

CONFIDENTIAL MEMORANDUM

TO: Administrator Jackson
FROM: David McIntosh
DATE: June 8, 2009
RE: Tuesday 12:00 Meeting with Democratic Senators about Climate Policy

From noon to 1:00 on Tuesday, you are scheduled to meet with Democratic Senators about climate policy in room S-116 of the Capitol Building. S-116 is the meeting room of the Senate Foreign Relations Committee. The only link between that committee and your meeting is Senator Kerry. He will co-lead the meeting along with Senator Boxer, and he chairs the SFR Committee, so he was able to reserve its meeting room. The location will be convenient for the attending Senators, who will have their weekly Senate Democratic Caucus luncheon in the Capitol immediately following their meeting with you.

At 9:30 Tuesday morning, the Environment and Public Works Committee will begin a scientific-integrity hearing at which you will testify. You probably will be released from that hearing at around 11:00, at which point you might be rushed to the White House for a brief meeting with the President. If so, then after that meeting you will turn around and go back up the Hill to the SFR room in the Capitol. I will sit through the entire EPW hearing (the committee will hear from a second panel of witnesses after you leave) and then accompany Chairman Boxer's staff to the Capitol for your meeting.

Tuesday's meeting is one in a series. Every week or two, Chairmen Boxer and Kerry (and Senators Whitehouse and Cardin, as sub-ringleaders) invite a different guest or group of guests to meet privately (no reporters or members of the public) with them and other Democratic Senators who are particularly interested in climate policy. At the most recent meeting, Congressmen Waxman, Markey, and Boucher presented on the House Energy and Commerce Committee's energy/climate bill and on their recent success in reporting the bill favorably to the full House. Fifteen Senators attended that meeting.

You will be the only guest at Tuesday's meeting. S-116 is not divided into a dais for committee members, a table for witnesses, and a large gallery for the public. Rather, there are chairs arranged around a large conference table, plus smaller chairs along the walls. You will sit at the side of the table nearest the door through which you will enter.

Chairmen Kerry and Boxer likely will open the meeting with brief remarks. Then they will invite you to speak for ten or fifteen minutes. For the balance of the hour, the Senators in the room will ask you questions and listen to your responses.

Several of the attendees will be EPW members, but the expanding list of Democratic Senators invited to these meetings now includes nearly every caucus member thought to be reasonably progressive on the question of climate legislation. Senators Lieberman and Specter have been attending. A group of moderate Democratic Senators meets (not specifically on climate policy) at the same time as the Boxer-Kerry meetings. Some of those members, including Senator Carper, might try to attend the second half of your meeting. Some Senators might leave your meeting early, because the doors to the caucus luncheon will open at 12:45.

Chairmen Boxer and Kerry expect you to speak mainly about the GHG-related steps that EPA is taking under the existing Clean Air Act, and about the ways in which that activity interacts with the effort to enact a GHG emissions-reduction statute. The Senators' questions might cover a range of climate-related topics and reflect a diversity of views.

I have attached ten minutes' worth of mock-remarks. You might read over that document once or twice this evening. The meeting will be too informal for script-reading, so I recommend that, during the meeting, you keep only the attached outline in front of you. Finally, I have drafted and attached a Q&A list that you might also read over prior to the meeting.

If a Senator asks you a question that you are not sure how to answer, referring it to me is not a *faux pas*. My response will not be better than yours would be, but my attempt will buy you time to think. Another way to gain time to consider your response is to ask the Senator a clarifying question.

OUTLINE OF PROPOSED JUNE 9 REMARKS TO DEMOCRATIC SENATORS

Compliment about early Senate leadership on climate legislation.

What EPA is doing to directly assist the effort to enact climate and energy legislation.

Technical assistance, including drafting legislative provisions.

Computer modeling of the economic impacts of climate and energy legislation.

Close cooperation with other Executive agencies to coordinate message and outreach.

EPA actions that are underway now, under existing law, in the arena of GHG pollution control.

Mandatory reporting rule.

Endangerment findings.

Vehicle emissions standard.

The road ahead for EPA, and the relation of EPA's regulatory steps to the legislative effort.

Proposed Clean Air Act GHG emissions standards for new major stationary sources.

Why regulating exclusively under existing Clean Air Act programs would be unwise.

EPA's pre-legislative regulatory approach will be sensible and measured.

Most climate bills envision some future use of programs already in the Clean Air Act.

The question of EPA's ongoing efforts providing political leverage for new legislation.

PROPOSED REMARKS FOR JUNE 9 MEETING WITH DEMOCRATIC SENATORS

OPENING COMPLIMENT

Thank you very much for inviting me to meet with you. I have followed for many years the effort to launch a serious, federal climate policy. So I know that Senators – people in this room – are the ones who pioneered that effort more than a decade ago. And I know that Senators – again, people in this room – are the ones whose labors in the last Congress endowed serious federal climate policy with the mark of inevitability. So I am in the presence of some personal heroes.

INTRODUCTION TO THE PREAMBLE

I think you have asked me here mainly to do two things. First, to describe the steps that EPA is taking now in the arena of greenhouse-gas pollution control. Second, to explain how those steps relate to the effort to enact a new, greenhouse-gas pollution-control statute. I will do that. First, though, I would like to describe the work that EPA is doing to directly assist the effort to enact that climate statute.

PREAMBLE

First, EPA is providing technical assistance, including assistance in drafting legislative provisions, to the authors of climate legislation. EPA has traditionally played that role in environmental legislation, as many of you know. Brave EPA civil servants even played that role to a degree under the last Administration, at the risk of reassignment to bureaucratic Siberia. We are blessed that most of EPA's climate-policy experts endured the last eight years and were ready to start helping climate-bill authors from Day One of this Congress.

Second, EPA's computer modelers are developing and publishing objective estimates of the economic impacts that draft energy and climate provisions would have on American families and businesses. EPA is not the only source of that expertise in the Executive Branch. The Energy Information Administration does similar work using its own computer models. Multiple analyses of a draft policy using different computer models and different assumptions are to be desired, because every computer model has shortcomings, and no assumption is fully accurate. Still, I take some pride in the fact that, in the last four months, the most sought-after, respected, and influential economic analyses of climate policies have come from EPA.

Finally, political appointees at EPA cooperate with their counterparts at the other federal agencies that have major equity in climate policy. We work to develop coordinated climate-policy messages that are designed to help narrow the range of conflict between the legislative positions of different outside constituencies whose support is necessary to enact a comprehensive energy and climate bill.

I'll provide a specific example: My understanding is that any cap-and-trade climate bill probably needs the acquiescence of agricultural constituencies in order to become law. To those constituencies, EPA is usually the bad cop. So they fear an outcome in which EPA is the exclusive authority implementing a domestic land-use offsets program – a program that farmers, foresters, and ranchers see as essential to their economic viability under a cap-and-trade system. They react with skepticism when EPA tries to reassure them directly. But when I say things to environmentalist audiences about the importance of a role for USDA in implementing a domestic offsets program, and when Secretary Vilsack cites my statements in his meetings with farmers, it helps to put them at ease. Conversely, when Secretary Vilsack speaks to farm

groups about the necessity of a role for EPA as the guarantor of the environmental integrity of a domestic offsets program, then I can cite his statements in my meetings with environmental groups, and hopefully it helps to put them at ease. President Obama places a high premium on that kind of cooperation across traditional bureaucratic fiefdoms. I hope it will help attract the stakeholder support necessary to enact a strong, cap-and-trade climate bill.

So those are the three main ways in which EPA is directly engaged in the effort to help enact a cap-and-trade climate bill: First, technical assistance on legislative provisions. Second, economic analysis of the legislation. Third, close coordination across Executive agencies, so that the right messenger says the right thing to the right stakeholder, without contradicting another Administration messenger.

INTRODUCTION TO THE MAIN SUBJECT

Again, I think you mainly want to hear two things from me today. First, a description of the steps that EPA is taking now in the arena of global-warming pollution control. Second, an explanation as to how those steps relate to the effort to enact a new, global-warming pollution-control statute.

THE STEPS THAT EPA IS TAKING NOW

The first regulatory step EPA took in this Administration in the arena of global-warming pollution control was not under the Clean Air Act, but rather under a provision that Appropriations Subcommittee Chairman Feinstein and others got into the current appropriations act. That provision directs EPA to promulgate a mandatory greenhouse-gas emissions registry across the United States. Administrator Jackson signed that rulemaking proposal on March 10. The public-comment period closes today. EPA intends to issue a final rule in time to collect, in early 2011, emissions data for all of 2010. That is what the appropriations act directs EPA to do. I believe that the authors in Congress of cap-and-trade climate legislation will be able to rely on EPA's mandatory reporting system being up-and-running, and ratify it rather than design something from scratch.

The second step that EPA took in the arena of global-warming pollution control was on April 17, when Administrator Jackson proposed to find under the Clean Air Act that man-made greenhouse-gas emissions endanger public health and welfare, and that carbon dioxide emitted from light-duty motor vehicles contributes substantially to those emissions and that endangerment. The Supreme Court had ordered EPA, more than two years earlier, to issue findings on those two points. The public comment period closes on June 23. I cannot tell you the precise date on which the Administrator will sign final findings. But I believe it will be well before the end of this year. I certainly do not intend to dawdle.

The third step that EPA took in the arena of global-warming pollution control was on May 19, when Administrator Jackson joined the President in announcing that EPA will issue nation-wide, tailpipe greenhouse-gas emissions standards for light-duty vehicles under the Clean Air Act. The new standards will apply to model years 2012 through 2016, and will be backed up by new CAFÉ rules to be issued by the Transportation Department. Together, the EPA and DOT rules will have the effect of requiring an average fuel-economy of 35.5 miles-per-gallon for new light-duty vehicles. EPA has not finished preparing that rulemaking proposal, and the issuance of a final rule will require the final Clean Air Act endangerment findings that I just described. But EPA is working on a schedule that would have a final rule in place in time to apply to the 2012 model year.

THE ROAD AHEAD, AND INTERACTION WITH THE LEGISLATIVE EFFORT

Administrator Jackson is often asked what else EPA will do in that arena under existing law, in the period before Congress enacts a climate statute. The answer depends in part, of course, on how much time elapses before Congress enacts that new law. If Congress does not act this year, then I think it is likely that EPA at least will have proposed emissions standards for new major stationary sources of greenhouse gases – most prominently, for fossil-fuel-fired power plants – prior to the enactment of the new law.

But I would like Congress to pass comprehensive climate legislation sooner than that. I do not believe that regulating greenhouse-gas emissions exclusively under the existing Clean Air Act, without new legislation, would be the best way to address the challenge of climate change. I believe that reducing total US greenhouse-gas emissions expeditiously enough and substantially enough to protect the nation's economic future requires instituting an integrated, economy-wide, market-based system. I do not believe the existing Clean Air Act can support regulations that institute such a comprehensive system, even though the existing Act probably can support sensible regulations that achieve substantial reductions from some industrial sectors of the economy. And I do not believe that regulations under the existing Clean Air Act can send a strong enough signal – much less include the necessary inducements – to convince nations such as China and India to do their part to curb global warming.

If, in the absence of action by Congress, EPA moves forward to regulate greenhouse-gas emissions from any sources of those emissions, the agency will avail itself of the flexibility that the Clean Air Act provides for a sensible -- as opposed to a maximalist -- approach. Before EPA finalizes any greenhouse-gas regulations, the agency will not only propose those regulations and seek public comment on them, but also propose and seek public comment on the legal interpretations that allow the agency to avoid a maximalist approach to regulating greenhouse-gas emissions. So EPA will go public with its legal interpretations before it acts in reliance on them and before it issues any final greenhouse-gas regulations. I will not be previewing those legal interpretations today. But when the time comes, no one will need to simply take my word for it.

It is important to note that some of the draft climate bills that have been circulated to-date would direct EPA to promulgate certain types of greenhouse-gas regulations under programs that are already found in the Clean Air Act. If EPA were to begin working on some such regulations under existing Clean Air Act mandates prior to the enactment of federal climate legislation, then that work might well be compatible with the legislative enterprise.

Many also believe that having EPA begin taking steps now in the arena of greenhouse-gas pollution control is politically compatible with the legislative enterprise, in that the specter of strict EPA regulation might help convince emitters to support a cap-and-trade statute as a less onerous, more flexible alternative.

I hope that EPA's ongoing steps do improve the politics of climate legislation. I need to urge some caution, however. First, if EPA were ever to give the impression that its ongoing greenhouse-gas regulatory activity were motivated by anything other than a desire to apply today's best science to today's statutory law, then it would de-legitimize EPA's actions in the eyes of many stakeholders and members of the public. Second, circumstances could, for some time, leave EPA rules issued under the existing Clean Air Act as the primary thing that the President really can show or promise the international community at climate negotiating sessions such as the one in Copenhagen in December. If that turns out to be the case, then we

will not want the domestic opponents of action to be able to cite recent statements from US progressives accentuating the downsides of EPA regulation under the existing Clean Air Act for American private enterprise.

I think I have gone on long enough. Let me thank you again for inviting me and offer to answer any questions you might have.

SOME TOUGH QUESTIONS AND PROPOSED RESPONSES FOR JUNE 9

QUESTION: The Waxman bill would prohibit EPA from using key Clean Air Act programs to reduce greenhouse-gas pollution. Will EPA help get that provision removed?

ANSWER: I doubt that Chairman Waxman and Congressman Markey, two of the House's most steadfast champions of EPA and the Clean Air Act, included the provision lightly. My understanding is that the bill would have lost a substantial number of the necessary industrial-state votes if that provision were not in the bill. EPA believes that enacting a greenhouse-gas cap-and-trade bill is more important than leaving EPA the ability to apply requirements such as new source review to greenhouse-gases, for sources that are subject to the cap.

QUESTION: The caps in the Waxman bill are now so weak, the allowance give-aways so generous, and the offsets so voluminous that existing coal plants will not have to shut down for more than a decade. What can we do about that?

ANSWER: The purpose of the bill is not to shut down coal plants or prevent their construction. If that were the bill's purpose, it would not have been reported favorably from the Energy and Commerce Committee. EPA's modeling shows that coal use in this country would not increase until carbon capture and sequestration technology begins to penetrate the marketplace significantly. The bill's caps cover coal combustion, and those caps tighten aggressively.

QUESTION: What is going on between EPA and USDA when it comes to implementation of a domestic offsets program?

ANSWER: Secretary Vilsack said on Friday that EPA will play important roles in implementing a domestic offsets program, and EPA believes that USDA will play important roles in implementing that program. USDA is well-situated to interact directly in the field with the farmers, foresters, and other land-owners conducting offset projects. Moreover, USDA has expertise that should be used in developing the protocols, baselines, and methodologies for land-use offset categories. EPA will be ultimately responsible for ensuring that the overall cap-and-trade program achieves all of the emissions reductions that it advertises. A necessary part of that responsibility is ensuring that the offsets program does not cause actual emissions reductions to be less than the advertised reductions. Moreover, EPA will be the primary agency when it comes to non-land-use offsets, and market participants will expect EPA to ensure that a land-use offset allowance will always merit the same compliance value and a non-land-use-offset allowance. So EPA is going to be expected to have had enough of a role in the certification of each land-use offset such that EPA can really stand behind it as meriting the same compliance value as non-land-use offsets and as a regular emission allowance. Moreover, EPA will need to play a large role alongside USDA in developing the protocols, baselines, and methodologies for land-use offset categories.

QUESTION: Irrespective of the Copenhagen talks, I believe it is very important that EPA use whatever authority it has to regulate greenhouse-gas emissions under the existing Clean Air Act now, because it might take a while for Congress to enact a climate bill. Last month, two professors at NYU law school published a report concluding that EPA can, under the existing Clean Air Act, promulgate an efficient -- or, in their words, "nearly efficient" -- cap-and-trade system for greenhouse gases. Do you agree with them? If so, will EPA issue such a rule-making proposal this year?

ANSWER: I have not taken a close look at the NYU paper, but I suspect that what it is proposing is a theoretical possibility rather than a likely outcome. Moreover, I am aware that various cost-containment mechanisms such as offsets have been integral to most legislative cap-and-trade proposals, and I am not sure that even the NYU lawyers read the existing Clean Air Act to authorize the inclusion of those cost-containment features in any greenhouse-gas cap-and-trade system that they think EPA could promulgate under the existing Act. In any event, I believe that reducing total US greenhouse-gas emissions expeditiously enough and substantially enough to protect the nation's economic future requires instituting an integrated, economy-wide, market-based system. I do not believe the existing Clean Air Act can support regulations that institute such a comprehensive system, even though the existing Act probably can support sensible regulations that achieve substantial reductions from some sectors of the economy.

QUESTION: Current statutory law directs EPA to promulgate a final mandatory reporting rule for greenhouse gases no later than June 26 of this year. Is EPA on track to meet that deadline? If not, why not? And if not, then is EPA on track to promulgate a final rule in time to collect 2010 emissions data?

ANSWER: Completing this rule is a priority for me. As you know, I signed the proposed rule on March 10. I have directed my staff to do everything possible to enable EPA to promulgate the final rule this fall, so that we can collect 2010 emissions data. I believe that we can meet that deadline, and I assure you that EPA staff shares my commitment to accomplishing this important goal. EPA is not going to be able to complete the rule by June 26, because the public comment period does not close until today.