAMES M. INHOFE,
U.S. SENATOR FROM THE STATE OF OKLAHOMA**

Senator INHOFE. Madam Chairman, I think I will go ahead.

Senator BOXER. Please.

Senator INHOFE. I understand you said that Senator Craig was here and made a strong statement. I will associate with his remarks and submit mine for the record, and go ahead and start with the questions.

[The prepared statement of Senator Inhofe follows:]

STATEMENT OF HON. JAMES M. INHOFE, U.S. SENATOR
FROM THE STATE OF OKLAHOMA

I'm pleased we are holding this nominations hearing today. However, I must say that I'm very concerned about the Senate's lack of progress on nominations. Several critical nominations have been sitting idle on the Senate Calendar for months due to political power plays by the Democratic leadership in a partisan effort to wrestle the Constitutional power to nominate individuals from the President. Prior to the Easter break, this Committee had seven nominees who had been delayed by the Democratic Leadership as a result on this political act. Two of these nominees waited 8 months and another waited 11 months before they were confirmed on March 13th. Three nominees favorably reported by this Committee remain on the calendar. They deserve fair and swift consideration by the Senate. Please understand, Madame Chairman, that this criticism is aimed at the Democratic Leadership, not at you. You have been reasonable in handling nominees.

That said, I'm pleased to support David Hill's nomination EPA's General Counsel. Mr. Hill is currently serving as General Counsel at the Department of Energy. Prior to Senate confirmation in 2005, Mr. Hill served as Deputy General Counsel for Energy Policy from 2002 to 2005. He is a well qualified candidate for this very important position.

Senator BOXER. Very good.

Then I will start the questions, 5 minutes, and we will just go back and forth.

I have here a list I will share with you—it is all a public document—of the cases that have been overturned by the courts, the decisions by EPA that have been overturned by the courts. I read a few, Massachusetts v. EPA and so on. I wonder whether you, in preparing for this hearing, have taken a look at these rulings and what your comments might be.

Mr. HILL. Over time, Madam Chairman, I have read the opinions in some of those cases. I don't know a full list of all of the cases

that have involved EPA and that the courts have ruled against the agency. I am aware of at least some of the major cases like Massachusetts v. EPA and the recent case having to do with the clean air mercury rule and some others.

Senator BOXER. And you must be aware where the Supreme Court told the EPA they absolutely have to regulate carbon and greenhouse gas. I am sure you read that as well.

Mr. HILL. In the Massachusetts v. EPA case, I believe what the Supreme Court decided was that greenhouse gases were air pollutants under the Clean Air Act.

Senator BOXER. Right.

Mr. HILL. And that under section 202 of the Clean Air Act, the Administrator had to make a decision under that particular section as to whether or not emissions of greenhouse gases from mobile sources endangered the public health and welfare.

Senator BOXER. Did you read the part where they discuss the action to set mileage standards, what they said about that? Because Administrator Johnson, his first argument was that DOT was setting mileage standards and therefore we didn't have to do anything else.

Mr. HILL. I remember there was a part of the opinion, Madam Chairman, where the court was talking about the interplay between the Department of Transportation's responsibilities to set CAFE standards under the Energy Policy and Conservation Act, and EPA's duties under section 202 of the Clean Air Act. I believe what the court said in that context was that the court had confidence that the agencies would be able to work together and work something out. It certainly said that DOT had its responsibilities and EPA had its responsibilities.

Senator BOXER. Actually, the language was very different from that. They said, "The fact that DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities."

How do you feel in general about the EPA, you know, because it is the legal people who are advising EPA here, overturned nine times in major cases, more times than that, but in major cases nine times since 2004. Why do you think that happened?

Mr. HILL. Madam Chairman, of course it is a serious concern for an agency when it makes a decision and invests a lot of time in a particular decision and a particular course of action, and that decision is overturned in the courts. At DOE, we of course are sued at various times and we try to vigorously defend what it is we have done. We try to do things in a way that is legally defensible. It is a real concern to have a good record of being able to defend those cases in court.

If I were the General Counsel at EPA, of course I would look at the decisions that have been made and to the extent those are final, those are settled law and we have to operate with those. I would do everything I can to try to advise the Administrator in a way where we do develop decisions and rules that are going to be legally defensible.

Senator BOXER. Yes, because my concern is, frankly as I look over this list, it is just extraordinary to me that politics is playing a part here, that these decisions are being made because of politics, rather than following these various landmark laws.

Before I turn it over to Senator Inhofe, I want to talk about your involvement in some of these rules that were overturned by the courts. Were you involved in an interagency review process of EPA's new source review rules and the mercury rule?

Mr. HILL. Yes, I have been involved in the interagency process on numerous things—actions by DOE, actions by EPA, actions by other agencies. I was involved in interagency discussions.

Senator BOXER. Do you recall what your view was at that point on that new source review and the mercury rule?

Mr. HILL. Well, Madam Chairman, I remember discussing those in the interagency process. I am sure I offered comments. I don't know specifically, and that has been several years ago. I don't know that I recall specifically what comments I was offering.

Senator BOXER. Did you offer any criticism of the overall approach that EPA was taking that eventually was overturned?

Mr. HILL. I remember us having discussions of various kinds. I don't remember actually saying that I thought they should go in a completely different direction than the one that they were going in.

Senator BOXER. OK. I will get back to that.

Senator INHOFE.

Senator INHOFE. Thank you, Madam Chairman. I apologize for being a little bit late.

I have looked into your background and your past performance and I feel you would do an excellent job in this position. One of the things that has bothered me quite a bit is when you look at the regional offices, there is quite a disparity between the enforcement policies that they have from these various offices. When I chaired this Committee when the Republicans were a majority, we held several hearings.

Now, in this position, it would seem to me that you would be in a position to deal with the attorneys at these regional offices to have consistency in the application of the laws and the policies of the EPA in those offices. This is the one thing that I would like, No. 1, to know if you agree that there is a problem; and No. 2, if you are willing to get out there and confront that problem so that when we call and we see that there is a disparity in application that maybe we can correct that problem.

Mr. HILL. I appreciate the question, Senator Inhofe. One of the things that I have done at the Department of Energy as General Counsel is try to travel around the Country to the sites where DOE has major operations, where we have Chief Counsels and where we have attorneys that practice, DOE attorneys around the Country.

Senator INHOFE. And how many regional offices would that be?

Mr. HILL. We don't have as many site offices as EPA has regional offices, but we probably have attorneys maybe at seven or eight places around the Country.

Senator INHOFE. OK. And you actually yourself have gone there on this mission?

Mr. HILL. Yes. I personally have traveled to a number of those places. There are several places I have been to, at several DOE facilities where they have noted that I am the first General Counsel in the 30 years of DOE to ever set foot in their office.

Senator INHOFE. And they were offended, I am sure.

[Laughter.]

Mr. HILL. Well, I don't know. They may have been. I don't know, Senator. They didn't tell me whether they were happy that I showed up. I have done that for a couple of reasons. One is so that I actually can see where we are conducting operations, whether it is one of the laboratories or one of the cleanup sites or the Strategic Petroleum Reserve. And so that I can meet a number of the people, both attorneys and non-attorneys, who are there, a number of whom I normally don't have any occasion to work with.

When I have traveled around the country, one of the things that I have done is I have told them that I view it as our obligation as attorneys—and that is really true whether they are a part of the Office of General Counsel or whether they are a part of the Office of Science or the Office of Environmental Management—to work with attorneys throughout the Country so that we do have a coordinated approach to things, and so that we do have consistency in the way that we approach matters.

I also I have focused on making sure that they have the resources they need as practicing attorneys and that their voices are being heard in the matters that they are working on.

Senator INHOFE. Well, I would like to ask for a commitment. I believe you are going to be confirmed. I certainly support your confirmation. But I would like to get a commitment that you, let's say in the first year, actually physically visit and talk about this problem. And prior to making that trip to the various regional offices, read the transcripts of the—I think we had two hearings back when I chaired this Committee—on really egregious inconsistencies of application of the law and the policies in these various regional offices. Would you be willing to do that?

Mr. HILL. Senator, I will commit to you to extract myself from Washington, DC. and go out and visit some of these regional offices. I don't know if I can commit to visit them all, but it certainly will be a priority of mine to get on the road and visit some of these regional offices and talk with them.

Senator INHOFE. Yes. OK. Let me alter my request. I want all of them, yes, but Region V and Region IX to be the first two priorities.

Mr. HILL. I will work to make those my first priorities, Senator, if at all possible.

Senator INHOFE. All right. Thank you very much.

Thank you, Madam Chairman.

Senator BOXER. Senator Bond, do you have an opening statement?

**OPENING STATEMENT OF HON. CHRISTOPHER S. BOND,
U.S. SENATOR FROM THE STATE OF MISSOURI**

Senator BOND. Madam Chair, I apologize.

Senator BOXER. That is all right.

Senator BOND. Everything has hit my schedule today, and I ran into the Cherry Blossom traffic coming in. I thought the traffic was over with.

Senator BOXER. Yes, well, you are welcome to make an opening statement.

Senator BOND. Fine. I wanted to do that because David Hill is a Missourian with deep and strong roots. I believe that the Com-

mittee and the full Senate should act expeditiously to approve him. David is a sixth-generation Missourian. His great-great-great-grandfather Sam Hill came to Missouri in the early 1800's. My great-great-great-grandfather came to Missouri in the late 1700's, and so we have a similarity there.

His parents are from rural Caldwell County, Northwest Missouri. He grew up in Smithville, north of Kansas City, where his parents live. After Smithville High School, he received a degree in ag journalism for the University of Missouri, which is our nationally known school both for its college of agriculture and its law school.

He attended law school at Northwestern University in Chicago, and clerked for a judge on the Tenth Circuit Court, U.S. Court of Appeals. I clerked on the Fifth Circuit Court of Appeals. David practiced law in Kansas City and Washington, DC, as I did. He served as a professional staff member of the House Ag Committee, but despite his Washington connections, he has maintained his ties with Kansas City and Missouri. I think he would make an excellent member of the EPA.

Madam Chair, this is a very contentious time for environmental policy in this Administration. Congress and our oversight role needs to understand better the decisionmaking of the EPA. EPA's General Counsel must play a central role in responding to information requests such as the request that our Ranking Member has just made. That is why I think it is in the interest of the Committee and the Senate to have the EPA General Counsel office fully staffed with leaders empowered to make decisions.

He was unanimously confirmed as General Counsel at the Department of Energy and his 3 years of experience there make him well qualified to serve in the same role at another major governmental agency. He has a record of proven experience, management acumen, and legal experience. I believe this Show Me State product has shown us he can make an excellent EPA General Counsel.

I urge the Committee to report the nomination favorably, and I will urge our colleagues in the Senate to confirm him as swiftly as possible.

With that, Madam Chair, I am due at three more committee meetings this morning.

Senator BOXER. I know.

Senator BOND. So I apologize, but mark me down as strongly in favor.

Senator BOXER. I know that and I will mark you down as strongly in favor. We really do thank you for making the effort. It says a lot for your opinion.

Senator BOND. This is a fine man. Even though he and I have a similar track record, don't judge him by my mistakes please.

[Laughter.]

Senator BOND. I hope he has learned better than I did.

So thank you very much.

Senator BOXER. Thank you, Senator Bond, for making the effort to come over. We know this is just such a hectic time for all of us, and we appreciate your being here.

I want to get back to your role in the EPA new source review rules and the mercury rule, because I have the docket here. You know, you made some edits and that is about it. So it is clear to

me, and you said before you didn't recommend they go in a different direction. This is a problem because of what eventually happened, which was the courts came down hard on EPA and the docket shows you did make comments kind of on every page, but they were more technical or corrective.

In *New York v. EPA*—this was the D.C. Circuit in 2006—EPA's interpretation of substantial plant modifications did not come within the scope of any physical change and would make sense only in a Humpty Dumpty world. That is pretty tough talk.

And then *New Jersey v. EPA*, the D.C. Circuit, which is certainly a conservative circuit—I mean Janice Rogers Brown as I understand it, is that right, signed off on it? Janice Rogers Brown, and she is one of the most conservative judges ever, I think I could say. The EPA rules seeking to reverse controls on mercury emissions from power plants was unlawful on its face. EPA's explanation—and this is a direct quote from the decision—“deploys the logic of the Queen of Hearts, substituting EPA's desires for the plain text of the section.” That is pretty fancy language for that court.

So what I am saying is, here you had an opportunity to save EPA from themselves. This list is shocking, frankly, and you didn't exercise that judgment which is of concern.

On the ozone air quality standard, on March 15th EPA announced a revised secondary air quality standard for ozone. The Federal Register notice showed the White House overruled EPA on the appropriate standard based on an OMB position. Do you believe it is appropriate for OMB or other White House staff to overrule the scientific judgment of the EPA Administrator, when Congress has explicitly delegated the decision to the Administrator under the Clean Air Act?

Mr. HILL. Madam Chairman, I think it is perfectly appropriate for there to be coordination and consultation between various agencies and with the various agencies with officials at the White House. I read some of the press reports about the conversations between the EPA and the White House about the secondary standard on the ozone rule that was recently issued. I don't know anything more about those conversations than what I read about them in the papers.

Senator BOXER. Right. But I am not asking you about conversations. I am saying I know you have read the Clean Air Act. Under the Clean Air Act, it is supposed to be a clean decision by the EPA Administrator without that type of interference. It is supposed to be based on protecting the health of the people. That is the way the Act is written. The Act wasn't written with any other purpose.

So I am asking you again, do you believe it is appropriate for OMB or other White House staff to overrule—to overrule, I am not saying talk to—to overrule the scientific judgment of the EPA Administrator when Congress has explicitly delegated the decision to the Administrator in the Clean Air Act? Do you think it is appropriate for them to overrule? That is my question.

Mr. HILL. Senator, the courts have held for a number of years, and in fact the executive orders dealing with interagency review of major regulations say that it is perfectly appropriate for there to be any amount of consultation and coordination and work among the various agencies and with the folks at the White House. So I

think it is perfectly reasonable and appropriate that those inter-agency conversations go on.

Senator BOXER. I agree with you. I am not questioning that. You are repeating it. Do you think—yes or no—it is appropriate for OMB or other White House staff to overrule the scientific judgment of the EPA Administrator when the Congress has explicitly delegated the decision to the Administrator under the Clean Air Act?

Mr. HILL. Senator, again, I think the courts have held that within the unitary executive, it is fine for the White House to be significantly involved in decisions.

Senator BOXER. I know. I am not asking that. Can you please answer my question? I thank you. You are a very smart man. I am not trying to trap you. I am simply trying to get an answer.

Do you believe it is appropriate for the OMB or other White House staff to overrule the scientific judgment of the EPA Administrator when Congress has explicitly delegated that decision to the Administrator? I am not talking about consultation, having lunch, chit-chatting, having coffee and exchanging ideas. I am talking about overruling a decision.

Mr. HILL. Ultimately, the Administrator works for the President of the United States.

Senator BOXER. Doesn't the Administrator have to carry out the Clean Air Act? What if the President of the United States tells him to do something illegal? You are saying he has to do that?

Mr. HILL. I believe the courts have held, Senator, that within the unitary executive that the Administrator and the EPA, just as with all executive agencies, work for the President and are responsible to the President of the United States.

Senator BOXER. OK. Well, my legal experts are telling me that there is going to be another lawsuit because of the way this rule was handled. What is discouraging to me is you are basically giving the sign-off. He works for the President so if the President tells him ignore the health factors, I just think politically this is a bad decision, that you would be fine with that. That is extremely troubling to me because I will tell you why. There will be another lawsuit. EPA will lose again, and all we are doing is delaying the work we have to do.

We will go to Senator Inhofe for his questions.

Senator INHOFE. Madam Chairman, I don't have any more questions. After listening to Mr. Hill, I think he is doing fine. In just a very short while, I am going to have to leave, and I hate to do that to you, but I think you can handle yourself.

Senator BOXER. Senator Whitehouse.

**OPENING STATEMENT OF HON. SHELDON WHITEHOUSE,
U.S. SENATOR FROM THE STATE OF RHODE ISLAND**

Senator WHITEHOUSE. Thank you, Madam Chair.

Mr. Hill, I would be interested in hearing a little bit more about your conception of the role of a General Counsel to a government agency. Unfortunately, from the various seats that I have on Senate committees, on a variety of occasions I have seen attorneys' performance and attorneys' work that to me does not meet very, very basic standards of adequacy, but appears to serve a larger political purpose, i.e. corners were cut that shouldn't have been cut;

cases were ignored that shouldn't have been ignored; analysis was flawed, but it got where people thought the President wanted it to go.

It is concerning to me to hear you sort of leap to the notion of unitary executive, and the implication one takes from that the role of a Cabinet officer in a President's Administration, particularly of an agency like EPA that is a regulatory agency as well as an implementing agency, is simply to do the President's bidding.

How do you compare and contrast your conception of a unitary executive, for instance, with the conception of the first Administrator of the Environmental Protection Agency, also a Republican, that it was an independent agency?

Mr. HILL. Senator, your first question about the role of a General Counsel and how a General Counsel operates within an agency, of course, having been General Counsel of the Department of Energy for almost 3 years, there have been various situations that I have been in where I have given advice in various DOE matters and various DOE decisions, some major, some minor, where the advice I have given has been that we cannot as a legal matter pursue a policy objective that one or the other of the policy officials wishes to pursue. And there are times that people have been very angry with me about that.

But as a matter of carrying out my obligations as General Counsel to the Secretary, the President and the American people, I view that as being my obligation. I am perfectly willing to accept that responsibility as the General Counsel of DOE.

Senator WHITEHOUSE. Good. of EPA, you mean?

Mr. HILL. I do currently at DOE. If I were confirmed at EPA, I would at EPA as well.

Senator WHITEHOUSE. Yes. EPA appears to have a pretty tragic history recently with the result of its litigation. Courts of the United States have referred to its litigation positions using reference to Humpty Dumpty, using reference to Alice in Wonderland. It is embarrassing to me as a member of the U.S. Government to have an agency of the U.S. Government referred to in that way by our courts.

The record of success on significant litigation of the EPA is essentially zero. They got knocked out of the box essentially every time. There appears to have been no effort that I can divine to, if this was a company, for instance, and corporate counsel made litigation recommendations to the CEO that caused defeat after defeat after defeat, and caused the courts not only to say you lose, but to mock the credibility of the position that corporate counsel had taken. At some point, somebody you would think would look back and say, you know, our corporate counsel aren't doing a very good job here; let's take a second look.

I worry in the context of this sort of unitary executive theory that at the EPA the legal determinations are now being made not because of their merit or because even of any likelihood of success, but because they will either kick the can down the road for a little while, or at least please the policymakers in the White House. That creates substantial expense to taxpayers and it also creates departures from American law, which are significant. No matter what

party you are in, no matter what agency you are in, we would like to operate a government that is lawful.

I am wondering what your comment is on the record of EPA in terms of its litigation, whether you see warning signs there that suggest that maybe something is wrong that needs to be corrected, and what you might do to correct it.

Mr. HILL. Senator, I think your concerns are very legitimate. I am concerned about that as well. I think a lot of these decisions that EPA has made and makes and a lot of the matters before the agency are very complex, from a legal and policy and scientific and technical perspective. As a result, they are very complicated decisionmaking matters.

I think if I were confirmed as General Counsel, I certainly would view it as my obligation and I would do everything I can to make sure that in carrying out those responsibilities decisions and in making those decisions or issuing those rules, that we did those in a responsible manner, and I would advise the policymakers about a way to do that in a legally defensible way.

Senator WHITEHOUSE. Do you have concerns at present, or any idea at present as to what might have gone wrong that caused this extraordinary series of not only defeats, but embarrassing criticisms of the very professional quality of the work that led to the defeat?

Mr. HILL. If confirmed, Senator, one of the first things I would do is meet with all of the Associate General Counsels and the Deputy General Counsels, I believe all of whom, perhaps with one exception, are career Federal employees there at EPA, and learn from them just what they believe. The past is the past, but we can do something about the future. What it is from their perspective, and how it is that we might approach our work in a way where the agency would be able to have an improved track record.

Senator WHITEHOUSE. It is your sense that the patterns and practices that have led to this sequence of defeats at least merits a look at this point by a new incoming General Counsel as to what the heck is going on here.

Mr. HILL. I certainly don't know, Senator, that anything that has been done in terms of management of the office before has been wrong, but I of course haven't been in that office.

Senator WHITEHOUSE. Working back from the conclusion you draw from the batting record of the department and from the really extraordinary things that were said about it by United States District Court and Circuit Court judges, just that alone, setting aside knowing what went on, that merit at least being looked at as General Counsel?

Mr. HILL. Senator, it is concerning, just as at DOE when we are sued and lose, it is a matter of significant concern to me. What it causes me to do is say, OK, well how is it that we can conduct our work differently; how is it we can go about this in a different way, so that we don't just make decisions and get them remanded to us or get them overturned. These are decisions and rules and other matters that require an extraordinary amount of work, and yet we need them to survive judicial challenge. And so I certainly would do what I can to address that.

Senator WHITEHOUSE. I have gone over my time. I see that some of my colleagues have arrived. I appreciate the Chair for her indulgence while I have the floor for a while here. Thank you very much, Madam Chairman.

Senator BOXER. No, I appreciate your line of questioning.

Here is what we are going to do. We are closed for opening statements. We will put those in the record, but we will go to questions.

Senator BARRASSO.

Senator BARRASSO. Thank you very much, Madam Chairman.

Mr. Hill, congratulations. I appreciate your being here with your family in the front row. I want to appreciate your service and your willingness to do continued service here for our country, so thank you very much.

I am from Wyoming, and in Wyoming we believe that Wyoming solutions to environmental problems are better than the one size fits all approach that Washington often offers. We also often disagree with interpretations of the law coming from Washington on statutes such as the Clean Air Act or the Clean Water Act.

Can you elaborate a little bit about your feelings of incorporating State and local viewpoints in terms of analyzing and interpreting the law?

Mr. HILL. Thank you for that question, Senator. Again speaking about my experience at DOE, we have a number of major operations around the Country both in terms of laboratories or our cleanup sites. In most of those really in all of those situation it is important to the success of what we are doing that we work very closely with the States. In fact, often we are regulated by the States in terms of our cleanups.

So one of the things that I personally have done occasionally is work with State officials on those particular matters. Other attorneys in the office have as well, and that is really true both on legal matters and also working with other officials in the department on more policy or budget matters.

Senator BARRASSO. Along that line, with your experience at the Department of Energy in terms of the legal, the technical, policy matters, could you give us a couple of examples of how you work with others? You know, you talked in your testimony about the reputation that you have gained of being careful and considerate of all viewpoints. I don't know if you want to share with the Committee any specific examples of how you have worked well with others.

Mr. HILL. Sure. One of the things that we are doing right now and that I spoke with Senator Craig about just a little bit before the hearing started, is that we of course have a laboratory and a large cleanup ongoing in the State of Idaho. I personally and other attorneys in the office have worked for months, for years in connection with Idaho officials, both lawyers and non-lawyers, on that operation. We don't always agree, and sometimes we have very difficult arguments about that, but I think we have worked constructively over time.

In the context of the DOE work and within the Administration, within the Federal family, the loan guarantee program that DOE is working to implement that was authorized in the Energy Policy Act of 2005 has required extensive coordination by us at DOE with officials at the Department of the Treasury, with the Office of Man-

agement and Budget, with Members of Congress and their staffs. Again, it is not something where we can always make everybody happy, but it is something where we try to address legitimate concerns. We try to listen to reasonable arguments, and we try to come up with something that makes sense from a legal and a policy and a fiscal standpoint.

Senator BARRASSO. Thank you very much, Mr. Hill.

Thank you, Madam Chairman.

Senator BOXER. Thank you very much, Senator.

Senator CARPER.

Senator CARPER. Thank you, Madam Chair.

Mr. Hill, welcome. I see two of your three daughters are here. Is that right?

Mr. HILL. Thank you, Senator. Yes, we have three daughters, but there are only two of them that made the trip.

Senator CARPER. Where is the third one?

Mr. HILL. The third one is 3 years old and she is in her preschool this morning.

Senator CARPER. I would call that an excused absence. We welcome you. At least you have a quorum of your family here, so we are glad you are here. Welcome and thank you for your service to our country.

I am going to go back over 7 years in time, to Saginaw, Michigan, when my colleague, a former Governor, then-Governor George Bush made the following campaign promise. What he said is he said if he were to become President, and this is what he pledged, and I am going to quote him, "to require all power plants to meet clean air standards in order to reduce emissions of sulfur dioxide, nitrogen oxide, mercury and carbon dioxide within a reasonable period of time." Those are his words.

Unfortunately, less than 60 days after taking office, President Bush began backing away from that pledge. And 6 months later, on March 13th, 2001, in a letter that President Bush sent, he said, and again I quote, "I intend to work with the Congress on a multi-pollutant strategy to require power plants to reduce emissions of sulfur dioxide, nitrogen oxide and mercury. I do not believe, however that the government should impose on power plants mandatory emissions reductions for carbon dioxide, which is not a pollutant under the Clean Air Act." That is again his quote.

Unfortunately, in 2005, President Bush continued to pull away from his initial pledge. He decided not to work with Congress on a multi-pollutant strategy, and his Clear Skies proposal failed here because it would not have improved the environment and ignored carbon dioxide emissions. He then attempted to implement his Clear Skies proposal through regulation in the form of a clean air interState rule and the clean air mercury rule.

One year ago, the Supreme Court rejected the President's position that carbon dioxide is not a pollutant. As you know, the Supreme Court told EPA that the EPA's decision not to regulate carbon dioxide—and this is a quote again from the decision "rests on reasoning divorced from the Clean Air Act." In other words, the Supreme Court decided that EPA failed to follow the clear directives of the law.

In 2006, the D.C. Circuit Court concluded that EPA's attempt to weaken the regulations known as new source review would make sense "only in a Humpty Dumpty world."

I wish some of these people were writing my speeches. They are pretty good.

In February of this year, the D.C. Circuit vacated a clean air mercury rule. In their decision, the court said EPA's mercury rule was based on "the logic of the Queen of Hearts substituting the EPA's desires for the plain text" of the law.

In my opinion, this was a welcome decision. The clean air mercury rule was deeply flawed, and I understand you have a different view of this, but it was deeply flawed and did not go far enough to protect the public's health, in my own estimation. EPA should have regulated mercury as a hazardous air pollutant and imposed regulations that would require every covered power plant to install best available controls to reduce their mercury emissions.

And finally late last month, the D.C. Circuit Court heard oral arguments on a challenge to the clean air interstate rule. Many believe the court could overturn that rule as well. Given EPA's track record in the courts, I would say it is not unlikely.

In short, regrettably we are not much closer to cleaner air than we were in 2000. What this means is that in the 8 years since then-Governor Bush promised to address all four major pollutants from power plants, 190,000 people have died prematurely due to air pollution; five million babies have been exposed to dangerous mercury levels in the womb; 580 million hours of work have been missed because of asthma and other respiratory diseases; and countless dollars have been spent on health care treating the many illnesses that these pollutants cause. This is not an environmental legacy that I would be proud of.

Given the fact that EPA has had so many of its proposals overturned by the courts, I think it is an understatement to say that EPA has suffered from some bad legal advice. The Supreme Court and the District Courts have repeatedly chastised EPA for failing to follow the law and making instead Alice in Wonderland-types of interpretations of the Clean Air Act.

Mr. Hill, that is the legacy position that you are seeking to fill and may well fill. I sincerely hope that if you are confirmed as EPA's next General Counsel you will follow through with the commitment made in your written statement to help the agency advance its mission protecting human health and the environment in a manner that fully complies with the law. It is a long statement. Here is my question.

On April 2d, 2007, the U.S. Supreme Court ruled that carbon dioxide is a pollutant and charged EPA with making a formal endangerment finding regarding greenhouse gases. On April 2d, 2008, the litigants in the Supreme Court decision petitioned the court to force EPA to make this finding within the next 60 days. I find a year long delay in acting on a ruling, responding to a ruling from the highest court in the Nation to establish critical environmental regulations unacceptable.

Question: What do you consider an appropriate response time to a decision or a finding of this nature? How will you work to ensure the agency responds in a timely manner in the future? Please.

Mr. HILL. Thank you for the question, Senator. I think that how fast an agency should work on remand of a particular case depends on the circumstances. I know that in this particular case, I believe the Administrator recently announced that he had decided to publish an advance notice of proposed rulemaking having to do with how to respond to the particular decision in light of all the implications of regulation of greenhouse gases under the Clean Air Act if that were to happen as a result of an endangerment finding under section 202 of the Clean Air Act.

So your direct question I believe is how fast should the agency act. I think the answer is really it depends on the circumstances.

Senator CARPER. Is a year a reasonable period of time given this situation?

Mr. HILL. In this particular case, I believe it was maybe within a month or so of the Supreme Court's decision the President issued an Executive Order calling for different agencies to work together in response to the Massachusetts v. EPA case. The agencies were working together on that, and then the Energy Independence and Security Act was passed, and now the Administrator has decided to publish an advance notice of proposed rulemaking.

So I think the agency has proceeded down one path, but then what the Administrator said was that in light of some of the recent developments and really thinking more about it, that he thought that an advance notice of proposed rulemaking was the right way to go.

So I think in answer to your question, it really depends on the circumstances. But in this case, the Administrator has decided that an advance notice of proposed rulemaking is appropriate at this time.

Senator CARPER. My time has expired. Let me just say, I wish you well, but I am disappointed with that response. Thank you.

Senator BOXER. Mr. Hill, I want to talk about the Savannah River nuclear waste disposal. In 2006, you sent a letter to the Nuclear Regulatory Commission objecting to the commission's plan for overseeing DOE's handling and disposal of spent nuclear fuel at the Savannah site.

You raised issues with the NRC's proposal to make key aspects of their review of DOE's nuclear waste disposal publicly available, and you objected also to having key meetings open to the public. Press reports said that DOE insisted on having closed door meetings to define the scope of NRC's rule. I have a copy here of the letter that you wrote expressing your concern, and I am going to make it part of the record, without objection.

[The referenced document was not received at the time of print.]

Senator BOXER. Do you believe that keeping the public in the dark on such important matters as nuclear waste disposal is appropriate?

Mr. HILL. Madam Chairman, I believe that it is important in some contexts for there to be a free and frank discussion among agency officials of different agencies that isn't always in public. I think in that particular context, which I believe had to do with the waste incidental to reprocessing matter at Savannah River, that Congress had passed and the President had signed a law calling for the Department of Energy to make certain determinations. We be-

lieved that at the particular time the Nuclear Regulatory Commission was proceeding in a way that was inconsistent with what Congress had intended and the authority it had given the Department of Energy in that particular statute. So that was why I wrote that letter to the NRC.

Senator BOXER. But sir, your objections went beyond that because you said you objected to having key meetings open to the public. So you objected to that, and eventually, by the way, you were overruled. People weighed in on it and that changed. So I have a problem with that as someone who believes the public has a right to know, especially on these important matters. Representatives Dingell and Barton, bipartisan, raised concerns to these closed meetings, and the NRC opened the meetings despite your objection.

As we move forward, this is an issue that I care deeply about, the public's right to know. It is involved in a lot of environmental laws. This, I think, is symbolic to me of your taking the side of secrecy. I understand your concerns. You outline them in your letter.

Now, on Yucca Mountain, what role would you play as General Counsel in finalizing the Yucca Mountain radiation standards?

Mr. HILL. If I were confirmed as General Counsel at the Environmental Protection Agency, I anticipate I would work with the Administrator and other officials if that hadn't been finalized by that time to help finalize the standard.

Senator BOXER. So you would be in a position to modify the radiation standards and in a position to approve or deny promulgation of the radiation standards?

Mr. HILL. Well, it would be the Administrator's decision in the end about what standard and what rule to approve.

Senator BOXER. And the Administrator works for the President, right? That is what you said. Do you work for the President?

Mr. HILL. I work for the President as well, yes.

Senator BOXER. OK. All right. This whole thing is interesting the way you see your role. I respect it, but it flies in the face of what Richard Nixon said the agency ought to be totally independent. It is a problem and it reflects exactly why we are where we are with a series of court decisions that have been overturned and make all of you who are involved with them look like you don't know what you are doing.

You are a brilliant man. I see it, with a beautiful family, and I wish you nothing but good things in your life. But I don't necessarily want to see this attitude continue at the EPA, which has become a shadow of its former self.

Now, have you ever participated in making any recommendations or comments to the EPA, the NRC or the White House on the Yucca Mountain radiation standards?

Mr. HILL. I have participated in interagency discussions on that matter.

Senator BOXER. And what was the substance of your comments or recommendation?

Mr. HILL. The DOE has of course been working for years on the Yucca Mountain matter. We are currently in the process of trying to prepare a license application to file at the Nuclear Regulatory Commission relating to the Yucca Mountain project. We have tried

to participate in those discussions constructively, and of course to help EPA develop a standard that is both technically sound and legally defensible.

Senator BOXER. Have you ever recommended or suggested in writing or verbally that anyone should modify the technical recommendations of EPA's staff regarding any Yucca Mountain standards?

Mr. HILL. Have I recommended?

Senator BOXER. Have you recommended or suggested in writing or verbally that anyone should modify the technical recommendations of EPA staff regarding any Yucca Mountain standards?

Mr. HILL. Have I recommended that anyone modify the technical recommendations of EPA staff?

Senator BOXER. Yes.

Mr. HILL. I don't remember doing that, Madam Chairman.

Senator BOXER. OK. Do you disagree with the court that overturned the EPA standards?

Mr. HILL. Madam Chairman, you are referring to the decision in, I think it was, 2004?

Senator BOXER. Yes.

Mr. HILL. The EPA standard, the radiation standard for Yucca Mountain, was promulgated in I believe it was 2001. The court later overturned the rule with respect to whether or not it was permissible for EPA to only set a 10,000-year standard instead of a standard going out to a million years or on the order of geologic stability. I believe the 2001 rule that EPA signed and issued was a solid standard. The court disagreed with that and said that it was inconsistent with part of the NAS report. So, the original EPA rule I think was very sound.

Senator BOXER. OK. So you disagree with the court?

Mr. HILL. I think the original EPA rule was very sound. The court at this point has spoken and we need to live with what it is that the court decided.

Senator BOXER. Well, again, this is so disturbing because you sound like you would be just in line with what has been happening over there at EPA, you know, no independent thought, and continuing to see these battles in court that you lose every time not you, that they have lost every time.

Now, if you have any papers on your recommendations on the standard, we would appreciate if you could get it to our Committee, anything in writing. All right? Could you do that for us?

Mr. HILL. Anything in writing from me to the EPA.

Senator BOXER. Yes. To EPA or anyone else regarding the standard.

Mr. HILL. I will see what I have on that, Madam Chairman.

Senator BOXER. Thank you. Thank you very much.

Have you participated in making any recommendations—oh, we just asked that.

Were you involved in any way with the drafting or review of the Nuclear Fuel Management and Disposal Act by DOE?

Mr. HILL. This is the legislation that the Administration proposed, that I believe Secretary Bodman maybe sent up to Congress in 2007?

Senator BOXER. Yes. Were you involved in any way with the drafting or review of the Nuclear Fuels Management and Disposal Act by DOE?

Mr. HILL. Yes, I participated in the work at DOE and within the interagency process on that.

Senator BOXER. Are you aware that the bill could preempt State public health laws and transportation routing decisions for nuclear waste?

Mr. HILL. I am aware that there is a provision in that bill having to do with transportation.

Senator BOXER. As General Counsel of DOE, did you support or approve the part of that legislation that dealt with the public health laws being preempted in transportation and routing decisions being preempted?

Mr. HILL. I and other attorneys in the office and other non-attorneys at DOE participated in developing that.

Senator BOXER. OK. Well, you will be glad to know that was my last question. What I am going to do is put in the record a letter in opposition to that bill signed by the Alliance for Nuclear Accountability, Alliance for Nuclear Responsibility, American Rivers, Blue Ridge Environmental Defense League, Citizen Action Coalition of Indiana, Citizen Alert, Citizens Awareness Network, Clean Water Action, Colorado Coalition for the Prevention of Nuclear War, Concerned Citizens for Nuclear Safety, Friends of the Earth, Grace Policy Institute, Green peace, National Environmental Trust, NRDC, Nevada Nuclear Waste Task Force, New Mexico Environmental Law Center, Nuclear Peace Foundation, Nuclear Energy Information Service, Nukewatch, Nuclear Watch of New Mexico, Physicians for Social Responsibility, Sierra Club, Southern Alliance for Clean Energy, Snake River Alliance, Tri-Valley CAREs, Union of Concerned Scientists, U.S. Public Interest Research Group, and Women's Action for New Directions.

The reason I point this out is these are a lot of the groups that have brought lawsuits successfully. You know, it seems that we just keep on this same direction of political decisions in spite of the protective laws that Congress has passed.

Senator Whitehouse, the floor is yours.

Senator WHITEHOUSE. Thank you.

I wanted to follow my earlier line of questioning just a little bit further, Mr. Hill. I would like to ask first for your assessment of the reputation right now of the Environmental Protection Agency among four separate constituencies, if you could answer for each one.

The first is EPA career staff. The second is the environmental community. The third is the environmental bar, the lawyers and judges that EPA works with and work around EPA. And the fourth is I would say the political establishment surrounding EPA that it must work with, particularly the Hill, us, and the State agencies that are often the EPA either colleagues or operate under EPA authority in their States—those four categories.

Mr. HILL. Your question, Senator, is the reputation that EPA has among those different constituencies at the current time?

Senator WHITEHOUSE. At the current time, yes.

Mr. HILL. I don't know that I am really qualified to say what reputation the EPA has among the career EPA staff. I personally, of course, have worked with different career attorneys and other officials at EPA over time. I have always had a good constructive working relationship with them. I don't know that I have heard them actually say one thing or the other to me about what they view as being EPA's reputation.

Senator WHITEHOUSE. With respect to the staff, you have no concerns with respect to the reputation of EPA in that regard?

Mr. HILL. Well, Senator, I think that is a different question. It is always of concern to me what reputation both the agency and the senior leadership of an agency have with the career staff. Again, just speaking about my experience at DOE, it is important to the mission of DOE and it is important for us being able to successfully carry out our mission that the career staff—and of course in my case the career attorneys, who are 99 percent of the attorneys at the department—have respect for both me and respect for the department's leadership.

So I can tell you I believe the respect of the career employees is a very important thing to have. If I were EPA General Counsel, I would see what I could do to both assess that and to improve it to the extent I could.

Senator WHITEHOUSE. But you don't have an opinion on where that reputation stands right now?

Mr. HILL. All I know about that, Senator, at the current time is what I might read in a particular report in the newspapers, and I don't always accept that whatever newspapers say is 100 percent true.

Senator WHITEHOUSE. As for the other three?

Mr. HILL. The environmental community, I certainly have read about the environmental community and some of the prominent environmental organizations—NRDC and so forth—that have been quite critical of EPA and of some of EPA's decisions. There are others I have read about at different times where they have been complimentary of how EPA has been proceeding. I would say that in that context, the environmental community, at least according again to the press reports I read, has been critical of EPA.

I should say that they are sometimes critical of DOE as well in various things, and we try to work with that. We get criticized not only by environmental organizations, but by industry and others as well. We just try to do the best we can.

Senator WHITEHOUSE. Do you think the reputation of EPA with the environmental community right now is at an unusual point in its history? I mean, are we looking at sort of an epic low? Is it a cause for concern? You are sort of suggesting that sometimes people are mad at us, and sometimes they are not. We have tough calls to make; no big deal, standard operating procedure for an agency. There might be something more than the SOP occasional disputes going on right now.

Mr. HILL. Well, I certainly note, Senator, that some of the criticisms that have been tendered by various environmental organizations have been quite strident. And I do believe it is important for EPA to successfully carry out its mission, to work cooperatively with a number of those organizations. So I think it is important

that their concerns be listened to and that EPA seek to work with them, just as with other interested stakeholders.

Exactly how the reputation of EPA is in relation to how it has been at different times in the past, I can't really speak authoritatively to that.

You asked about the environmental bar. I think there really are two aspects to that. One is of what people's views would be in terms of what their own particular policy objectives are or their policy views. The other would be how the attorneys view the work of the agency as a legal matter.

Senator WHITEHOUSE. Does this crowd know what they are doing?

Mr. HILL. Right. And I think that it of course would be a matter of concern to some members of the bar if the agency decisions are challenged and EPA is losing on those. Of course, the members of the environmental bar are often both defending and challenging those decisions from the perspective of whatever clients they may have in a particular matter.

So again, if I were confirmed as General Counsel, I think talking with members of the bar, particularly prominent members of the bar, would be a useful thing for me to do to gain what their views are and how I could best serve both the bar and EPA as General Counsel.

Senator WHITEHOUSE. And with State regulators and Congress?

Mr. HILL. In that context, I of course read about the different stories in connection with oversight or various other things and the arguments that are made. I think that is probably a fair term for what is going on between different members or committees of Congress and EPA on various things.

I know there are a number of difficult issues between EPA and the Congress, and individual Members of Congress and different committees. So I think there are a lot of difficult issues presented in that. Again, if I were confirmed, I have worked cooperatively with the committees of jurisdiction for the Department of Energy. We can't always agree on everything, and sometimes we have to strongly disagree about things. But I have tried to work as cooperatively as I can, with State agencies, political officials, as well as regulators, and with Members of Congress and their staffs. So if I were confirmed, I would seek to do that at EPA.

Senator WHITEHOUSE. Madam Chair, may I ask unanimous consent that my opening statement be made a part of the record, rather than deliver it now.

Senator BOXER. Without objection.

[The prepared statement of Senator Whitehouse follows:]

STATEMENT OF HON. SHELDON WHITEHOUSE, U.S. SENATOR FROM
THE STATE OF RHODE ISLAND

Thank you, Madam Chairman, and thank you for holding this hearing to consider David Hill for the position of Assistant Administrator and General Counsel of the Environmental Protection Agency. Madam Chairman, this is a very important hearing because, sadly, EPA is an agency in crisis.

For most of its nearly 4-decade history, Americans could look to EPA for independent, science-based leadership in the area of environmental protection. Indeed, in a 1970 press release setting forth the agency's mission, its first administrator, William Ruckelshaus, stated unequivocally, and I quote:

“EPA is an independent agency. It has no obligation to promote agriculture or commerce; only the critical obligation to protect and enhance the environment.” I repeat—“the critical obligation to protect and enhance the environment.”

However, during the entire Bush administration, and especially under this administration, EPA has forsaken its longstanding mission. EPA’s decisionmaking process has been hijacked by those in the White House and the agency who place the political interests of the Administration and its allies over any concerns for the environment, the integrity of the regulatory process, or the public health.

Thus, in recent years, we have seen EPA leadership, in cahoots with its White House allies:

- Falsify data and fabricate results of studies regarding the safety of the air around the site of the collapse of the World Trade Center on September 11th;
- Selectively edit government reports to convey an artificial impression of uncertainty in the area of climate change science, placing the imprimatur of the government of the United States of America on views soundly rejected by a resounding majority of the world’s scientific community;
- Routinely tamper with regulatory and scientific processes in order to achieve results sought by industry, at the expense of the environment;
- Hide, suppress, and delay the release of scientific findings in order to affect agency decisionmaking, as in the case of a 2002 report on the effects of mercury on children’s health;
- Disregard or delay legally mandated scientific and administrative procedures, as in the case of the agency’s failure to abide by the Supreme Court’s recent decision on Greenhouse Gas Emissions;
- Stock the EPA’s leadership and its advisory committees with persons who have clear ties to industries affected by agency decisions, removing from these positions respected scientists who argued for stronger regulation of industry;
- Reduce the reporting burdens on industries involved in the release of toxic chemicals into our land, sea and air;
- Ignore the recommendations of career staff and scientists when they collided with White House political imperatives, as in the case of the agency’s decision on the so-called California wavier;
- Weaken enforcement and monitoring by opening fewer criminal investigations, filing fewer lawsuits, and levying smaller fines against corporate polluters; and
- Fail to protect, and indeed seek reprisals against, agency employees who point out problems, report legal violations, and attempt to correct factual misrepresentations made by their superiors.

These are just some of the examples of the ways in which this Administration, and this Administrator, has compromised the mission of EPA to serve its own political, anti-environment agenda.

The consequences of this Administration’s conduct are dire indeed:

First, the Administration’s elevation of industry interests at the expense of independent, science-based decisionmaking threatens our ability to respond to complex challenges to public health, the environment, and national security.

Second, the Administration’s conduct demoralizes EPA’s professional workforce—the scientists, lawyers, and regulatory experts to whom EPA owes its reputation as the gold standard in the area of environmental policy and who, time and time again during this Administration, have seen their expert counsel set aside in favor of a partisan political agenda.

Third, and perhaps most importantly, the Administration’s conduct compromises average Americans faith in the integrity of their government, and promotes the idea that in Washington, policy is always made by the special interests and never for the public good or according to the dictates of science and law.

This is a serious failure of leadership with the potential for lasting harm to our environment and the confidence of the American people. I plan on looking further into this issue, and the challenges facing the next Administration in repairing the damage caused by this Administration in the upcoming months.

The committee now has before it David Hill, the President’s nominee for one of the highest-ranking positions at EPA—the position of Assistant Administrator and General Counsel.

EPA’s General Counsel is the chief legal advisor to the agency, providing legal support for agency rules, policies, and decisions, and articulating the agency’s position before the courts. The person who fills this position has the responsibility to ensure that agency decisions and positions are firmly grounded in law, science and fact, and not held hostage to a partisan political agenda. An agency general counsel is not like a corporate general counsel, whose main role is to looking after the interests, and do the bidding, of his client even if that bidding skirts the margins of the

law. An agency general counsel is the steward of the public good—including, in EPA's case, the public health—, not just an advocate for the results sought by his or her client. It is critical that the EPA's General Counsel understand and respect this crucial distinction. Unfortunately, the outgoing EPA General Counsel, Mr. Martella, appears not to have appreciated this distinction.

My measuring stick for Mr. Hill's nomination will be whether he does understand that distinction. I have concerns, based on the information I have reviewed, that he does not. We need a General Counsel at EPA who is prepared to help the agency regain the stature and independence that it has lost during this Administration, to restore the Agency's commitment to the rule of law and science, and to help it fulfill the mission announced for it in 1970 by Administrator Ruckelshaus. I look forward to discussing my concerns with Mr. Hill.

Senator WHITEHOUSE. I would just sum up by offering my own personal observation of where we are. My own personal observation is that at present the integrity of the Environmental Protection Agency at its senior levels is shot. I see the abysmal litigation record of the Environmental Protection Agency, the scornful remarks of career United States judges as to its theories, and the lack of any follow-up or apparent concern on the part of EPA about all that—just sort of blandly going ahead.

It is all leading to a conclusion that the current management of the EPA is perfectly satisfied with losing all these cases because it no longer cares to win. It no longer even cares to get it right. Its sole job is to do what it perceives to be the political bidding of the Administration; that this is a department that has completely and utterly taken a dive into the tank.

I think that is a very difficult position for a new General Counsel to go into. You have independent obligations as a member of the bar regarding the circumstances you have around yourself in a corporate context. You would have obligations for quiet and noisy exits if you felt that there were improper conduct going on.

I take this terribly seriously because I come to this job and from my whole life experience with the very, very strong belief that the government of the United States of America is probably the most powerful and important force for good on the face of the Earth. And one of the reasons that it is that way is because of ways in which we have detracted from the powers of the President or of leaders of Congress; the ways we have separated those powers; the ways we have set up independent agencies; the very nature of administrative law that you don't just do what the President says. We set up certain agencies that have the purpose of doing what is right, what the facts dictate, what the science dictates, and what the law demands, and that comes first.

And when I see those principles attacked, ignored, abused, rejected, I see an assault on something that is much larger than just the current issue and trying to make things nice for the political interests behind this President. It really affects back to where I started. It undercuts and corrodes the greatest force for good on the face of this human Earth that we inhabit right now.

I just want to close by saying how very troubled I am right now by what is going on at the Environmental Protection Agency. I am on the Judiciary Committee as well. We have had a very similar problem at the Department of Justice that caused the Attorney General and his entire senior staff ultimately to resign. I see far more similarities than differences right now between the posture of the Administrator of EPA and the senior staff, the political staff

there, than differences from what I saw at the Department of Justice.

I would really urge you to go in there with your head up on full alert as to the nature of the organization you are going into, and with a keen personal regard for your own reputation and for the obligations that you have a member of the bar to adhere to certain minimum core professional standards no matter what is going on around you, and no matter where the directive is coming from.

I just caution you in that regard because I am very, very concerned about what is going on. This is an agency with an enormously proud history. I see particularly in those four areas a reputation that is just in tatters and a community of interests around this organization that just says forget it, let's just wait until we can get new and decent people here and start fresh next year. And that is a very, very sad thing for me to see.

Senator BOXER. Senator, thank you for your remarks. You absolutely speak for me. When I opened up my statement, I quoted President Nixon, who said that the EPA should be "a strong independent agency." And then in questioning Mr. Hill—I mean, he has been very straightforward with us—he said, look, the Administrator works for the President.

There is a fine line here. The Administrator is supposed to do what is right for public health. This is the root of the problem. We have had all of these political decisions made over there and they have been overturned by the courts time in and time out. When I have asked Mr. Hill about a few cases he is aware of, he hasn't agreed with the courts. These aren't liberal courts. The D.C. Circuit Court is far from a liberal court, with Janice Rogers Brown joining in on some of these decisions.

Now, I do have one more question regarding—this registry is of concern to me, rather the radiation standard at Yucca. So I want to ask you, you didn't agree with the court decision regarding the radiation standard at Yucca. My question is, have you discussed this with the Department of Justice? Setting the rules consistent with the court?

Mr. HILL. The decision of the D.C. Circuit in that particular matter I believe is final. And so then back in 2005, I believe it was 2005, the EPA published a notice of proposed rulemaking to address the decision and there have been various discussions since then.

Senator BOXER. But that rule has not been set. It is years. So it is still hanging out there. Have you been involved in any discussions about the rule?

Mr. HILL. There have been interagency discussions on that matter, yes.

Senator BOXER. Have you discussed it with the Justice Department?

Mr. HILL. There have been discussions involving all of the interested agencies.

Senator BOXER. Have you discussed it with the Justice Department in particular?

Mr. HILL. The Justice Department has been in some of those discussions, yes.

Senator BOXER. OK. Have you discussed it with OMB?

Mr. HILL. OMB and other agencies have been involved in those discussions.

Senator BOXER. Do you agree with the Justice Department's view on how the rule ought to proceed?

Mr. HILL. That matter hasn't been finalized, Madam Chairman, and so I don't feel at liberty to talk about the details of those discussions.

Senator BOXER. Have you put anything in writing about your views and sent it to Justice or OMB or anybody else on this rule?

Mr. HILL. I don't remember whether I have. I may have.

Senator BOXER. I would like to have copies of those if I might. If you could get that to us, we would be very appreciative on this.

Well, let me just say, you know, I appreciate your frankness with the Committee. I don't agree with your view of your role. I think you are basically telling me, and as I say, I do appreciate your straightforward way you see your role, and the way you see the Administrator's role. You are on the record advocating against the public right to know in the Savannah case, for secrecy in the Savannah case. You were overruled by the NRC at the end of the day.

And so I know that you certainly have the qualifications to be the choice here, but we are going to have to do some careful thinking about this. But we do appreciate your honesty with the Committee. We look forward to receiving some of these documents I have requested.

I have to ask you just two boilerplate questions so we can move this forward. In order for the Committee and other committees to exercise their legislative and oversight responsibilities, it is important that committees of Congress are able to receive testimony, briefings, and other communications, which you promised me you would send.

So, one, do you agree if confirmed as EPA General Counsel to appear before this Committee or designated members of this Committee and other appropriate committees of the Congress and provide information, subject to appropriate necessary security protection, with respect to your responsibilities as General Counsel?

Mr. HILL. Yes.

Senator BOXER. Do you agree when asked to give your personal views, even if those views differ from the Administration in office at the time?

Mr. HILL. I would, Madam Chairman.

Senator BOXER. Three, do you agree to ensure that testimony, briefings, documents, and electronic and other forms of communication of information are provided to this Committee and its staff and other appropriate committees in a timely manner?

Mr. HILL. I would try to do that, Madam Chairman.

Senator BOXER. And four, do you know of any matters which you may or may not have disclosed that might place you in any conflict of interest if you are confirmed as General Counsel?

Mr. HILL. No.

Senator BOXER. OK. Well, we do thank you. We thank your family for coming. I thank Senator Whitehouse and other colleagues who joined me.

We stand adjourned.

Thank you, Mr. Hill.

[Whereupon, at 10:27 a.m. the committee was adjourned.]

STATEMENT OF HON. BENJAMIN L. CARDIN, U.S. SENATOR FROM
THE STATE OF MARYLAND

Thank you for holding this hearing today. Today we'll hear testimony from David Hill, nominee for the General Counsel of EPA. The EPA's office of General Counsel provides legal guidance on the Agency's rules and policies as well as support for the Agency's permits and response actions. Given the testimony we heard yesterday regarding the Clean Water Restoration Act and testimony we've heard over the last year from EPA regarding the California waiver and other issues, it is clear that we need clarity and timeliness in EPA's rulemaking. Moreover, we need the decisions and rules the EPA makes to be scientifically justifiable and legally defensible.

I look forward to hearing Mr. Hill's testimony on view of his role as General Counsel of the EPA. I am further interested in Mr. Hill's perspective of his being a forceful legal advocate for the well considered, scientifically based rules the EPA enforces.

Thank you Madame Chairman.

STATEMENT OF HON. THOMAS R. CARPER, U.S. SENATOR FROM
THE STATE OF DELAWARE

On Sept. 29, 2000 in Saginaw, Michigan, then-Governor Bush made the following campaign promise. If he were to become President he pledged to "require all power plants to meet clean air standards in order to reduce emissions of sulfur dioxide, nitrogen dioxide, mercury and carbon dioxide within a reasonable period of time."

Unfortunately, less than 60 days after taking office, President Bush began backing away from that pledge.

In a March 13, 2001 letter President Bush said, "I intend to work with the Congress on a multi-pollutant strategy to require power plants to reduce emissions of sulfur dioxide, nitrogen oxides, and mercury. I do not believe, however, that the government should impose on power plants mandatory emissions reductions for carbon dioxide, which is not a "pollutant" under the Clean Air Act."

Unfortunately, in 2005, President Bush continued to pull away from his initial pledge. He decided not to work with Congress on a multi-pollutant strategy, and his Clear Skies proposal failed because it would not have improved the environment and ignored carbon dioxide. He then attempted to implement his Clear Skies proposal through regulation in the form of the Clean Air InterState Rule and the Clean Air Mercury Rule.

One year ago, the Supreme Court rejected the President's position that carbon dioxide is not a pollutant. The Supreme Court told EPA that their decision not to regulate carbon dioxide "rests on reasoning divorced from the [Clean Air Act]." In other words, the Supreme Court decided that EPA failed to follow the clear directives of the law.

In 2006, the D.C. Circuit Court concluded that EPA's attempt to weaken the regulation known as New Source Review would make sense "only in a Humpty Dumpty world." And in February of this year, the D.C. Circuit vacated the Clean Air Mercury Rule. In their decision the court said EPA's Mercury Rule was based on "the logic of the Queen of Hearts, substituting the EPA's desires for the plain text" of the law.

In my opinion, this was a welcome decision. The Clean Air Mercury Rule was deeply flawed and did not go far enough to protect the public's health. EPA should have regulated mercury as a hazardous air pollutant and imposed regulations that would require every covered power plant to install best available controls to reduce their mercury emissions.

Finally, late last month, the DC Court heard oral arguments on a challenge to the Clean Air InterState Rule, and many believe the Court could overturn that rule as well. Given EPA's track record in the courts, I'd say it is very likely. In short, we are no closer to cleaner air than we were in 2000.

What this means is that in the 8 years since then Governor-Bush promised to address all four major pollutants from power plants: 190,000 people have died prematurely due to air pollution, 5 million babies have been exposed to dangerous mercury levels in the womb, 580 million hours of work have been missed because of asthma and other respiratory diseases, and countless dollars has been spent on health care treating the many illnesses these pollutants cause. That is not an environmental legacy to be proud of.

Given the fact that the EPA has had so many of its proposals overturned by the courts, I think it is an understatement to say that EPA has suffered from some bad

legal advice. The Supreme Court and the District Courts have repeatedly chastised EPA for failing to follow the law and making Alice in Wonderland types of interpretations of the Clean Air Act. Mr. Hill, this is the legacy of the position you are seeking to fill.

I sincerely hope that if you are confirmed as EPA's next General Counsel, you will follow through with the commitment made in your written statement to help the agency advance its mission of protecting human health and the environment in a manner that fully complies with the law.

