The Marriage of the Mandamus and Data Quality Acts: Implications for Regulatory Relief from Carbon Capture and Sequestration

Now or Never for the Coal Industry

Stock prices for some coal companies have dropped 80% and the Obama Administration has proposed a regulation banning new coal-fired power plants. Currently it appears that the strategy of the coal industry is to take no defensive action until the aforementioned regulation is issued as a final rule. During this quiet period, the Environmental Protection Agency's momentum goes unchecked. The Center for Regulatory Effectiveness believes the coal industry should seek relief from the EPA's regulation in an action which capitalizes on the strengths of the Mandamus Act and the Data Quality Act. Accordingly, the CRE has prepared a draft of a petition for a writ of mandamus based upon non-compliance with the Data Quality Act. (See the attachment hereto.)

Foundation of a Growing Crisis

The Environmental Protection Agency's carbon capture and sequestration technology requirements are based upon information that does not meet the standards of the Data Quality Act, making this regulation an ideal target to challenge by a writ of mandamus. The EPA's new regulations will effectively prevent construction of new coal-fired power plants due to egregious cost and implementation requirements. Since the information that serves as the foundation for these regulations are flawed, a writ of mandamus action will likely be the best way for the coal industry to correct the EPA's extraordinary error.

The Data Quality Act gave rise to government-wide guidelines requiring federal agencies to disseminate information that meets minimum standards of quality, objectivity, utility, and integrity as defined by the Office of Management and Budget (OMB).[1] OMB guidelines require agencies disseminating scientific information prepared by an outside party to provide significant transparency and reproducibility requirements. These requirements generally include how the analysis is performed, how the data used, and how the federal agency applies its assumptions, analytic methods, and statistical procedures to the scientific data.

The EPA's own Office of Inspector General (OIG) publicly denounced the EPA for failing to meet minimum federal standards for the data it used to support the carbon capture and sequestration regulations. In fact, the EPA's OIG released a detailed report discussing the many ways that the EPA failed to meet federal standards in data adequacy and assessment.[2] The Data Quality Act violations identified by the EPA's OIG include the EPA's procedural failure to perform peer review of the information used to conclude that carbon capture and sequestration technology is economically feasible and available. The CRE is unaware of any efforts by the EPA to conform its research to federal government standards in response to the EPA OIG's findings at this time.

A writ of mandamus is a court order that can force a government agency like the EPA to perform an

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1 The Data Quality Act amendments to the Paperwork Reduction Act, 44 U.S.C. 3516 statutory and historical notes, P.L. 106-554, Appendix C, §515; 114 Stat. 2763A-153.

2 Procedural Review of EPA's Greenhouse Gases Endangerment Finding Data Quality Processes (Report No. 11-P-0702).
Available online at http://www.epa.gov/oig/reports/2011/20110926-11-P-0702.pdf.

action it is legally required to perform. The Mandamus Act[3] was created as an important part of the federal government's system of checks and balances. Specifically, the writ of mandamus helps those injured by the inaction or arbitrary acts of the executive branch of government. Violations of the Data Quality Act are among the many government agency failures to act that can be successfully challenged through a writ of mandamus. The Mandamus Act gives federal district courts the power to hear any action owed to a party suffering from a sufficient injury by the federal agency's inaction or arbitrary action. Although commonly called an "extreme form of equitable relief,"[4] writs of mandamus have been successfully used to force federal agencies to perform their duties correctly.[5]

The legal criteria required to file a writ of mandamus are likely present for coal industry members in this case. The filing party must be able to show to the federal district court that: 1) they have a clear right to relief; 2) the federal agency or employee has a clear, non-discretionary duty to act; and 3) there is no other adequate remedy available. Members of the coal industry are suffering from the immediate effects of the EPA's regulations. The Environmental Protection Agency's failure to fulfill its obligations under the Data Quality Act regulations has even been criticized by its own Office of Inspector General. The final element, whether another adequate remedy is available, unfortunately cannot be determined with certainty. While there is certainly a history of success using the writ of mandamus to correct federal agency inaction, a court's analysis of the specific facts of a claim are hard to accurately predict.

Analysis

The writ of mandamus is an excellent way for the coal industry to confront the Environmental Protection Agency's carbon capture and sequestration regulations, forcing the EPA to comply with the Data Quality Act. The damage the coal industry suffers from these regulations can be easily corrected before the EPA announces the final form of these regulations, but will be much harder to change after the regulation is formally announced. The applicable District of Columbia court rules place a petition for mandamus ahead of other regular civil cases on the court docket. This will allow the writ of mandamus petitioner to move for a stay of further action on the regulation, or negotiate a voluntary stay with the EPA.

<u>The Problem</u>

The Environmental Protection Agency's failure to open their carbon capture and sequestration findings to peer review presents a clear procedural violation of the Data Quality Act's peer review and public commentary requirements. Peer review and public commentary are necessary mechanisms to hold regulatory agencies accountable for the integrity of the scientific information they provide. Peer review is necessary to demonstrate the regulatory agency uses accurate, reliable, and unbiased information and sound statistical and research methods to fulfill their objectivity requirements. Public commentary is necessary to promote legitimacy and fairness in agency rule-making as well improve the quality of the rules, increase the probability of compliance, and create a complete record for judicial review.

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3 28 U.S.C. §1361.

4 *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976); *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005).

5 For example, see *In re Aiken County,* 725 F. 3d 255 (D.C. Cir. 2013).

The coal industry's failure to challenge the Environmental Protection Agency's flawed carbon capture and sequestration regulations presents a significant threat to the industry's future. Despite the EPA's assertions, it is commonly known that carbon capture and sequestration technologies still require substantial development before they become economically feasible or demonstrably effective over an extended time.

The Writ of Mandamus

There are a number of strong advantages to using a writ of mandamus to challenge the Environmental Protection Agency's erroneous carbon capture and sequestration findings, with the foremost being the type of error to be corrected. The Data Quality Act violation committed by the EPA is not a conventional one where a federal agency releases inaccurate data. Rather, the EPA committed a serious procedural violation is that they did not seek peer review of information that forms the foundation of their conclusions regarding carbon capture and sequestration. While a writ of mandamus may not be the best choice for challenging a federal agency's use of inaccurate information, the writ of mandamus is an excellent way to challenge the EPA's critical mistake in supporting its carbon capture and sequestration regulations.

There are other practical reasons why a writ of mandamus is ideal to challenge the Environmental Protection Agency's erroneous carbon capture and sequestration findings. As a procedural matter, the writ of mandamus will allow a member of the coal industry to gain priority over other civil cases on the court dockets. A successful writ of mandamus may also cause the courts to stay further actions on the EPA regulations until the EPA corrects its failure to offer peer review and public commentary opportunities as required by law. The timing of the lawsuit may also place positive pressure on the federal government during election season by emphasizing important government objectives, namely public access to and dissemination of quality data and information. The CRE champions the requirement for federal agencies to gather and distribute quality information to the public as a fundamental necessity of good governance.

Even if the D.C. Circuit does reject a writ of mandamus, such a lawsuit could have some positive results. For one, the D.C. Circuit could hold the writ of mandamus in abeyance, requiring the federal agency to provide periodic updates in cases of bad faith or unreasonable delays.[6] A petitioner could also request an advisory decision from the D.C. Circuit. An advisory decision would allow the D.C. Circuit to place restrictions on the Environmental Protection Agency. These restrictions could limit the EPA's future legal or regulatory activities or create judicial standards and evidentiary thresholds limiting the EPA's ability to delay compliance with its legal obligations. While these remedies are also not commonly granted, the potential threat of these actions could lead to positive results.

Of course, filing a writ of mandamus challenging the Environmental Protection Agency's regulatory

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6 For example, see, In re United Mine Workers of Am. Int'l Union, 190 F.3d 545, 553-56 (D.C. Cir. 1999) (Jurisdiction retained due to agency's delays).

failings is not without some risk. Among the most basic is a possible failure by the D.C. Courts to grant the writ of mandamus against the EPA. The writ of mandamus is considered a "drastic" remedy[7] that courts do not often grant. Given this high standard, it is not unthinkable that the courts may deny the motion and leave the petitioner subject to standard penalties. The D.C. Court's acceptance or refusal of the writ of mandamus could give the court an opportunity to narrow its responsibilities for oversight, limit the scope of future appeals, or create a new standard unfavorable to public and private interests. While a lesser concern, the court's order could be inadequate, unhelpful, or give rise to ongoing delays by the EPA in complying with its duties under the Data Quality Act.

A Call to Action

The Center for Regulatory Effectiveness wants to help solve an important problem created by the Environmental Protection Agency's failure to comply with the Data Quality Act in forcing unworkable carbon capture and sequestration technology requirements for new coal power plants. The CRE drafted a sample writ of mandamus for the coal industry's reference to promote responsible government through the advancement of peer review and public commentary.. By making this sample writ of mandamus available to the coal industry, the CRE hopes to provide the beginning of an immediate course of action to protect an important pillar of the economy as well as promoting good governance.

Please visit our website (http://www.thecre.com/index.html) to learn more about how the Center for Regulatory Effectiveness ensures regulators comply with good governance laws.

7 *In re Cheney,* 406 F.3d 723, 729 (D.C. Cir. 2005).

Draft

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave.,
NW Washington, DC
20460

RE: The Coupling of the Mandamus and Data Quality Acts: Implications for a Scientific Review of CCS

Dear Administrator McCarthy:

I am writing with respect to the often stated twin goals of the President to have transparent and science-based regulations.

To this end we have explored a coupling of the federal Mandamus Act and the Data Quality Act to accomplish the aforementioned goals.

The Mandamus Act (28 U.S.C. § 1361) can be used to compel EPA to perform an unquestionably clear non-discretionary duty.

The Data (Information} Quality Act (DQA), in conjunction with the *Prime Time* decision in the DC Court of Appeals which held the OMB DQA guidelines to be binding on agencies, could be used as a basis for filing a petition for a Writ of Mandamus. Upon issuance by the Court the writ would require EPA to conduct a peer review of the CCS technology pursuant to the Data Quality Act.

The requirement to perform the resultant peer review is well established by the landmark report of the EPA Inspector General which concluded that EPA violated the DQA when it failed to conduct a DQA-type peer review of its endangerment finding.

In our letter to you of February 3, 2014 we delineated in considerable detail the agency's failure to comply with the peer review requirements of the DQA when it opined that CCS is an economically viable technology.

We have now coupled the action forcing capabilities of the Mandamus Act with the science-based requirements of the DQA to produce the attached petition for a Writ of Mandamus.

In keeping with the aforementioned goals of the Administration we are not

filing the petition at this time. Instead we are sending it to you for your consideration with the recommendation that you institute a DQA peer review of CCS based upon your statutory authority to do the same.

As you are reviewing this matter we are making our petition available for public comment through our Interactive Public Docket titled CCS DQA.

A large number of stakeholders are impacted by the pending regulation for New Source Performance standards for new coal fired plants. Based upon the information we have gathered we expect an onslaught of legal action as soon as the regulation goes final.

Failure to initiate a DQA-structured review prior to the promulgation of the aforementioned rule is a clear sign that you're willing to live with litigation over an informed review of the matter by a group of seasoned professionals.

We encourage you to meet with a wide range of stakeholders prior to making your decision as to whether or not to initiate a DQA-structured peer review of CCS, in particular officials in your office of the Inspector General who were responsible for the preparation of the aforementioned report which disclosed the widespread non-compliance with the DQA peer review guidelines when the agency issued its endangerment finding.

I would appreciate your timely attention to this request.

Respectfully

Case No. _____

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re _____	)
Petitioner(s)	)

PETITION FOR WRIT OF MANDAMUS

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Counsel for Petitioner(s)

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* *In re Medicare Reimbursement Litig.*,
414 F.3d 7 (D.C. Cir. 2005)

Monmouth Med. Ctr. v. Thompson,
257 F.3d 807 (D.C. Cir. 2001)

* *Norton v. Southern Utah Wilderness Alliance*,
542 U.S. 55 (2004)

* *Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*,
494 F.3d 188 (D.C. Cir. 2007)

* *Prime Time Int'l v. Vilsack*,
599 F.3d 678 (D.C. Cir. 2010)

Swan v. Clinton,
100 F.3d 973 (D.C. Cir. 1996)

***** *Telecommunications and Research and Action Center v. FCC*,
750 F.2d 70 (D.C. Cir. 1984)

United States v. Mead,
533 U.S. 218 (2001)

* *Walpin v. Corp. for Nat'l Land Cmty. Servs*,
630 F.3d 184 (D.C. Cir. 2011)

STATUTES

5 U.S.C. § 706(1)

28 U.S.C. § 1331

* 28 U.S.C. § 1361

* 28 U.S.C. § 1651

28 U.S.C. §§ 2201-2202

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42 U.S.C. § 7411

42 U.S.C. § 7607(b)(1) and (d)(1)(C)

42 U.S.C. § 7607(d)(4)(B)(ii)

44 U.S.C. § 3501 *et seq*.

44 U.S.C. § 3503

44 U.S.C. § 3504(d)(1)

* 44 U.S.C. § 3516

* 44 U.S.C. § 3516 note, Pub. L. 106-554, § 1(a)(3) [Title V, § 515], Dec. 21, 2000, 114 Stat. 2763, 2763A-153

REGULATIONS

5 CFR §§ 1320.1 *et seq*.

67 Fed. Reg. 8452 (Feb. 22, 2002) (original IQA guidance)

* 70 Fed. Reg. 2664 (Jan. 14, 2005) (OIRA final peer review Bulletin)

77 Fed. Reg. 22392 (April 13, 2012) (withdrawn NPRM)

* 79 Fed. Reg. 1430 (Jan. 8, 2014) (current NPRM at issue)

OTHER AUTHORITIES

Report of the Interagency Task Force on Carbon Capture and Storage (August 2010) at 7. http://energy.gov/fe/downloads/ccstf-final-report

Federal Efforts to Reduce the Cost of Capturing and Storing Carbon Dioxide. CBO June 2012. http://www.cbo.gov/publication/43357 .

Note: Authorities on which we chiefly rely are marked with an asterisk.

Presidential Memorandum – Power Sector Carbon Pollution Standards (June 25, 2013). http://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards

http://yosemite.epa.gov/sab/sabproduct.nsf/F43D89070E89893485257C5A007AF573/$File/SAB+work+grp+memo+w+attach+20140107.pdf (SAB workgroup withdrawal of recommendation for peer review)

http://yosemite.epa.gov/sab/sabproduct.nsf/c91996cd39a82f648525742400690127/6646907111A3A35385257C70006F5F22/$File/EPA-SAB-14-003-unsigned.pdf (SAB peer review recommendation)

http://www.regulations.gov/#!searchResults;rpp=50;po=0;s=EPA-HQ-OAR-2013-0495;dct=PS (rulemaking docket for NSPS NPRM)

http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201404&RIN=2060-AQ91 (Spring 2014 *Regulatory Agenda*)

http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201404&RIN=2060-AQ91 (EPA peer review Agenda)

MERRIAM-WEBSTER DICTIONARY

OXFORD ENGLISH DICTIONARY

EPA peer review plan for "MARINE OUTBOARD AND PERSONAL WATERCRAFT SI ENGINE TECHNOLOGIES AND COSTS" (completed; in support of rulemaking) http://cfpub.epa.gov/si/si_public_record_report.cfm?dirEntryID=149610

GLOSSARY

ADD.	Addendum to this petition
BSER	best system of emission reduction
CAA	Clean Air Act
CCS	carbon capture and storage (or sequestration) technology
EGU	electric generating unit
GHG	greenhouse gas
HISA	a "highly influential scientific assessment," as defined in the OIRA peer review Bulletin
IQA	"Information Quality Act" (44 U.S.C. § 3516 note)
ISI	"influential scientific information," as defined in the OIRA peer review Bulletin
NPRM	Notice of Proposed Rulemaking
NSPS	New Source Performance Standards
OIRA	Office of Information and Regulatory Affairs in the Office of Management and Budget, Executive Office of the President
PRA	Paperwork Reduction Act of 1995 (44 U.S.C. §§ 3501 *et seq.*)
SAB	Science Advisory Board (for EPA)
TRAC	*Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C.Cir.1984)

Note: Authorities on which we chiefly rely are marked with an asterisk.

JURISDICTION

Jurisdiction is under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1361 (mandamus), 28 U.S.C. § 1651 (All Writs Act), and 42 U.S.C. § 7607(b)(1) and (d)(1)(C) (Clean Air Act judicial review).

The relief requested is also authorized by 5 U.S.C. § 706(1) (APA judicial review) and 28 U.S.C. §§ 2201-2202 (declaratory judgment).

Original jurisdiction lies in this Court rather than district court under *Telecommunications and Research and Action Center v. FCC*, 750 F.2d 70, 75 & n. 24 (D.C. Cir. 1984) ("TRAC"), in which this Court held that "where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the *exclusive* review of the Court of Appeals [pursuant to 28 U.S.C. § 1651]." (Original emphasis.) The Clean Air Act gives this Court exclusive original jurisdiction pursuant to 42 U.S.C. § 7607 for review of the proposed rule at issue here if promulgated. Exclusive original jurisdiction in this Court is required to protect its CAA jurisdiction because the agency's failure to comply with peer review requirements, if not compelled by the district court, would result in the administrative record available to this Court after promulgation of a final rule being deficient with regard to the critical technology assessment issue -- whether partial carbon capture and storage ("CCS") technology has been "adequately

demonstrated" for new source performance standards ("NSPS") as required by the Clean Air Act. This Court therefore has original jurisdiction "in aid of" its jurisdiction under the CAA and 28 U.S.C. § 1651.

ISSUE PRESENTED

Has the agency unlawfully withheld or unreasonably delayed compliance with clear duties established by OIRA in its 2005 final "Bulletin" on peer review.

RELIEF SOUGHT

Petitioner seeks an order in the nature of mandamus or affirmative injunction requiring the agency to comply with the clear duties set out in the OIRA peer review Bulletin regarding planning for, and conduct of, peer review of "influential scientific information" ("ISI"), and particularly "highly influential scientific assessments" ("HISA"s). The Court's order should also require re-opening of the public comment period on the proposed rulemaking to allow the public sufficient time to comment on the final peer review report and the agency's responses thereto. Alternatively, Petitioner requests such relief in the form of a declaratory judgment.

FACTS

I. The CCS Controversy

CCS is a technology for the capture, transport, and geologic sequestration of CO_2 emissions from EGUs.

The controversy over CCS centers mainly over whether it has been "adequately demonstrated" to be commercially viable for application to coal-fired EGUs, which supply nearly 40 percent of the Nation's electricity. Many diverse sources (industry, federal agencies, Congress, even environmental organizations) regard CCS as a promising technology that should continue to be researched and developed but which is not currently feasible. Much of the controversy is over cost, with many contending that the high cost and uncertainties of the technology will mean that no new coal plants will be built, either to augment power supplies or to replace existing EGUs, thereby severely impacting energy supply and diversity, raising energy costs, and eliminating jobs. Another result of no new investment in coal-fired EGUs would be that there would be no further development of CCS technology, or other technologies to reduce CO_2 emissions from coal EGUs, that would bring down costs and improve emission reductions.

In February 2010, President Obama directed establishment of a federal inter-agency task force to evaluate CCS. The task force was co-chaired by EPA and DOE and comprised of 12 other federal agencies. It was charged with proposing a plan to "overcome the barriers to the widespread, cost-effective deployment of CCS within ten years, with a goal of bringing five to ten commercial

demonstration projects online by 2016."[1] The Task Force report, delivered in August 2010, stated in its Executive Summary:

> While there are no insurmountable technological, legal, institutional, regulatory or other barriers that prevent CCS from playing a role in reducing GHG emissions, early CCS projects face economic challenges related to climate policy uncertainty, first-of-a-kind technology risks, and the current high cost of CCS relative to other technologies. Administration analyses of proposed climate change legislation suggest that CCS technologies will not be widely deployed in the next two decades absent financial incentives that supplement projected carbon prices.

Id. at 7-8.

Since then, DOE has provided large subsidies to CCS demonstration projects, lawsuits have been filed to stop EPA rulemaking that would require CCS on new coal-fired EGUs, and legislation has been introduced and passed the House that would constrain EPA's authority to require CCS. A 2012 Congressional Budget Office report estimated that DOE had committed to over $2 billion in subsidies for six CCS demonstration projects then planned or under construction.[2]

On June 25, 2013, President Obama issued a directive to EPA to issue, by September 20, 2013, a proposed rule for controlling carbon pollution from new power plants, with a final rule to be issued in a timely fashion and "as

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[1] *Report of the Interagency Task Force on Carbon Capture and Storage* (August 2010) at 7. http://energy.gov/fe/downloads/ccstf-final-report.

[2] *Federal Efforts to Reduce the Cost of Capturing and Storing Carbon Dioxide*. CBO June 2012. http://www.cbo.gov/publication/43357.

appropriate."[3] EPA Assistant Administrator (now Administrator) McCarthy duly signed the current NPRM on September 20, 2013, although the proposal was not published in the *Federal Register* until January 8, 2014, apparently due to a dispute with the SAB regarding the need for peer review of CCS technology.[4]

II. The Current EPA Rulemaking on New Source Performance Standards for Electric Generating Units

On January 8, 2014, EPA issued a NPRM to establish CO_2 emission standards for new coal- and gas-fired EGUs under section 111 of the Clean Air Act. 79 Fed. Reg. 1430. A previous proposal elicited more than 2.5 million comments. 77 Fed. Reg. 22392. By the end of the comment period on the current NPRM, May 9, 2014, EPA had received well over 10,000

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[3] Presidential Memorandum – Power Sector Carbon Pollution Standards (June 25, 2013). http://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards. This short timeframe obviously did not allow for an independent peer review in compliance with the OIRA Bulletin.

[4] EPA persuaded the SAB to withdraw a recommendation for peer review, but it appears that the OIRA peer review Bulletin requirements addressed in this Petition were never discussed with, or even disclosed to, the SAB. The revised SAB work group recommendation for no review was issued on Jan. 7, 2014, the day before *Federal Register* publication of the NPRM. See http://yosemite.epa.gov/sab/sabproduct.nsf/F43D89070E89893485257C5A007AF573/$File/SAB+work+grp+memo+w+attach+20140107.pdf, particularly Attachment B at B-2 to B-3. The revised recommendation did not appear as an official recommendation of the full SAB until Jan. 29, 2014. http://yosemite.epa.gov/sab/sabproduct.nsf/c91996cd39a82f648525742400690127/6646907111A3A35385257C70006F5F22/$File/EPA-SAB-14-003-unsigned.pdf. See p. 2, referring to SAB deferral to EPA's "legal view" regarding CCS.

comments, although the actual number is far higher because many of the comments are in the form of petitions by thousands of individuals, or from coalitions, trade associations, or other types of organizations with numerous members.[5] Many of the comments argue that partial CCS technology for coal-fired EGUs is not "adequately demonstrated."

Under section 111(a) of the CAA, 42 U.S.C. § 7411(a), partial CCS technology must be "adequately demonstrated." Section 111(a)(1) states:

> The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

EPA announced in the Spring 2014 Regulatory Agenda (Feb. 28, 2014) that it plans to issue the final rule in January 2015.[6]

The NPRM does not indicate any compliance with the OIRA peer review Bulletin, nor any plans for future independent peer review of partial CCS technology. Nor is there any information in EPA's Peer Review

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[5] See http://www.regulations.gov/#!searchResults;rpp=50;po=0;s=EPA-HQ-OAR-2013-0495;dct=PS.

[6] See http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201404&RIN=2060-AQ91.

Agenda, required by the OIRA Bulletin, regarding the CCS technology assessment contained in the NPRM, or a (required) plan for peer review.[7]

III. The PRA and IQA

When the PRA was reauthorized and revised in 1995 it included a number of provisions directed not only at information collection by federal agencies, but also ones aimed at ensuring and maximizing the quality of information disseminated to the public by agencies. 44 U.S.C. § 3501 *et seq*. The Act retained the provision from the original 1980 version of the Act requiring OMB[8] to issue rules and regulations to implement the Act, 44 U.S.C. § 3516.

When OMB dragged its feet on issuing regulations on information dissemination, Congress, in 2000, issued legislative directions to OMB, in the "Information Quality Act," to issue such regulations by a definite time.[9] The IQA states, in relevant part:

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[7] The Agency's Peer Review Agenda is maintained at http://cfpub.epa.gov/si/si_public_pr_agenda.cfm. The items listed in the Agenda are linked to individual peer review "plans," as required by the OIRA Bulletin.

[8] OIRA was given authority to implement the Act in 44 U.S.C. § 3503.

[9] Pub. L. 106-554, § 1(a)(3) [Title V, § 515], Dec. 21, 2000, 114 Stat. 2763, 2763A-153. Because the legislative directive was considered a supplement to the PRA, not an amendment, it appears in the U.S. Code as a note to section 3516 of the Act. The legislation was not given a formal name, but it is referred to by OMB/OIRA as the "Information Quality Act, although it is also often referred to as the "Data Quality Act" by other entities.

> **(a) In general.**--The Director of the Office of Management and Budget shall, by not later than September 30, 2001, and with public and Federal agency involvement, issue guidelines under sections 3504(d)(1) and 3516 of title 44, United States Code, that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of chapter 35 of title 44, United States Code, commonly referred to as the Paperwork Reduction Act.

Section 3504(d)(1) of the PRA, states:

> **§ 3504. Authority and functions of Director**
>
> . . .
>
> **(d)** With respect to information dissemination, the Director [of OMB] shall develop and oversee the implementation of policies, principles, standards, and guidelines to--
>
> > **(1)** apply to Federal agency dissemination of public information, regardless of the form or format in which such information is disseminated; ….

Section 3516 of the PRA states:

> **3516. Rules and regulations**
>
> The Director [of OMB] shall promulgate rules, regulations, or procedures necessary to exercise the authority provided by this subchapter.

Moreover, the Purposes section of the PRA includes the goals of ensuring and improving the quality of information disseminated by agencies, and 44 U.S.C. § 3506(a)(1)(B) makes all agencies responsible for "complying with the requirements of this chapter and related policies established by the Director."

IV. The OIRA Peer Review Bulletin and Its Requirements

On September 28, 2001, OIRA issued its original government-wide final "Guidelines" under the IQA. Those Guidelines were re-issued, with several changes not pertinent here, on February 22, 2002. 67 Fed. Reg.8452. The Guidelines addressed peer review, but did not impose any clear duties on the agencies similar to those later contained in the 2005 peer review Bulletin.[10]

On January 14, 2005, OIRA published in the *Federal Register*, after two notice-and-comment proposals, the final "Bulletin" on peer review under legal authority of the IQA and its general authorities. 70 Fed. Reg. 2664 (Jan. 14, 2005). The Bulletin, set out fully in the Addendum, is written like a regulation and contains numerous "requirements" stated in mandatory language ("shall," "must"). It also allows for discretion in some areas, but in general carefully distinguishes such discretionary actions from those that are clearly required, using terms such as "encouraged" and "may" in describing discretionary actions.

An important distinction in the Bulletin is between peer review of "influential scientific information" ("ISI") and "highly influential scientific

[10] See 67 Fed. Reg. at 8454-55, 8459-60 (2002 Guidance). The 2005 peer review Bulletin states: "Prior to the development of this Bulletin, there were no government-wide standards concerning when peer review is required and, if required, what type of peer review processes are appropriate." 70 Fed. Reg. at 2666.

information" ("HISA"). The Bulletin mandates peer review of ISI, but allows considerable discretion as to how it will be done; on the other hand, it sets out additional and clear duties for independent peer review of HISAs. This distinction between ISI with broad discretion and HISAs with stricter minimum standards is maintained throughout much of the Bulletin, in both the preamble and the Bulletin text (as Section II for ILSI and Section III for HISAs). The mandates applicable to both ISI and HISAs are set out in more detail below in the Argument section, but basically the Bulletin requires each agency to –

(1) establish and publicize a peer review "agenda" for each ISI and HISA it plans to disseminate, along with a detailed peer review "plan" for each agenda item (with each plan to include all information mandated by the OIRA Bulletin, including the determination of whether it is ISI or a HISA). Agencies are also required to establish a mechanism for allowing the public to comment on peer review plans, and must consider comments;

(2) conduct or sponsor peer reviews of both ISI and HISAs, with the agency allowed discretion over *how* to conduct a peer review of ISI, but stricter, non-discretionary requirements for independent peer review of HISAs; and

(3) publish in the administrative record for a regulatory action that relies on ISI or a HISA a "certification" explaining how the agency has complied with the requirements of the Bulletin and other applicable IQA guidance.

EPA has not complied with any of these requirements.

SUMMARY OF ARGUMENT

The OIRA peer review "Bulletin" is a legislative rule that has the force and effect of law and contains multiple clear duties for peer review of the technology assessment of CCS contained in, and relied on, in the NPRM. EPA has unlawfully withheld or unreasonably delayed carrying out those duties, and Petitioners have no alternative remedy. Mandamus is therefore amply justified.

The technology assessment of partial CCS in the NPRM is indisputably a HISA as defined in the Bulletin and therefore subject to a number of stricter, clearly defined, non-discretionary peer review duties, the most important of which is sponsorship of an independent peer review of the technology assessment by a panel of qualified experts, with the opportunity for public participation.

EPA has also failed to comply with the public peer review planning requirements in the Bulletin, which apply to both ISI and HISAs.

It is clear from the Bulletin, particularly its requirement for certification of compliance with the Bulletin in the administrative record for a final rule that relies on either ISI or a HISA, that peer review must be planned for and carried out at

least prior to a final rule, and preferably in advance of an NPRM or a technical support document in support of a rulemaking. At this time, the public comment period on the proposed rule has ended with no indication of compliance.

An independent peer review following the end of the public comment period and before promulgation of a final rule would significantly impair the public's right to comment, contrary to this Court's established precedents regarding the need to make available to the public for comment all significant technical information regarding a rulemaking proposal. Therefore, even if peer review planning and peer review were now carried out following the public comment period and prior to a final rule, this Court would almost certainly be compelled to vacate the final rule and order a new public comment period.

STANDING

[Content to be provided (here and in the Addendum – hopefully it can be stated that the petitioners would be directly subject to the emission standards because they have plans for, or at least want to plan for and build, new coal-fired EGUs, and therefore their standing is "self-evident" under the Court's precedents.]

ARGUMENT

I. The OIRA Peer Review Bulletin Is a Legislative Rule with the Force and Effect of Law, Establishing Clear Duties that are Properly Subject to Mandamus.

A. The Standards for Mandamus

Mandamus relief is proper when a petitioner can demonstrate that (1) he has a "clear right to relief;" (2) the official has "a clear duty to act;" and (3) there is no other adequate remedy available" to the petitioner. Put another way, the petitioner must demonstrate a "clear and indisputable right to relief" based on a "clear and compelling duty to act." *Walpin v. Corp. for Nat'l Land Cmty. Servs*, 630 F.3d 184, 187 (D.C. Cir. 2011); *Am. Cetacean Soc'y v. Baldrige*, 768 F.2d 426, 433 (D.C. Cir. 1985).[11]

However described, the type of "duty" required for mandamus is a duty required by law, and such a duty can be set out in a legislative rule with the force of law as well as a statute. *In re Medicare Reimbursement Litig.*, 414 F.3d 7 (D.C. Cir. 2005); *Monmouth Med. Ctr. v. Thompson*, 257 F.3d 807 (D.C. Cir. 2001); *Esquire, Inc. v. Ringer*, 591 F.2d 796, 806 n. 28 (D.C. Cir. 1978).

The duty to be enforced might require the agency or official to act, but allow discretion as to how the action is carried out. In such a case, mandamus requiring the action is proper, but the mandate cannot decree *how* the action will be carried out. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64, 66 (2004); *Am. Cetacean Soc'y*, 768 F.2d at 435; *Swan v. Clinton*, 100 F.3d 973, 978 (D.C.

[11] The duty required to support mandamus has also been described in other similar terms, such as "narrowly defined," *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc), "ministerial," *Swan v. Clinton*, 100 F.3d 973, 977-78 (D.C. Cir. 1996), "clear and indisputable," *Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476, 1480 (D.C. Cir. 1995), and "peremptory," *13th Regional Corp. v. U.S. Dep't of Interior*, 654 F.2d 758, 762 (D.C. Cir. 1980).

Cir. 1996); *Ganem v. Heckler*, 746 F.2d 844, 854 (D.C. Cir. 1984). However, a required action allowing for discretion in its exercise can be reviewed for abuse of discretion. *Haneke v. Sec'y of Health, Educ., and Welfare*, 535 F.2d 1291, 333-34 (D.C. Cir. 1976).

A duty involving a factual determination can be enforced by mandamus if the facts are clear and indisputable or must be developed. *Am. Cetacean Soc'y,* 768 F.2d. at 435, 444.

In short, mandamus under 28 U.S.C. § 1361 is appropriate to correct "clear cases of illegality" by federal agencies or their officials. *Ass'n of Am. Med. Colleges v. Califano*, 569 F.2d 101, 111 n.80 (D.C. Cir. 1977).

B. The OIRA Peer Review Bulletin is a Legislative Rule with the Force and Effect of Law.

This Court held, in *Prime Time Int'l v. Vilsack*, 599 F.3d 678, 685 (D.C. Cir. 2010), that OIRA's original 2002 government-wide "guidance" implementing the IQA was "binding" with the "force and effect of law." This Court, relying on an exemption for "adjudications" from the definition of "dissemination" in the guidance, stated that "because Congress delegated to OMB authority to develop binding guidelines implementing the IQA, we defer to OMB's reasonable construction of the statute. *See United States v. Mead*, 533 U.S. 218, 226–27, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001)." The portion of *Mead* that the Court cited states: "We hold that administrative implementation of a particular statutory

provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."

This *Prime Time* holding is in line with U.S. Supreme Court precedent and D.C. Circuit caselaw regarding legislative rules. In *Chrysler Corp. v. Brown*, 441 U.S. 281, 295, 302-03 (1979), the Supreme Court held that regulations have the "force and effect of law" when they are issued pursuant to legislative authority to implement a statute and are promulgated pursuant to any procedural requirements imposed by Congress, such as the notice-and-comment requirements of the APA. The D.C. Circuit has elaborated on those basic principles by holding that a regulation has the force and effect of law if it appears on its face to be binding, as indicated by its use of mandatory language. *Cement Kiln Recycling Coal. v. U.S. EPA*, 493 F.3d 207, 215-16, 226-28 (D.C. Cir. 2007); *Elec. Privacy Info. Ctr. v. U.S. Dept. of Homeland Security*, 653 F.3d 1, 6-7 (D.C. Cir. 2011).[12]

The OMB peer review guidance was issued following extensive *Federal Register* notice and comment and uses unambiguous mandatory language for those provisions it describes as "requirements."

[12] The D.C. Circuit cases appear possibly to give insufficient weight to a factor that the Supreme Court in *Chrysler* indicated was of great importance and that is applicable here: That the rule was promulgated pursuant to legislative authority.

Although the OMB "Bulletin" promulgates "requirements" and uses extensive plain mandatory language (as well as satisfying the other criteria for a legislative rule), it also contains a disclaimer regarding judicial reviewability at the end. 70 Fed. Reg. at 2677. As this Court has made clear, however, such a disclaimer cannot transform a binding legislative rule into a non-binding internal advisory. A similar disclaimer in EPA "guidance" was expressly given no effect in *Appalachian Power Co. v. U.S. EPA*, 208 F.3d 1015, 1022-23 (D.C. Cir. 2000). The court characterized the disclaimer as "'boilerplate,'" and held that the guidance imposed binding obligations subject to judicial review because it required, ordered, and dictated what must be done, as is the case here. OIRA cannot, by fiat, immunize agencies from judicial review of non-compliance with legislative rules.

The "boilerplate" disclaimer of judicial reviewability at the end of the OIRA peer Bulletin indicates that its requirements are intended "to improve the internal management of the executive branch."[13] This is simply a transparent fiction. The Bulletin was issued as a supplement to the original 2002 IQA guidelines, and the

[13] " *XII. Judicial Review*

This Bulletin is intended to improve the internal management of the executive branch, and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, against the United States, its agencies or other entities, its officers or employees, or any other person."

clear purpose of the PRA, the original guidance, and Bulletin is to ensure that government agencies disseminate the most accurate and unbiased information to the public.[14] The public is the intended beneficiary of the Act and its "Rules and regulations;" the ultimate purpose is not improvement of "the internal management of the executive branch."

It is also significant that this Court has relied on the information collection regulations of the PRA as binding legislative rules. *Ctr. for Auto Safety v. NHTSA*, 244 F.3d 144, 148 (D.C. Cir. 2001). Those rules,[15] like the peer review requirements, were issued under the legislative rulemaking authority of § 3516 of the PRA.

C. The OIRA Peer Review Bulletin Specifies Clear Duties.

The Bulletin contains clear mandatory language establishing duties to act. For example, it refers many times to "the requirements of this Bulletin,"[16] requires "certification" in a final rulemaking record "explaining how the agency has complied with the requirements of this Bulletin and the applicable information quality guidelines," and consistently uses mandatory language such as "shall,"

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[14] There is no indication in the legislative history of the PRA or the IQA that Congress intended preclusion of judicial review (much less clear and convincing evidence).

[15] 5 CFR §§ 1320.1 *et seq*.

[16] 70 Fed. Reg. at 2664, 2666, 2673, 2674, 2677.

"must," and "required." The Bulletin also specifies types of information that are exempt and effective dates.[17]

Among the clear duties that EPA has not complied with, and for which Petitioner requests mandamus to enforce compliance, are the following:

"Each agency shall post on its Web site, and update at least every six months, an agenda of peer review plans. The agenda shall describe all planned and ongoing influential scientific information subject to this Bulletin. …." At 2676.

"For each entry on the agenda the agency shall describe the peer review plan. Each peer review plan shall include … (ii) whether the dissemination is likely to be influential scientific information or a highly influential scientific assessment …. [ten requirements for plan content in all]." At 2676-77.[18]

"Agencies shall establish a mechanism for allowing the public to comment on the adequacy of the peer review plans. Agencies shall consider public comments on peer review plans." At 2677.

"To the extent permitted by law, each agency shall conduct a peer review on all influential scientific information [and highly influential scientific assessments] that the agency intends to disseminate." At 2675, sections II and III.

"Peer reviewers shall not have participated in development of the work product." At 2675. "[For HISAs], the agency – or entity selecting the reviewers – shall bar participation of scientists employed by the sponsoring agency unless the reviewer is employed only for the purpose of conducting the peer review (*i.e.*, special government employees). The only exception to this bar would be the rare case where …." At 2676.

[17] 70 Fed. Reg. at 2677.

[18] The phrase "likely to be" is obviously used here because the Bulletin clearly contemplates that agenda items and peer review plans will usually be posted before it becomes apparent from public, interagency comments, or otherwise whether the scientific information is sufficiently controversial or of significant interagency interest to qualify as a HISA.

"Peer reviewers shall be selected based on expertise, experience and skills, including specialists from multiple disciplines, as necessary. The group of reviewers shall be sufficiently broad and diverse to fairy represent the relevant scientific and technical perspectives and fields of knowledge." At 2675.

"The agency – or entity managing the peer review -- shall instruct peer reviewers to prepare a report that describes the nature of their review and their findings and conclusions. … The agency shall disseminate the final peer review report on the agency's Web site along with all materials related to the peer review." At 2675. "[For HISAs], [t]he agency shall prepare a written response to the peer review report explaining …." At 2676.

"[For HISAs], [w]henever feasible and appropriate, the agency shall … sponsor a public meeting where oral presentations on scientific issues can be made to the peer reviewers …." At 2676.

II. The Requirements in the Bulletin Clearly Apply to Technology Assessments Relied on in a Rulemaking.

There can be no doubt that the Bulletin applies to technology assessments, with regard to both technical feasibility and costs. The Bulletin states that "[t]he term 'scientific information' means factual inputs, data, models, analyses, technical information, or scientific assessments based on the behavioral and social sciences, public health and medical sciences, life and earth sciences, engineering, or physical sciences." 70 Fed. Reg. 2675. The social sciences include economics as a matter of common definition.[19] And a "scientific assessment" expressly includes a "technology assessment." At 2675.

[19] *See, e.g.*, the MERRIAM-WEBSTER DICTIONARY and the OXFORD ENGLISH DICTIONARY.

That the peer review requirements apply to a technology assessment relied on in a rulemaking is abundantly clear simply from the "certification" requirement for a final rule, which states:

> If an agency relies on influential scientific information or a highly influential scientific assessment subject to this bulletin to support a regulatory action, it shall include in the administrative record for that action a certification explaining how the agency has complied with the requirements of this Bulletin and applicable information quality guidelines. [Emphasis added]

70 Fed. Reg. at 2677 1st col. [20] Moreover, EPA has previously published plans for peer review of upcoming technology assessments pursuant to the Bulletin.[21]

III. The NPRM Contains and Relies on a Technology Assessment of Partial CCS as "adequately demonstrated" under Section 111 of the CAA.

The NPRM acknowledges that CAA section 111 requires EPA to set "technology-based" emission standards that are "cost-effective" and based on technology that is "adequately demonstrated." 79 Fed. Reg. at 1432, 1433.

The NPRM contains an extensive, detailed, technical discussion of the feasibility and reasonableness of all aspects of partial CCS as BSER. Much of the

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[20] The preamble of the Bulletin makes clear that public notice and comment on a rulemaking proposal pursuant to the APA cannot substitute for this independent expert peer review. 70 Fed. Reg. at 2672.

[21] See, e.g., agenda item and peer review plan for "MARINE OUTBOARD AND PERSONAL WATERCRAFT SI ENGINE TECHNOLOGIES AND COSTS" (completed; in support of rulemaking) http://cfpub.epa.gov/si/si_public_record_report.cfm?dirEntryID=149610.

assessment appears in section VII, beginning with the subsection on "Technical Feasibility" at 1471. This subsection begins by stating:

> The EPA proposes to find that partial CCS is feasible because each step in the process has been demonstrated to be feasible through an extensive literature record, fossil fuel-fired industrial plants currently in commercial operation and pilot-scale fossil fuel-fired EGUs currently in operation, [sic] the progress towards completion of construction of fossil fuel-fired EGUs implementing CCS at commercial scale.

The NPRM then proceeds to discuss "each step in the process" and the literature it believes supports the feasibility and cost-reasonableness of each step. Those steps include capture of the emitted CO_2, transportation by pipeline, and geologic sequestration. 79 Fed. Reg. at 1471-85.

The NPRM cites the Report of the Interagency Task Force Report on Carbon Capture and Storage numerous times even though, as noted above, the Report concluded that the technology would likely not be commercially viable within the next two decades without financial subsidies. It also cites extensive literature from other federal agencies and laboratories and discusses factual information concerning a number of CCS demonstration projects.

This NPRN analysis certainly meets the definition in the peer review bulletin of a "scientific assessment," which means "an evaluation of a body of scientific or technical knowledge which typically synthesizes multiple factual inputs, data,

models, assumptions, and/or applies best professional judgment to bridge uncertainties in the available information." 70 Fed. Reg. 2675.

The NPRM analysis of partial CCS as "adequately demonstrated" relies considerably on legal interpretation, agency discretion, policy judgment, and judicial deference to agency expertise, but that does not detract from the necessity for independent, objective peer review of the underlying scientific, technical, and economic information and analysis – especially because at this stage all that is being made available to the public is the agency's own opinions. The Bulletin makes clear the limitations on the role of the peer reviewers in stating that "[p]eer reviewers shall be charged with reviewing scientific and technical matters, leaving policy determinations for the agency." 70 Fed Reg. at 2675 1st & 2d cols. And this is discussed in more detail in the Bulletin preamble, which states: "Peer reviewers can make an important contribution by distinguishing scientific facts from professional judgments. Furthermore, where appropriate, reviewers should be asked to provide advice on the reasonableness of judgments made from the scientific evidence. However … reviewers are not to provide advice on the policy …. Such considerations are the purview of the government." 70 Fed. Reg. at 2669 1st col. Thus, the peer review requirements preserve a distinction between objective scientific/technology assessment and policy discretion.

IV. The Technology Assessment of CCS in the NPRM Is Indisputably a HISA.[22]

A HISA is a "scientific assessment" that is "highly influential." A "scientific assessment" (which is a particular form of "scientific information) is defined as "an evaluation of a body of scientific or technical knowledge which typically synthesizes multiple factual inputs, data, models, assumptions, and/or applies best professional judgment to bridge uncertainties in the available information. These assessments include … technology assessments …." 70 Fed. Reg. at 2675 1st col. The NPRM's analysis of CCS is clearly a "scientific assessment" because it must synthesize multiple inputs regarding technical feasibility, cost, and energy impacts of various aspects of the overall CCS system (capture, transport, and storage/sequestration).

A scientific assessment is "highly influential" and subject to clearly-defined additional requirements (particularly regarding independence of the reviewers and public participation) if "the agency or the Administrator [of OIRA] determines" that it "(i) Could have a potential impact of more than $500 million in any year, or (ii) is novel, controversial, or precedent-setting or has significant interagency interest." 70 Fed. Reg. at 2675.

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[22] Even if the CCS technology assessment were arguably not a HISA, EPA would be in violation of the Bulletin requirements for ISI, such as the requirements for public peer review planning and peer review by diverse experts who had not participated in development of the work product. See section I, C, *supra*.

It might be argued that because either the agency or the OIRA Administrator must make a determination of ISI or HISA, there is discretion involved and therefore enforcement of any of the duties in the Bulletin is not appropriate for mandamus. However, it is established that mandamus is appropriate when there is a duty to make a determination even though there is discretion as to *how* it will be made. As discussed below, there is a duty to make such a determination when announcing the mandatory peer review plan when a technology assessment is "forthcoming."

Also, when the record facts are beyond dispute, that a mandate requires a determination of the facts will not be a bar to mandamus. *Am. Cetacean Soc'y*, 768 F.2d at 444 (undisputed determination that Japanese had violated fishing quota). That is the case here.

While the first criterion for a HISA, a cost of more than $500 million in any year, is perhaps problematic due to its speculative nature,[23] all portions of the second criterion (novel, controversial, precedent-setting, or of significant interagency interest) are clearly met as a matter of public record, and any

[23] Such speculation is unavoidably circular: If in fact a requirement for CCS on coal EGUs is regarded by industry as too expensive to be commercially feasible, no new plants will be built, and therefore no costs will be incurred. If, however, despite high costs, new plants were built, the $500 million in any year criterion would undoubtedly be met based simply on the DOE subsidies that have been provided, as noted above at p. ____.

determination to the contrary would be clearly wrong and a clear abuse of discretion.

Satisfaction of the criterion of "significant interagency interest" is shown by the Presidential establishment of the interagency task force, co-chaired by DOE and EPA, (see p. , *supra*) to evaluate the feasibility of CCS, and the interagency comments on the draft NPRM (see below).

The proposal is also indisputably novel, since the feasibility of partial CCS for coal EGUs has never before been evaluated under section 111(a) of the CAA.

Finally, that the assessment of partial CCS for coal EGUs is controversial is demonstrated not only by the large number of public comments on the feasibility of the technology, but also by the published interagency comments questioning whether the technology has been "adequately demonstrated." It should be sufficient to quote another agency's (or agencies') comment provided to OIRA and EPA during pre-publication review of the NPRM and placed in the public docket:[24]

> • EPA's assertion of the technical feasibility of carbon capture relies heavily on literature reviews, pilot projects, and commercial facilities yet to operate. We believe this cannot

[24] The CAA requires that all interagency comments on a rulemaking proposal be placed in the public docket. 42 U.S.C. § 7607(d)(4)(B)(ii) ("Rulemaking"). There were a number of interagency comment documents. The comment quoted here, in an EPA memorandum responding to interagency comments summarized by OIRA, dated August 19, 2013, is in regulations.gov at EPA-HQ-OAR-2013-0495-0046. The agency (or agencies) that submitted the summarized comment was not identified by OIRA.

form the basis of a finding that CCS on commercial-scale plants is 'adequately demonstrated."

- EPA should provide details of the specific CCS operations already in service that process the rate of CO_2 necessary for a typical IGCC power plant to be in compliance. Where only literature reviews or simulations exist, the text should make this clear.
- We are concerned that the unsupported assertions of technology as 'adequately demonstrated' in this rulemaking will form a precedent for future such determinations, even if the three CCS projects used as the basis for the determination fail or are never completed.

V. The Required Peer Review Has Been Unlawfully Withheld or Unreasonably Delayed Because Conduct and Publication of the Peer Review after the End of the Public Comment Period Would Be Contrary to this Court's Notice and Comment Precedents.

The public comment period on the NPRM ended on May 9, 2014, without any mention by the agency of compliance with the OIRA peer review requirements. Since the Bulletin requires preparation of a peer review report and public release of the report, the public has not had the benefit of an expert, unbiased critical assessment of the CCS technology assessment in the NPRM. Assuming the assessment is a HISA, the public also has not had an opportunity to review the agency responses to the peer review.

Although this Court has not had occasion to address the importance of making peer review reports and agency responses thereto available to the public for comment in a rulemaking, it has emphatically required that agencies make available for public comment all technical studies and data forming the basis for its

rulemaking proposal. This Court has stated that "'[a]n agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.'" *Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 199 (D.C. Cir. 2007) (citing cases). *See also Friends of Blackwater v Salazar*, 691 F.3d 428, 448 (D.C. Cir. 2012); *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236-37 (D.C. Cir. 2008). This principle should apply also to the technical comments of peer reviewers and agency responses. This is particularly true in this instance because the validity of the rulemaking proposal clearly depends on a complex interplay of technical assessment, legal precedent, and policy choices that are ideally suited for public comment because that interplay involves, yet goes beyond, the technical analysis that would be supplied by a peer review report and agency responses.

The importance of conducting peer review before notice and comment is reflected in the preamble discussion of the Bulletin, which states:

> When an information product is a critical component of a rule-making, it is important to obtain peer review before the agency announces its regulatory options so that any technical corrections can be made before the agency becomes invested in a specific approach or the positions of interest groups have hardened.

70 Fed. Reg. at 2668.

CONCLUSION

EPA has disregarded clear, legally-binding duties regarding peer review of the technology assessment of CCS contained in, and relied on, in its NPRM. Action on those duties has been unlawfully withheld and unreasonably delayed beyond the public comment period. For the reasons given above, Petitioner respectfully urges this Court to issue mandamus (or, alternatively, an affirmative injunction and declaratory judgment) requiring the agency to comply with the peer review requirements in the OIRA Bulletin and to re-open the public comment period after publication of the peer review report and any agency responses.

Respectfully submitted,

[Petitioner(s)]

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[Attorneys]

[Date]

Case No. _____

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In re _____)
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Petitioner(s))
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ADDENDUM TO
PETITION FOR WRIT OF MANDAMUS

TABLE OF CONTENTS FOR THE ADDENDUM