

**United States Senate
Committee on Environment and Public Works
Minority Staff Report**

EPA's Playbook Unveiled:



***A Story of Fraud, Deceit, and
Secret Science***

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Contact: Luke Bolar — Luke_Bolar@epw.senate.gov (202) 224-6176
Cheyenne Steel — Cheyenne_Steel@epw.senate.gov (202) 224-6176
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EXECUTIVE SUMMARY

The greatness of our unique nation hinges on the fundamental purpose of the government to serve at the will of the people and to carry out public policy that is in the public interest. When it comes to the executive branch, the Courts have extended deference to agency policy decisions under the theory that our agencies are composed of neutral, non-biased, highly specialized public servants with particular knowledge about policy matters. This report will reveal that within the Environmental Protection Agency (EPA), some officials making critically important policy decisions were not remotely qualified, anything but neutral, and in at least one case — EPA decision making was delegated to a now convicted felon and con artist, John Beale.

John Beale is the character from the bizarre tale of the fake CIA agent who used his perch at the EPA to bilk the American taxpayer out of more than a million dollars. Even Jon Stewart, host of the popular Daily Show, featured Beale's bizarre tale as "Charlatan's Web" on his program in December 2013. Before his best friend Robert Brenner hired him to work at EPA, Beale had no legislative or environmental policy experience and wandered between jobs at a small-town law firm, a political campaign, and an apple farm. Yet at the time he was recruited to EPA, Brenner arranged to place him in the highest pay scale for general service employees, a post that typically is earned by those with significant experience.

What most Americans do not know is that Beale and Brenner were not obscure no-name bureaucrats housed in the bowels of the Agency. Through his position as head of the Office of Policy, Analysis, and Review, Brenner built a "fiefdom" that allowed him to insert himself into a number of important policy issues and to influence the direction of the Agency. Beale was one of Brenner's acolytes — who owed his career and hefty salary to his best friend.

During the Clinton Administration, Beale and Brenner were very powerful members of EPA's senior leadership team within the Office of Air and Radiation, the office responsible for issuing the most expensive and onerous federal regulations. Beale himself was the lead EPA official for one of the most controversial and far reaching regulations ever issued by the Agency, the 1997 National Ambient Air Quality Standards (NAAQS) for Ozone and Particulate Matter (PM). These standards marked a turning point for EPA air regulations and set the stage for the exponential growth of the Agency's power over the American economy. Delegating the NAAQS to Beale was the result of Brenner's facilitating the confidence of EPA elites, making Beale the gatekeeper for critical information throughout the process. Beale accomplished this coup based on his charisma and steadfast application of the belief that the ends justify the means.

Concerned about this connection, the Senate Committee on Environment and Public Works (EPW) staff have learned that the same mind that concocted a myriad of ways to abuse the trust of his EPA supervisors while committing fraud is the same mind that abused the deference afforded to public servants when he led EPA's effort on the 1997 NAAQS.

Brenner was known to have an objective on NAAQS, and would have done whatever was necessary to accomplish his desired outcome. Together, Brenner and Beale implemented a plan, which this report refers to as "EPA's Playbook." The Playbook includes several tools first employed in the 1997 process, including sue-and-settle arrangements with a friendly outside

group, manipulation of science, incomplete cost-benefit analysis reviews, heavy-handed management of interagency review processes, and capitalizing on information asymmetry, reinforced by resistance to transparency. Ultimately, the guiding principal behind the Playbook is the Machiavellian principal that the ends will justify the means.

In the case of the 1997 NAAQS, the Playbook started with a sue-and-settle agreement with the American Lung Association, which established a compressed timeline to draft and issue PM standards. This timeline was further compressed when EPA made the unprecedented decision to simultaneously issue new standards for both PM and Ozone. Issuing these standards in tandem and under the pressure of the sue-and-settle deadline, Beale had the mechanism he needed to ignore opposition to the standards — EPA simply did not have the time to consider dissenting opinions.

The techniques of the Playbook were on full display in the “Beale Memo,” a confidential document that was leaked to Congress during the controversy, which revealed how he pressured the Office of Information and Regulatory Affairs to back off its criticism of the NAAQS and forced them to alter their response to Congress in 1997. EPA also brushed aside objections raised by Congress, the Office of Management and Budget, the Department of Energy, the White House Council of Economic Advisors, the White House Office of Science and Technology Policy, the National Academy of Sciences, and EPA’s own scientific advisers — the Clean Air Science Advisory Committee.

These circumstances were compounded by EPA’s “policy call” to regulate PM_{2.5} for the first time in 1997. PM_{2.5} are ubiquitous tiny particles, the reduction of which EPA used to support both the PM and Ozone NAAQS. In doing so, the Playbook also addressed Beale’s approach to EPA’s economic analysis: overstate the benefits and underrepresent the costs of federal regulations. This technique has been applied over the years and burdens the American people today, as up to 80% of the benefits associated with all federal regulations are attributed to supposed PM_{2.5} reductions.

EPA has also manipulated the use of PM_{2.5} through the NAAQS process as the proffered health effects attributable to PM_{2.5} have never been independently verified. In the 1997 PM NAAQS, EPA justified the critical standards on only two data sets, the Harvard “Six Cities” and American Cancer Society (ACS II) studies. At the time, the underlying data for the studies were over a decade old and were vulnerable to even the most basic scrutiny. Yet the use of such weak studies reveals another lesson from EPA’s Playbook: shield the underlying data from scrutiny.

Since the 1997 standards were issued, EPA has steadfastly refused to facilitate independent analysis of the studies upon which the benefits claimed were based. While this is alarming in and of itself, this report also reveals that the EPA has continued to rely upon the secret science within the same two studies to justify the vast majority of all Clean Air Act regulations issued to this day. In manipulating the scientific process, Beale effectively closed the door to open scientific enquiry, a practice the Agency has followed ever since. Even after the passage in 1999 of the Shelby Amendment, a legislative response to EPA’s secret science that requires access to federal scientific data, and President Obama’s Executive Orders on

Transparency and Data Access, the EPA continues to withhold the underlying data that originally supported Beale's efforts.

After President Clinton endorsed the 1997 NAAQS and the Agency celebrated their finalization, Beale became immune to scrutiny or the obligation to be productive for the remainder of his time at the Agency. Similarly, the product of his labors have remained intact and have been shielded from any meaningful scrutiny, much the same way Beale was protected by an inner circle of career staff who unwittingly aided in his fraud. Accordingly, it appears that the Agency is content to let the American people pay the price for Beale and EPA's scientific insularity, a price EPA is still trying to hide almost twenty years later.

After reaching the pinnacle of his career at the Agency in 1997, and facing no accountability thereafter, Beale put matters on cruise control and enjoyed the lavish lifestyle that the highest paid EPA employee could afford, producing virtually no substantive work product thereafter. For Beale's successes in the 1997 NAAQS process, Beale was idolized as a hero at the Agency. According to current EPA Administrator, Gina McCarthy, "John Beale walked on water at EPA." This unusual culture of idolatry has led EPA officials to blind themselves to Beale's wrongdoing and caused them to neglect their duty to act as public servants. As such, to this day EPA continues to protect Beale's work product and the secret science behind the Agency's NAAQS and PM claims.

FINDINGS

- After Robert Brenner assumed the position of Deputy Director of Office of Policy, Analysis, and Review (OPAR), within the office of Air and Radiation, (OAR) in 1988, he recruited John Beale to work for him in OPAR, and arranged to pay his friend the highest step on the General Service pay scale, despite the fact that Beale had no prior government experience.
- Brenner's decision to hire Beale was based solely on their personal relationship and not on Beale's qualifications. Beale himself admitted that he had no environmental experience. In the critical area of federal legislative experience, Beale's supposed qualification was an unpaid undergraduate internship for Senator John Tunney (D-CA).
- In 1994, Beale started spreading his most notorious lie, that he was an operative for the CIA. Apparently the lie began as a joke by Beale's coworkers, which Beale then seized upon and spun into a full blown false identity.
- At the same time, under Beale and Brenner's control, OPAR grew in both scope and influence, stretching the boundaries of OPAR's authority. According to a former high ranking official, OPAR was Brenner's "fiefdom" where he was considered to be "the most influential career person at [the] Agency [as] head of OPAR."
- Beginning in 1995, Beale and Brenner took the lead on EPA's internal process to set National Ambient Air Quality Standards (NAAQS) for Ozone and Particulate Matter (PM). The duo set in motion "EPA's Playbook," a strategy to game the system by compressing the Office of Information and Regulatory Affairs (OIRA) review via a friendly sue-and-settle arrangement, relying on secret science, and inflating benefits while underestimating costs.
- Evidence suggests that Beale used the NAAQS as a vehicle for his own self-aggrandizement and rose above reporting just to Brenner and began to work alongside Mary Nichols, the Assistant Administrator (AA) for OAR at the time, as well as then-Administrator Carol Browner.
- With these standards, EPA sought to regulate fine particulates ($PM_{2.5}$) in addition to larger particles (PM_{10}) for the first time under the NAAQS, despite a distinct lack of scientific understanding of the integrity of the underlying data.
- The two studies EPA relied upon, known as the Harvard "Six Cities" and American Cancer Society (ACS II) studies, were and remain controversial. EPA's own scientific advisors warned EPA that the Six Cities study was "not in the peer-reviewed literature" and emphasized that there were significant uncertainties with the data, meaning EPA's decision to proceed with the standards was a pure "policy call."

- Both Administrator Carol Browner and AA Mary Nichols admitted that neither of them had actually read the studies. Rather, it appears that Browner and Nichols deferred to the “expertise” of EPA’s career staff — Beale and Brenner — to make this “policy call.”
- Beale led EPA’s effort to suppress interagency criticism of the standards and issued the “Beale Memo,” threatening OIRA officials who dared to criticize EPA in a letter to Congress. EPA tried to hide the existence of the Beale Memo from Congress, but was undermined by a conscientious whistleblower who surreptitiously turned over the memo to Congressional staff.
- Beale used his leadership on the 1997 Ozone and PM NAAQS as a justification for nearly all of his monetary awards. At the end of the Clinton Administration, Brenner pushed through a renewal of Beale’s retention incentive bonus and recommended him for a promotion to Senior Leader. This made Beale one of the highest paid, non-elected federal government employees. He also used his work on the 1997 NAAQS as the foundation necessary to secure his colleagues’ confidence, which paved the way for his future lies and abuse of his leadership position at the Agency.
- When current Administrator Gina McCarthy was Beale’s supervisor, she was reportedly very impressed with Beale’s intelligence and leadership ability when she moved him in 2010 to be the immediate office’s lead for all of OAR’s international work.
- In 2010, Brenner accepted an illegal gift from his golfing buddy, prominent DC attorney, and member of the Clean Air Act Advisory Committee, Pat Rahe; but retired in August 2011, before the Agency could take administrative action against him and the EPA Office of Inspector General (OIG) could question him on the matter.
- Beale stopped showing up to work at EPA in June 2011; however, he never filed his retirement paperwork. His ability to continue to collect his salary without doing any work for EPA was facilitated by an arrangement he made with McCarthy before he left the Agency, as he had no set termination date. In December 2012, McCarthy met with Beale for the first time in nearly fifteen months, and he informed her that he was no longer planning on retiring. Two more months passed before concerns with Beale were officially reported to the OIG.
- On March 4, 2013, President Barack Obama nominated McCarthy to replace Lisa Jackson as head of the EPA. EPW Republicans made transparency, including data access, a priority throughout her confirmation process. Specifically, EPW Republicans sought the Agency’s secret science used to justify nearly all regulations issued under the Clean Air Act. This underlying science is the exact same science that Beale relied on in setting the 1997 PM NAAQS.
- On April 30, 2013, McCarthy had cause to fire Beale, but instead elected to allow him to voluntarily retire with full benefits.

- On July 9, 2013, the EPA finally agreed to initiate the process of acquiring and turning over the secret data to EPW Republicans. On July 18, 2013, McCarthy was sworn in to be the next Administrator of EPA. On August 21, 2013, pursuant to the agreement regarding McCarthy's confirmation, EPW Republicans received the first tranche of scientific data.
- On August 23, 2013, the Department of Justice filed criminal charges against John Beale and on September 27, 2013, Beale pled guilty to government theft of nearly \$900,000, pursuant to a plea agreement covering Beale's crimes from 2000 to 2013.
- Several of Beale's former colleagues submitted letters to the court requesting leniency in Beale's sentencing, including one key official from the 1997 NAAQS, Lydia Wegman. These officials' reaction to the scandal suggests that an individual can steal a million dollars from taxpayers and perpetrate a crime for nearly two decades, but still be considered — by some — as an environmental legend.
- On December 18, 2013, Beale was sentenced to 32 months in federal prison. Even after his voluntary confession and subsequent conviction, many of his former colleagues refuse to view him as a criminal. Some at EPA have clung to the narrative that Beale was CIA, and believe that Beale was being abandoned by his former agency.
- On March 11, 2014, Senator Vitter sent a letter to the EPA inquiring where they were in the process of being able to de-identify the datasets, a necessary step to making the data accessible for independent reanalysis.
- On March 17, 2014, Senator Vitter sent a letter to Dr. Francesca Grifo, EPA's Scientific Integrity Official, regarding concerns with EPA continuing to violate the Organization for Co-operation and Economic Development's (OECD) guidelines for "Best Practices for Ensuring Scientific Integrity and Preventing Misconduct." The letter focused on data-related misconduct ("not preserving primary data," "bad data management, storage," "withholding data from the scientific community") and outlining the serious concern that Harvard, American Cancer Society, the researchers, and the EPA were likely responsible for similar data-related misconduct as an OECD member country.

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INTRODUCTION

The actions of John C. Beale, a former senior official at the U.S. Environmental Protection Agency (EPA) who claimed to be a CIA agent for years and was later convicted of fraud and stealing nearly \$900,000 from American taxpayers, have disgraced the Agency and raised questions about the integrity of the Agency's management and oversight abilities. In addition to investigating EPA's incompetence in the Beale saga, the Senate Committee on Environment and Public Works (EPW) staff has examined the ripple effects of Beale's tenure with the Agency. More specifically, staff has determined that Beale played a leading role in shaping some of our nation's most significant air regulations.

During the 1990s, Beale was instrumental in creating and implementing major regulations pursuant to the Clean Air Act (CAA), which have shaped the nation's most expansive and overreaching environmental efforts for nearly two decades. Unambiguously, Beale spearheaded the National Ambient Air Quality Standards (NAAQS) for Ozone and Particulate Matter (PM) in 1997, which were justified using data from two controversial studies that EPA has refused to share with Congress and the American public. These standards have affected all aspects of the U.S. economy, with a profound impact looming on Americans' utility costs.

Working with Beale through the years was his self-described best friend Robert Brenner, former Director of the Office of Policy, Analysis, and Review (OPAR) within the Office of Air and Radiation (OAR), who recruited Beale to EPA. Evidence suggests that Brenner played a pivotal role in Beale's fraud. Additionally, for over a decade the two developed controversial regulations under the CAA, establishing what this report refers to as "EPA's Playbook" by which EPA would expand and exacerbate its control over the U.S. economy. As the two men prepared to jointly retire in 2011, Brenner highlighted their unique relationship and described Beale's influence in shaping EPA's regulatory agenda:

I wanted to tell you what I should have said last night: it's no coincidence that OAR's greatest legislative, regulatory and international successes came when you were around to develop the strategy and make sure we all did our jobs in carrying it out. There is just no one better at it than you.

Back in '88, I thought I'd get to spend 2 or 3 years working with you on a pretty cool political/policy project. I still can't believe it turned into 23 years of working with my best friend to try to make some good things happen--I lucked out.¹

This report will detail the history of Beale and Brenner's personal and working relationship, how this relationship contributed to the most significant scandal in EPA history, and how these two individuals were at the heart of constructing a heavy-handed regulatory agenda with long-lasting and economically devastating effects.

¹ E-mail from John Beale to Robert Brenner (June 2, 2011, 06:36 EST) (*emphasis added*).

I. WHERE IT BEGINS: Origin of an Alliance

Before Robert Brenner recruited John Beale to work at EPA, Beale's professional life consisted of a string of random employers with no clear career trajectory. This made Beale neither an expert in public policy nor an expert in environmental law; his employment at EPA was solely based on his relationship with Brenner, whom he met while studying together at Princeton in the 1970s. Beale's abnormally high starting salary was not merit-based and certainly not supported by his resume; instead it was the product of Brenner's influence at the Agency. The relationship they shared was mutually beneficial, but Beale particularly capitalized on the opportunities as the growing stature of both men facilitated Beale's fraud over the next two decades.

a. A Friendship for Life

“[W]hen the opportunity arose to help develop the new Clean Air Act, I was able to convince my best friend from those days, John Beale . . . to join me in the effort.”²

– Former Deputy Assistant Administrator, Office of Air and Radiation, Robert Brenner

In the years before he joined the EPA, Beale led an admittedly “itinerant” life and career.³ After dropping out of college,⁴ Beale allegedly served as a police officer in Costa Mesa, California,⁵ a position in which he later claimed that he worked undercover.⁶ Beale was drafted soon thereafter and served in the Army stateside as a physical therapist,⁷ but he left the service after completing the minimum amount of time required by law.⁸ Taking advantage of GI Bill benefits, Beale went back to school to finish his undergraduate degree,⁹ and then pursued a Master in Public Affairs at Princeton University.¹⁰

At Princeton, Beale and Robert Brenner met as classmates in 1975.¹¹ At graduate school, the two became best friends.¹² After each graduated with a Master in Public Affairs,¹³ the two

² *Robert Brenner Graduate Alumni Profile*, PRINCETON UNIVERSITY WOODROW WILSON SCHOOL OF PUBLIC AFFAIRS, <http://wws.princeton.edu/qzalumni/testimonials/brenner/> (last visited Sept. 9, 2013) [hereinafter *Brenner 2013 Graduate Alumni Profile*] (on file with Committee).

³ Sentencing Memorandum of John C. Beale at 6, *United States v. Beale*, No. 1:13-cr-00247-ESH (D.D.C. Sept. 27, 2013).

⁴ *Id.* at 3.

⁵ *Id.*

⁶ John C. Beale, Application for Vacancy Announcement Number EPA-00-SL-OAR-6174 (Apr. 13, 2000) [hereinafter *Beale Senior Leader Application*].

⁷ Transcript of John C. Beale Deposition at 123–24, H. Comm. on Oversight & Gov't Reform, 113th Cong. (Dec. 19, 2013) [hereinafter *Transcript of John C. Beale Deposition*], available at <http://oversight.house.gov/wp-content/uploads/2014/01/Beale-Deposition.pdf>.

⁸ *Id.*

⁹ See Sentencing Memorandum of John C. Beale, *supra* note 3, at 3.

¹⁰ See *id.* at 4.

¹¹ *Secret Agent Man? Oversight of EPA's IG Investigation of John Beale: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 113th Cong. (Oct. 1, 2013) [hereinafter *Oversight & Gov't Reform Hearing*] (testimony of Robert Brenner)

stayed very close even as Brenner remained at Princeton's Center for International Studies¹⁴ and Beale pursued a law degree.¹⁵

In 1979, Brenner left Princeton to accept employment with the EPA.¹⁶ That same year, Beale graduated from law school and went to work in corporate law for the Seattle, Washington, office of the law firm Preston, Thorgrimson, Ellis, Holeman & Fletcher.¹⁷ Beale failed the Washington state bar exam on his first attempt, so he was not a practicing attorney for the firm.¹⁸ Thereafter, Beale joined the ultimately unsuccessful 1980 reelection campaign for Senator Warren Magnuson (D-CA).¹⁹ According to Beale, his decision to focus on the political campaign and his corresponding lack of focus on his studies for his second attempt at the Washington bar exam, ultimately led the firm to terminate his employment after only eighteen months.²⁰ Beale was subsequently given a job at his cousin's apple farm, where he worked for the next two-and-a-half years.²¹ After passing the bar exam in 1982,²² Beale eventually practiced law in the small town of Lake City, Minnesota, "represent[ing] clients in local matters, ranging from general business transactions to child protection cases," until Brenner recruited Beale to work at EPA in the fall of 1987.²³

Over the course of Beale's "nomadic" post-graduate work experience,²⁴ he and Brenner maintained close contact. In 1983, Beale and Brenner purchased a two-bedroom house on 2.14 acres in Truro, Massachusetts from Beale's parents.²⁵ The home had been in the Beale family since the 1960s.²⁶ At the time Beale and Brenner purchased the home, which was valued at approximately \$120,000,²⁷ Brenner invested \$10,000 in the property.²⁸ According to Brenner, from the early 1980s until about 1989, they saw each other roughly once a year at the vacation home.²⁹

¹² *Brenner 2013 Alumni Profile*, *supra* note 2.

¹³ See Sentencing Memorandum of John C. Beale, *supra* note 3, at 4; *Alumnus Profile: Robert Brenner*, PRINCETON UNIVERSITY WOODROW WILSON SCHOOL OF PUBLIC & INTERNATIONAL AFFAIRS, <http://www.princeton.edu/alumni/stay-connected/what-alumni-are-up-to/brenner-robert> (last visited Jan. 29, 2014) [hereinafter *2014 Brenner Alumnus Profile*].

¹⁴ See *2014 Brenner Alumnus Profile*, *supra* note 13.

¹⁵ See Sentencing Memorandum of John C. Beale, *supra* note 3, at 4.

¹⁶ See *2014 Brenner Alumnus Profile*, *supra* note 13.

¹⁷ See Deposition of John C. Beale, *supra* note 7, at 54.

¹⁸ See *id.* at 54–55.

¹⁹ See Deposition of John C. Beale, *supra* note 7, at 54–55.

²⁰ See *id.*

²¹ Sentencing Memorandum of John C. Beale, *supra* note 3, at 4.

²² *Lawyer Details*, MINNESOTA JUDICIAL BRANCH, <http://mncourts.gov/mars/AttorneyDetail.aspx?attyID=013904X> (last visited Jan 29, 2014) (confirming that Beale was admitted on Oct. 15, 1982). *But see* Beale Senior Leader Application, *supra* note 6 (asserting that Beale was barred in 1987).

²³ See Sentencing Memorandum of John C. Beale, *supra* note 3, at 4.

²⁴ Deposition of John C. Beale, *supra* note 7, at 12.

²⁵ Search for Property Records of John C. Beale (LEXIS); *see also* Search for Property Records of John C. Beale, MASSACHUSETTS LAND RECORDS, <http://www.masslandrecords.com>.

²⁶ Oversight & Gov't Reform Hearing, *supra* note 11 (testimony of Robert Brenner).

²⁷ See Deposition of John C. Beale, *supra* note 7, at 31–32.

²⁸ Oversight & Gov't Reform Hearing, *supra* note 11 (testimony of Robert Brenner).

²⁹ *Id.*

In the fall of 1987, Beale and Brenner engaged in “several discussions about working together.”³⁰ When Brenner was promoted to Deputy Director of the Office of Policy, Analysis, and Review (OPAR),³¹ he used his new authority to land his struggling friend a position at the EPA.³² By December of that year, Beale had quit his job in Minnesota and moved to the Washington, D.C. area to work as a temporary consultant for OPAR.³³ In June 1989, Brenner hired Beale as “a permanent, career EPA employee with the position of Policy Analyst in OPAR.”³⁴ At the time, Brenner prepared an “Advance in Hire” memorandum that alleged Beale would not accept the position unless he started as a GS-15 Step 10³⁵ — the maximum pay level for federal general service employees.³⁶ Notably, individuals hired at GS-12 or above generally have at least twenty years of work experience,³⁷ so Beale’s hiring was an anomaly given his minimal experience.

It is extremely rare for a new employee to start at Beale’s pay level, an anomaly only compounded by his lack of pertinent experience.

Brenner has claimed he sought out Beale to help him shepherd legislation through Congress after EPA failed to push forward legislation to amend the Clean Air Act.³⁸ Rather than recruit someone with the requisite experience, Brenner sought out Beale, in what appears to be a decision based solely on their personal relationship, rather than any experience or credentials that would justify hiring Beale. On the central qualification identified by Brenner — experience in environmental policy — Beale himself admitted that he had no experience in the area.³⁹ In the critical area of federal legislative experience, Beale’s supposed qualification was limited to his alleged employment in the Washington, D.C., office of Senator John V. Tunney (D-CA).⁴⁰ However, the EPA Office of Inspector General (OIG) uncovered that Beale was never actually employed by Senator Tunney;⁴¹ he was only an unpaid undergraduate intern for a few months.⁴²

³⁰ *Id.* (statement of Robert Brenner).

³¹ Deposition of John C. Beale, *supra* note 7, at 14–15.

³² Sentencing Memorandum of John C. Beale, *supra* note 3, at 4

³³ *Id.*

³⁴ *Id.* at 7. Nevertheless, the OIG asserts that Beale was hired as a Senior Policy Advisor. *See* Oversight & Gov’t Reform Hearing, *supra* note 11 (statement of Patrick Sullivan).

³⁵ Oversight & Gov’t Reform Hearing, *supra* note 11 (statement of Patrick Sullivan)

³⁶ *See* Rates of Pay Under the General Schedule Effective the first pay period beginning on or after January 1, 1989, Office of Personnel Mgmt., available at http://archive.opm.gov/oca/pre1994/1989_Jan_GS.pdf.

³⁷ *See* U.S. MERIT SYSTEMS PROTECTIONS BOARD, IN SEARCH OF HIGHLY SKILLED WORKERS: A STUDY ON THE HIRING OF UPPER LEVEL EMPLOYEES FROM OUTSIDE THE FEDERAL GOVERNMENT 13 (2008), available at <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=323118&version=323564&application=ACROBAT>.

³⁸ Oversight & Gov’t Reform Hearing, *supra* note 11 (statement of Robert Brenner).

³⁹ Deposition of John C. Beale, *supra* note 7, at 13 (demonstrating that Beale answered “no” when questioned as to whether he “ha[d] any environmental experience prior to joining the EPA”).

⁴⁰ Sentencing Memorandum of John C. Beale, *supra* note 3, at 3 n.1.

⁴¹ Oversight & Gov’t Reform Hearing, *supra* note 11 (statement of Patrick Sullivan).

⁴² Sentencing Memorandum of John C. Beale, *supra* note 3, at 3 n.1.

b. Establishing a Partnership at EPA

“I still can’t believe it turned into 23 years of working with my best friend to try to make some good things happen--I lucked out.”⁴³

– Email from Robert Brenner to John Beale

Beale and Brenner remained close friends throughout nearly twenty-five years of working together at EPA. For the first decade of Beale’s EPA career, Brenner served as Beale’s supervisor.⁴⁴

When Beale first moved to the Washington, D.C. area to start work at the EPA, he lived in the same apartment complex as Brenner.⁴⁵ Moreover, during the first few years Beale worked for Brenner, they vacationed together regularly at the Cape Cod beach house they co-owned.⁴⁶ Even after several years of employment at the EPA, Beale lived in Brenner’s home for more than a full year during the mid-1990s.⁴⁷ In 1999, after fifteen years of jointly owning the vacation home in Cape Code, Beale purchased Brenner’s share of the home at a value of roughly \$40,000, four times the amount Brenner originally paid for it.⁴⁸ When this transaction occurred, Beale was Brenner’s subordinate. Less than a year later Brenner recommended Beale’s promotion to Senior Leader (SL) status, which essentially made him Brenner’s professional equivalent.

Among their coworkers, Brenner and Beale were known to “spen[d] a lot of time together outside of work: going out to eat, playing golf and going on vacations together.”⁴⁹ They also scheduled regular breakfasts and lunches that continued through the end of their tenures at EPA.⁵⁰ Moreover, Beale, Brenner, and their respective wives socialized frequently, arranging get-togethers ranging from frequent dinners⁵¹ to Valentine’s Day celebrations⁵² to volunteering

⁴³ E-mail from John Beale to Robert Brenner (June 2, 2011, 06:36 EST) (on file with Committee).

⁴⁴ See Letter from Justin Shur, Counsel to Robert Brenner, to Rep. Staff, S. Comm. on Env’t & Pub. Works (Oct. 4, 2013) [hereinafter Initial Letter from Justin Shur].

⁴⁵ See Search for Property Records of John C. Beale (LEXIS); Search for Property Records of Robert Brenner (LEXIS).

⁴⁶ Oversight & Gov’t Reform Hearing, *supra* note 11 (testimony of Robert Brenner).

⁴⁷ See Search for Property Records of John C. Beale (LEXIS); Search for Property Records of Robert Brenner (LEXIS).

⁴⁸ Oversight & Gov’t Reform Hearing, *supra* note 11 (testimony of Robert Brenner).

⁴⁹ See Memorandum of Interview of Addie Johnson from Office of Inspector Gen., Env’tl. Prot. Agency 3 (Apr. 10, 2013) (on file with Committee).

⁵⁰ See, e.g., E-mail from John Beale to Robert Brenner (Apr. 7, 2012, 10:01 EST) (on file with Committee); E-mail from John Beale to Robert Brenner (Feb. 14, 2012, 12:32 EST) (on file with Committee); E-mail from John Beale to Robert Brenner (Jan. 25, 2012, 04:22 EST) (on file with Committee); E-mail from John Beale to Robert Brenner (Apr. 7, 2012, 10:01 EST) (on file with Committee); E-mail from John Beale to Robert Brenner (Nov. 5, 2011, 08:51 EST) (on file with Committee); E-mail from John Beale to Robert Brenner (Oct. 29, 2008, 02:41 EST).

⁵¹ See, e.g., E-mail from John Beale to Robert Brenner (Dec. 16, 2011, 11:35 EST) (on file with Committee); E-mail from Robert Brenner to John Beale (Nov. 6, 2008, 10:02 EST); E-mail from Robert Brenner to John Beale (Sept. 25, 2008, 14:08 EST) (on file with Committee); E-mail from Robert Brenner to John Beale (July 20, 2008, 01:49 EST) (on file with Committee); E-mail from Barbara Brenner to John Beale (Nov. 29, 2007, 14:49 EST) (on file with Committee); E-mail from John Beale to Robert Brenner (Nov. 6, 2006, 09:27 EST) (on file with Committee).

⁵² See E-mail from John Beale to Robert Brenner (Feb. 14, 2012, 12:32 EST) (on file with Committee).

for the Obama presidential campaign.⁵³ After working at the EPA together for more than two decades, the two planned a joint retirement party in September 2011,⁵⁴ which was paid for on Brenner's wife's credit card.⁵⁵

Beale and Brenner's friendship flourished as their careers increasingly overlapped. Such an arrangement proved to be mutually beneficial for the two of them. It is difficult to imagine that Beale could have gotten away with his long-term fraud against the Agency without the knowledge and support of his best friend Brenner. It is just as difficult to imagine Brenner's success at EPA without a cadre of followers who, like Beale, owed their career to Brenner.



Photo of Robert Brenner (left) and John Beale (right) before the House Committee on Oversight and Government Reform (October 1, 2013).

⁵³ See E-mail from Nancy Kete to Robert Brenner, John Beale, & Barbara Brenner (Nov. 4, 2008, 11:30 EST) (on file with Committee).

⁵⁴ Oversight & Gov't Reform Hearing, *supra* note 11 (testimony of Robert Brenner).

⁵⁵ See E-mail from Staff, Office of Inspector Gen., Env'tl. Prot. Agency, to Rep. Staff, S. Comm. on Env't & Pub. Works (Nov. 15, 2013, 14:08 EST) (on file with Committee).

II. GAMING THE SYSTEM: Fooling EPA and the Public

While Brenner served as Beale's facilitator throughout his time at EPA, Beale developed alliances with certain colleagues to shield him from scrutiny as he perpetuated his expanding fraud. For example, Brenner recommended Beale for his retention incentive bonuses, several awards, and promotions while former Assistant Administrator (AA) for the Office of Air and Radiation (OAR), Bob Perciasepe, approved Beale's bonus and promotion in 2000. In addition, as Beth Craig, Deputy AA for OAR, grew close to Beale, she approved his excessive travel vouchers without confirming their integrity. During the Obama Administration, Beale's allies had renewed influence and Beale's manipulation expanded, allowing him to escape work for over a year and a half, yet still receive an EPA paycheck.

a. Clinton Years: Creating an Infrastructure for Long-Term Abuse

"It is important to understand that everything was collaborated by Robert Brenner about John Beale. When she had asked Mr. Brenner questions about Mr. Beale's attendance and health, she would be told that John will be in tomorrow....he is feeling better."⁵⁶

- Former Deputy Assistant Administrator, Office of Air and Radiation, Beth Craig

In 1991, near the end of the first Bush Administration, Beale claimed the title of Deputy Director for OPAR.⁵⁷ The same year, Brenner submitted a request for Beale to receive a Retention Incentive Bonus,⁵⁸ "a rare privilege, normally reserved for scientists and others with hard-to-come-by technical skills."⁵⁹ At EPA, a retention bonus can be worth up to 25% of an employee's base pay. A supervisor must recertify annually that the conditions justifying the bonus still exist, and are limited to a maximum duration of three years.⁶⁰ These certifications occurred in 1992 and 1993; however, no such certifications were made for the remainder of the Clinton Administration.⁶¹ Regardless, Beale's retention incentive bonus should have been terminated no later than 1994, yet it continued uninterrupted through 2000.⁶²

At some point in the early 1990s, after he began receiving bonus payments, Beale started to miss work allegedly due to the fact "that he had contracted malaria in Vietnam during service in the U.S. Army."⁶³ Beale neither served in Vietnam nor contracted malaria,⁶⁴ both of which

⁵⁶ Memorandum of Interview of Elizabeth Craig from Office of Inspector Gen., Env'tl. Prot. Agency (Nov. 12, 2013) (on file with Committee).

⁵⁷ See Robert Brenner & John Beale, *Pizza at Midnight*, EPA JOURNAL, Jan.-Feb. 1991, at 54, 54.

⁵⁸ Oversight & Gov't Reform Hearing, *supra* note 11 (statement of Patrick Sullivan).

⁵⁹ Michael Gaynor, *The Suit Who Spooked the EPA*, WASHINGTONIAN, Mar. 4, 2013, <http://www.washingtonian.com/articles/people/the-suit-who-spooked-the-epa/>.

⁶⁰ *Id.*

⁶¹ Memorandum from Susan Smith, Team Leader, Executive Resource Division, Office of Admin. & Res. Mgmt., Env'tl. Prot. Agency, Executive Overview/Analysis of J. Beale Pay Issues 2 (Mar. 14, 2013) (on file with Committee).

⁶² Oversight & Gov't Reform Hearing, *supra* note 11 (statement of Patrick Sullivan).

⁶³ *Id.* The investigations by the OIG and Department of Justice did not include absences attributed to malaria in its calculations of Beale's time fraud, so the amount of money Beale pled guilty to stealing in his plea agreement is a vast understatement.

would have been documented on his military service record. No such documentation existed. The latter excuse, contracting malaria, is one he would use to hide from Congressional scrutiny on important scientific and policy matters. According to Beale, no one at EPA “ever ask[ed] . . . the sort of detailed questions about that claim or question[ed] the veracity of it,” nor “did anyone ever question [his] Vietnam service,” “ask[] for any documentation of the fact that [he] had malaria,” nor “ever ask what negative effects the malaria ha[d] on [his] day-to-day life.”⁶⁵ This willful ignorance occurred in a workplace where Beale was well-known for his athletic hobbies.⁶⁶ No one at the EPA was more knowledgeable of Beale’s active lifestyle than his supervisor and best friend, Brenner, as they were known to regularly engage in sporting activities together.⁶⁷ Despite Beale’s periodic time away from the office, he was promoted to Senior Policy Analyst in January 1994.⁶⁸ This coincided with Brenner’s promotion to the operational title of Deputy AA for OAR.⁶⁹

By 1994, Beale had begun spreading his most notorious lie that he was a CIA agent.⁷⁰ Apparently the lie began as a joke by Beale’s coworkers, which Beale then seized upon and spun into a full blown false identity.⁷¹ In fact, Beale has admitted to investigators that he perpetrated this lie to “puff up the image of [himself].”⁷²

Starting in 1998, Beale tested the waters with another scheme to abuse his position: he claimed to suffer from back pain to receive first-class travel accommodations.⁷³ In total, Beale claimed about \$300,000 in travel expenses, and “[h]is first-class airfares often were more than five times the amount of coach fares. In one case . . . his first-class ticket was 14 times higher than the coach fare — \$14,000 instead of approximately \$1,000 for a round-trip flight.”⁷⁴ In addition to requesting first-class travel, Beale also developed a habit of greatly exceeding the allowed per diem expense rate.

Notably, the approving official for his excessive travel expenses was Beth Craig.⁷⁵ Craig was known to have “worked very closely with Beale and Brenner . . . having daily meetings with the two men.”⁷⁶ Craig admitted that she handled Beale’s travel expenses “differently than others” and essentially did not review them.⁷⁷ Instead, she “relied on the administrative staff to

⁶⁴ *See id.*

⁶⁵ Deposition of John C. Beale, *supra* note 7, at 122–23.

⁶⁶ *See* Oversight & Gov’t Reform Hearing, *supra* note 11 (statement of Patrick Sullivan); Memorandum of Interview of Addie Johnson from Office of Inspector Gen, Env’tl. Prot. Agency 3 (Apr. 10, 2013) (on file with Committee).

⁶⁷ Memorandum of Interview of Addie Johnson from Office of Inspector Gen, Env’tl. Prot. Agency 3 (Apr. 10, 2013) (on file with Committee).

⁶⁸ Beale Senior Leader Application, *supra* note 6.

⁶⁹ *See* FEDERAL EXECUTIVE DIRECTORY 368 (Rosalie C. Ruane ed., Sept./Oct. 1993 ed.).

⁷⁰ Oversight & Gov’t Reform Hearing, *supra* note 11 (statement of Patrick Sullivan).

⁷¹ *See* Deposition of John C. Beale, *supra* note 7, at 86, 166.

⁷² Oversight & Gov’t Reform Hearing, *supra* note 11 (statement of Patrick Sullivan); *see also* Deposition of John C. Beale, *supra* note 7, at 27 (indicating that Beale invented the CIA lie based on his “fantasy”).

⁷³ Oversight & Gov’t Reform Hearing, *supra* note 11 (statement of Patrick Sullivan).

⁷⁴ *Id.*

⁷⁵ Memorandum of Interview of Elizabeth Craig from Office of Inspector Gen, Env’tl. Prot. Agency 3 (June 18, 2013) (on file with Committee).

⁷⁶ Memorandum of Interview of Elizabeth Craig from Office of Inspector Gen., Env’tl. Prot. Agency 1 (Mar. 7, 2013) (on file with Committee).

⁷⁷ Memorandum of Interview of Elizabeth Craig from Office of Inspector Gen, Env’tl. Prot. Agency 3 (June 18, 2013) (on file with Committee).

review specific trip details and receipts.”⁷⁸ However, when Beale’s executive assistant raised concerns over “the excessive and abusive nature of Mr. Beale’s travel expenses,” Craig told her “not to question the expenses, which were authorized because Mr. Beale was a senior level official.”⁷⁹ Craig explained her questionable decision making was due to Brenner, who was “always support[ing] . . . and pushing for Beale” in areas from “travel funding [to] retention incentives.”⁸⁰ In fact, Craig blamed her overall lax supervision on how hard she thought it was “to question Beale’s behavior and travel expenses when it was supported by another senior executive,” Brenner.⁸¹

As appointed officials in the Clinton Administration began to exit the Agency in mid-2000, Brenner took advantage of the leadership vacuum and sought out opportunities to advance Beale at the Agency. At some point in the year, Beale’s bonus payments stopped, but Brenner swiftly pushed through another retention bonus in June 2000.⁸² Beale has since claimed that he never asked Brenner or any other EPA official to recommend him for a promotion or to submit applications for a bonus on his behalf, which suggests that Brenner acted to reinstate the bonus *sua sponte*.⁸³ This could help explain why the employment offers listed in the application were identical to the offers included in Beale’s 1993 certification, which should have raised suspicions among reviewing officials, including Bob Perciasepe, who approved the bonus payment.⁸⁴ Brenner’s intervention paved the way for EPA to pay Beale, an additional \$32,000 a year, on average, without interruption until 2013.⁸⁵

As the Clinton Administration began to disband in mid-2000, Brenner seems to have taken advantage of the leadership vacuum and sought out opportunities to advance Beale.

Less than two months after Beale received the reauthorization for his Retention Incentive Bonus, based on a recommendation from Brenner and an approval from Bob Perciasepe, Beale was promoted on August 23, 2000, to SL, a designation equivalent to Senior Executive Service for technical professionals in the federal government pay system.⁸⁶ At the time, SL designation made Beale among the highest paid, non-elected federal government employees.⁸⁷ This was the last time Beale would receive a promotion in pay-grade.

⁷⁸ *Id.*

⁷⁹ Oversight & Gov’t Reform Hearing, *supra* note 11 (statement of Patrick Sullivan).

⁸⁰ Memorandum of Interview of Elizabeth Craig from Office of Inspector Gen, Env’tl. Prot. Agency 2 (June 18, 2013) (on file with Committee).

⁸¹ *Id.*

⁸² *See* Sentencing Memorandum of John C. Beale, *supra* note 3, at Exhibit 11 (listing Brenner as the requesting official for the bonus).

⁸³ Memorandum from Rep. Comm. Staff to Rep. Members, S. Comm. on Env’t & Pub. Works, Additional Facts Regarding EPA Negligence in Responding to Beale Fraud (Robert Brenner) (Feb. 6, 2014) (on file with Committee).

⁸⁴ ENVTL. PROT. AGENCY, REPORT OF EVALUATION AND CORRECTIVE ACTIONS 7 (Dec. 5, 2013).

⁸⁵ Oversight & Gov’t Reform Hearing, *supra* note 11 (statement of Patrick Sullivan).

⁸⁶ *Id.*

⁸⁷ Statement of the Offense at 2, *United States v. Beale*, No. 1:13-cr-00247-ESH (D.D.C. Sept. 27, 2013).

Thereafter, Beale held the same “functional” title as Brenner — Deputy AA for OAR.⁸⁸ Notably, the promotion and bonuses Brenner requested eventually elevated Beale’s salary to exceed the statutory threshold for employees at his pay grade for four years.⁸⁹

Beale’s Compensation History at EPA Compared to the Median Household Income

Year	Aggregate Pay	Median Household Income	Beale’s Salary in Excess of Average American Income
1991	\$ 79,630.00	\$30,126.00	\$49,504.00
1992	\$ 103,701.40	\$30,636.00	\$73,065.40
1993	\$ 107,572.80	\$31,241.00	\$76,331.80
1994	\$ 112,073.60	\$32,264.00	\$79,809.60
1995	\$ 115,784.00	\$34,076.00	\$81,708.00
1996	\$ 123,348.00	\$35,492.00	\$87,856.00
1997	\$ 122,836.80	\$37,005.00	\$85,831.80
1998	\$ 125,890.40	\$38,885.00	\$87,005.40
1999	\$ 130,225.60	\$40,696.00	\$89,529.60
2000	\$ 136,593.60	\$41,990.00	\$94,603.60
2001	\$ 145,472.60	\$42,228.00	\$103,244.60
2002	\$ 152,720.40	\$42,409.00	\$110,311.40
2003	\$ 158,929.00	\$43,318.00	\$115,611.00
2004	\$ 165,619.00	\$44,334.00	\$121,285.00
2005	\$ 171,401.00	\$46,326.00	\$125,075.00
2006	\$ 182,318.00	\$48,201.00	\$134,117.00
2007	\$ 186,314.00	\$50,233.00	\$136,081.00
2008	\$ 194,548.00	\$50,303.00	\$144,245.00
2009	\$ 202,620.00	\$49,777.00	\$152,843.00
2010	\$ 205,805.00	\$49,276.00	\$156,529.00
2011	\$ 213,840.00	\$50,054.00	\$163,786.00
2012	\$ 205,920.00	\$51,017.00	\$153,903.00

Source:
 1) <http://www.census.gov/hhes/www/income/data/historical/household/>
 2) Memorandum from Susan Smith, Team Leader, Executive Resource Division, Office of Admin. & Res. Mgmt., Env’tl. Prot. Agency, Executive Overview/Analysis of J. Beale Pay Issues Table 1 (Mar. 14, 2013) (on file with Committee).

⁸⁸ See FEDERAL DIRECTORY: EXECUTIVE, LEGISLATIVE, JUDICIAL 626 (Fall 2004 ed.); CARROLL’S FEDERAL DIRECTORY: EXECUTIVE, LEGISLATIVE, JUDICIAL 574 (Sept./Oct. 2000 ed.).

⁸⁹ Oversight & Gov’t Reform Hearing, *supra* note 11 (statement of Patrick Sullivan) (“Based upon his Senior Leader status and retention incentive bonuses, from 2000 to 2013, Mr. Beale was paid, on average, \$180,000 per year, an amount that exceeded statutory pay limits for federal employees at his grade for four of those years – 2007, 2008, 2009 and 2010.”).

At the same time, Beale also admittedly “began to engage in a pattern of time and attendance fraud in violation of 18 U.S.C. §641.”⁹⁰ In the beginning, Beale often failed to report for work on days when he placed “D.O. Oversight” on his calendar — approximately once per week.⁹¹ Beale has explained that he “created this time entry – a short-hand term to mean Directorate of Operations – Oversight,”⁹² responsible for covert operations at the CIA.⁹³ Furthermore, “Beale did not submit request[s] for annual leave for this time, and did not inform his supervisors as to the reason for his absences,”⁹⁴ but was never reprimanded for his unexcused time out of the office.⁹⁵

According to EPA’s Conduct and Discipline Manual, failure to report to duty for more than five consecutive days is a fireable offense.⁹⁶ Beale’s promotion to SL status made his calendar available to his supervisors and other co-workers both in written and electronic form.⁹⁷ However, Brenner’s ability and willingness to vouch for Beale created a space for Beale to nurture and grow this sensational fraud.

b. George W. Bush Years: Waning Influence and Testing Patience

EPA Investigators “found unwavering devotion [to Beale]. ‘He was known as the golden child, the go-to man . . . [e]verybody who had contact with him had nothing bad to say about the man.’”⁹⁸

– *Special Agent, Office of Inspector General, Mark Kaminsky*

The transition between the Clinton and George W. Bush Administrations marked a turning point for Beale and Brenner at the EPA. After playing a major role in the passage of the 1990 Clean Air Act Amendments, the two had been deeply involved in the implementation of the legislation through the rulemaking process in the 1990s. During the Clinton Administration, Beale first began testing the waters with his lies, including his infamous fabrication that he was an undercover CIA agent, as well his malaria and Vietnam claims. The early 2000s would bring about a reduction in the pair’s influence, but not in their efforts to take advantage of their stature at the Agency.

Faced with a loss of influence through official channels, Brenner used OPAR’s broad scope to dabble in everything and focus on nothing. According to one former high ranking EPA official, “Brenner had pet projects during [the] Bush years — nothing really substantive.”⁹⁹

⁹⁰ Sentencing Memorandum of John C. Beale, *supra* note 3, at 16.

⁹¹ Oversight & Gov’t Reform Hearing, *supra* note 11 (statement of Patrick Sullivan).

⁹² Sentencing Memorandum of John C. Beale, *supra* note 3, at 16.

⁹³ Oversight & Gov’t Reform Hearing, *supra* note 11 (statement of Patrick Sullivan).

⁹⁴ Statement of the Offense, *supra* note 87, at 2.

⁹⁵ Oversight & Gov’t Reform Hearing, *supra* note 11 (statement of Patrick Sullivan).

⁹⁶ Env’tl. Protection Agency Order 3120.1, *Conduct and Discipline*.

⁹⁷ Oversight & Gov’t Reform Hearing, *supra* note 11 (statement of Patrick Sullivan).

⁹⁸ Gaynor, *supra* note 59.

⁹⁹ Interview with former high-ranking Env’tl. Prot. Agency official by Rep. Staff, S. Comm. on Env’t & Pub. Works.

While Brenner started the Bush years as Deputy AA of OAR,¹⁰⁰ Bill Wehrum replaced him in July 2005, and Brenner retained only his title as Director of OPAR, no longer serving in a dual role.¹⁰¹ Colleagues, though, repeatedly emphasized that this move was a purposeful demotion for the untrusted Brenner,¹⁰² and news accounts of the reshuffle went so far as to note that Brenner “was never part of [departing OAR AA] Holmstead’s inner circle anyway.”¹⁰³ Brenner did retain, though, one of his primary vehicles of influence in his role as head of OPAR.¹⁰⁴

So broad was Brenner’s scope that political appointees “always wondered really what Brenner’s role was with the policy shop.”¹⁰⁵ Describing Brenner as a “fundamentally dishonest person,”¹⁰⁶ colleagues observed in Brenner a willingness to abuse his network of influence and noted that Brenner paid close attention to levers of power that others overlooked, noting, for example, that “he pa[id] a lot of attention to other things people don’t pay attention to, like bonuses.”¹⁰⁷ One of the people Brenner protected and continued to reward with lavish awards was his best friend and ally Beale.¹⁰⁸

With the election of President George W. Bush, Beale apparently contemplated retirement.¹⁰⁹ After testing his fraud during the Clinton years, Beale stayed at the Agency without any legitimate supervision. Indeed, as a SL, a promotion to which Brenner facilitated, Beale “did not have a supervisor besides an AA . . . That is a difference between a senior executive and a SL. As a senior executive, people report to you so there is inherent accountability. As a SL, Beale did not have that accountability.”¹¹⁰ Even so, Beale was reassigned in 2004 to the international portfolio within OAR¹¹¹ and again in 2007 to the amorphous role of Senior Policy Advisor.¹¹² At the time, colleagues witnessed Beale exploiting these roles — that were defined by a “longer-term strategic focus,”¹¹³ instead of the actual responsibilities involved in “day-to-day management”¹¹⁴ — to avoid doing any real work.

Since Beale had established among career staff that his responsibilities as a CIA agent required absences from EPA, he continued to perpetuate this fabrication with the new management team. After the confirmation of Jeff Holmstead as AA of OAR, Beale informed him that he had been, and would continue to be, out of the office approximately one day a week

¹⁰⁰ See CARROLL’S FEDERAL DIRECTORY: EXECUTIVE, LEGISLATIVE, JUDICIAL 581 (Nov./Dec. 2001 ed.)

¹⁰¹ See *Risk Policy Report: Personnel Changes Pave Way For Holmstead Aide To Head Air Office*, INSIDE EPA.COM, Aug. 2, 2005, <http://insideepa.com/Risk-Policy-Report/Risk-Policy-Report-08/02/2005/personnel-changes-pave-way-for-holmstead-aide-to-head-air-office/menu-id-1098.html>.

¹⁰² Interview of former high-ranking Env’tl. Prot. Agency official by Rep. Staff, S. Comm. on Env’t & Pub. Works.

¹⁰³ See *Risk Policy Report*, *supra* note 106.

¹⁰⁴ *Id.*

¹⁰⁵ Interview by Rep. Staff, S. Comm. on Env’t & Pub. Works.

¹⁰⁶ Interview of former high-ranking Env’tl. Prot. Agency official, by Rep. Staff, S. Comm. on Env’t & Pub. Works.

¹⁰⁷ Interview of Marcus Peacock, former Deputy Adm’r, Env’tl. Prot. Agency, by Rep. Staff, S. Comm. on Env’t & Pub. Works.

¹⁰⁸ Oversight & Gov’t Reform Hearing, *supra* note 11 (statement of Patrick Sullivan).

¹⁰⁹ See E-mail from John Beale to Barbara Pabotoy (Jan. 7, 2002, 05:24 EST) (on file with Committee).

¹¹⁰ Memorandum of Interview of Elizabeth Craig from Office of Inspector Gen., Env’tl. Prot. Agency 3 (June 18, 2013) (on file with Committee).

¹¹¹ See *Risk Policy Report*, *supra* note 106.

¹¹² See FEDERAL DIRECTORY: EXECUTIVE, LEGISLATIVE, JUDICIAL 605 (Fall 2007 ed.).

¹¹³ See *Risk Policy Report*, *supra* note 106.

¹¹⁴ See *id.*

for “D.O. Oversight” issues at the CIA.¹¹⁵ According to Holmstead, Beale informed him that he had been tapped by the CIA to review select agency activities as part of an advisory board, which required occasional absences from EPA, not that he was an actual CIA agent.¹¹⁶ Holmstead further recalls that Brenner likely participated in that meeting.¹¹⁷ Shockingly, Holmstead was the first person to whom Beale was compelled to account for his time off.¹¹⁸ When faced with Beale’s well-developed reputation, Holmstead accepted Beale’s assertions.¹¹⁹ According to Beale’s sentencing memorandum, “[t]his wholly contrived explanation for his periodic, unauthorized absences, which went unchallenged within the EPA, emboldened Mr. Beale to continue his time fraud.”¹²⁰

Beale’s time fraud was facilitated by career EPA officials, in addition to Brenner. Most notably, Beth Craig, a Deputy AA in OAR from 2000 to 2010,¹²¹ had the authority and responsibility to approve Beale’s timecards.¹²² In the ten year period in which she served as Deputy AA, she has admitted that she “held [him] to a different standard.”¹²³ She approved and instructed staff to record and sign off on Beale’s hours, even during the period of time when he did not report to EPA offices for six months.¹²⁴ Beale’s administrative assistant was instructed at different times by both Beale and Craig “to put Beale in for eighty (80) hours of work each pay period unless instructed otherwise.”¹²⁵ When Beale’s assistant brought her concerns about his absences and the time entries to Craig, Craig explained to her that “Beale worked for EPA, but from a different location.”¹²⁶ The former director of Human Resources within OAR, Omayra Salgado, also questioned the approval of Beale’s time cards during his absences.¹²⁷ Craig explained to her that “Beale worked for the CIA,” which ceased Salgado’s questioning of the matter.¹²⁸

EPA career officials, who frequently covered for Beale, actually emboldened him to perpetrate his fraud.

¹¹⁵ Oversight & Gov’t Reform Hearing, *supra* note 11 (statement of Patrick Sullivan).

¹¹⁶ Interview of Jeffrey Holmstead, former Assistant Adm’r, Office of Air & Radiation, Env’tl. Prot. Agency, by Rep. Staff, S. Comm. on Env’t & Pub. Works.

¹¹⁷ Interview of Jeffrey Holmstead by Rep. Staff, S. Comm. on Env’t & Pub. Works.

¹¹⁸ See Sentencing Memorandum of John C. Beale, *supra* note 3, at 16.

¹¹⁹ Oversight & Gov’t Reform Hearing, *supra* note 11 (statement of Patrick Sullivan).

¹²⁰ See Sentencing Memorandum of John C. Beale, *supra* note 3, at 17.

¹²¹ Memorandum of Interview of Elizabeth Craig from Office of Inspector Gen., Env’tl. Prot. Agency 2 (Nov. 12, 2013) (on file with Committee).

¹²² *Id.* at 3.

¹²³ Memorandum of Interview of Elizabeth Craig from Office of Inspector Gen., Env’tl. Prot. Agency 2 (June 18, 2013) (on file with Committee).

¹²⁴ Memorandum of Interview of Addie Johnson from Office of Inspector Gen., Env’tl. Prot. Agency 1 (Apr. 10, 2013) (on file with Committee).

¹²⁵ *Id.*

¹²⁶ *Id.* at 2.

¹²⁷ Memorandum of Interview of Omayra Salgado from Office of Inspector Gen., Env’tl. Prot. Agency 2 (May 13, 2013) (on file with Committee).

¹²⁸ *Id.* at 3.

Towards the end of the Bush Administration, Beale was absent for six months allegedly due to an “election-year multi-agency project relating to candidate security” with the CIA.¹²⁹ Beale admitted under oath that he “never produced any written work” for the EPA during this absence.¹³⁰ Evidence from this period suggests that Beale’s disinterest in fulfilling his basic responsibilities at the EPA under the Bush Administration stood in stark contrast to the excitement displayed by him and his allies about the incoming Obama Administration. Email exchanges between Beale and his friends and colleagues reflect their lack of “enthusiasm for dealing with the dying remnants of what these Bush guys have left behind at EPA”¹³¹ and an eagerness to get then-Senator Obama elected.¹³² Even in the midst of his ongoing fraud and deceit, Beale impressed colleagues by suggesting that he was secretly out “keep[ing] Obama safe!”¹³³

c. Obama Administration: Pinnacle of Fraud

“Beale ‘walked on water at EPA’ due to his work on the [Clean Air Act] and other policy issues in the early 1990s.”¹³⁴

– Notes from Office of Inspector General interview with Administrator Gina McCarthy

Given Beale’s reputation from the Clinton years, and protection from EPA career officials like Brenner and Craig during the Bush years, the incoming Obama officials believed Beale to be a highly respected senior official who should not be questioned. Such fortification emboldened Beale to perpetrate his fabrications and expand his fraud to an unprecedented level under the Obama Administration. Overall, Beale’s time and attendance fraud during the Obama Administration amounted to \$239,059, as compared to the \$138,827 collected during the George W. Bush years.¹³⁵

Shortly after her confirmation as Assistant Administrator for OAR in July 2009, Gina McCarthy met Beale for lunch to discuss his work at the Agency, where he told her that he also worked for the CIA.¹³⁶ However, McCarthy did not recall whether Beale specifically told her he worked at the CIA, as Beale suggests; rather, she said it was a “well known secret” that Beale “worked” for

Beale’s reputation among his EPA colleagues assisted him in evading any basic level of scrutiny.

¹²⁹ See Sentencing Memorandum of John C. Beale, *supra* note 3, at 18.

¹³⁰ *Id.* at 4.

¹³¹ E-mail from Jeff Clark to John Beale (Aug. 19, 2008, 04:29 EST) (on file with Committee).

¹³² See E-mail from Nancy Kete to Robert Brenner, John Beale, & Barbara Brenner (Nov. 4, 2008, 11:30 EST) (on file with Committee).

¹³³ E-mail from John Beale to Linda Fisher (Oct. 30, 2008, 10:44 EST) (on file with Committee).

¹³⁴ Memorandum of Interview of Gina McCarthy from Office of Inspector Gen., Env’tl. Prot. Agency 1 (Feb. 27, 2013) (on file with Committee).

¹³⁵ See INST. FOR ENERGY RESEARCH, DIRTY BUSINESS AT THE EPA: A REPORT ASSESSING THE ADMINISTRATIVE FAILURES THAT ENABLED THE FRAUD OF JOHN C. BEALE 5 (2014).

¹³⁶ Deposition of John C. Beale, *supra* note 7, at 18.

the CIA.¹³⁷ In 2010, McCarthy sent a note to OAR staff announcing that Beale would be resuming his role as the immediate office's lead for all of OAR's international work and added that she was "very excited to finally get the opportunity to work closely with him."¹³⁸ McCarthy also told investigators that she was very impressed with Beale's intelligence and leadership ability.¹³⁹ Yet, at some point in 2010, McCarthy questioned Deputy Administrator Bob Perciasepe about Beale's CIA employment status.¹⁴⁰ At the time, Perciasepe said he did not have personal knowledge of it, but was aware of Beale's claims.¹⁴¹ By 2011, Perciasepe informed McCarthy there were no CIA agents at the Agency and advised her to "find out if [Beale's claims were] true."¹⁴² Despite Perciasepe's instruction, McCarthy did not query Beale's CIA claims until late 2012.

It is clear that Beale's reputation among his colleagues assisted him in evading any level of scrutiny. According to Beth Craig, she never questioned Beale's qualifications because he was known as a "loyal employee with a great reputation."¹⁴³ Craig Hooks, AA for the Office of Administration and Resources Management (OARM) also stated that one of the reasons no action was taken in 2010 when the OIG first uncovered Beale's pay issues was due to Beale's reputation and status as a Deputy AA.¹⁴⁴

Brenner also enjoyed a strong reputation at the Agency, which he seemingly used to bend the rules to benefit himself and his friends outside the Agency. One political appointee of both the Clinton and Obama EPA remarked that Brenner "enjoyed a lot of respect in the organization."¹⁴⁵ However, Brenner was known to have had too cozy of a relationship with at least one D.C. lobbyist, Patrick Rahe. Two independent sources familiar with both Brenner and Rahe told EPW staff that the pair had a "standing weekly golf date and their wives vacationed together."¹⁴⁶ As a federal employee, Brenner was restricted from accepting gifts from sources outside the government.¹⁴⁷ Despite a clear prohibition, in 2010, Brenner accepted an \$8,000 discount on a new Mercedes-Benz, brokered by Rahe.¹⁴⁸ At the time Brenner received the discount, Rahe was outside counsel for Mercedes-Benz.¹⁴⁹ Notably, Brenner had previously

¹³⁷ Memorandum of Interview of Gina McCarthy from Office of Inspector Gen., Env'tl. Prot. Agency 2 (Feb 27, 2013) (on file with Committee).

¹³⁸ E-mail from Gina McCarthy to Office of Air and Radiation, Env'tl. Prot. Agency (Dec. 3, 2010 07:44 EST) (on file with Committee).

¹³⁹ Memorandum of Interview of Gina McCarthy from Office of Inspector Gen., Env'tl. Prot. Agency 2 (Feb 27, 2013) (on file with Committee).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Memorandum of Interview of Robert Perciasepe from Office of Inspector Gen., Env'tl. Prot. Agency 3 (Nov. 18, 2013) (on file with Committee).

¹⁴³ Memorandum of Interview of Elizabeth Craig from Office of Inspector Gen., Env'tl. Prot. Agency 4 (Nov. 12, 2013) (on file with Committee).

¹⁴⁴ Memorandum of Interview of Craig Hooks from Office of Inspector Gen., Env'tl. Prot. Agency 2 (Nov. 18, 2013) (on file with Committee).

¹⁴⁵ Robin Bravender, *EPA: A close friendship riven by lies*, GREENWIRE (Mar. 12, 2014), <http://www.eenews.net/greenwire/stories/1059996021>.

¹⁴⁶ Interview by Rep. Staff, S. Comm. on Env't & Pub. Works. Two independent sources confirmed this claim.

¹⁴⁷ See *Gifts & Payments*, U.S. OFFICE OF GOV'T ETHICS, <http://www.oge.gov/Topics/Gifts-and-Payments/Gifts---Payments/> (last visited Mar. 11, 2014).

¹⁴⁸ Oversight & Gov't Reform Hearing, *supra* note 11 (testimony of Robert Brenner).

¹⁴⁹ *Id.*

secured Raheer a perennial spot on the Clean Air Act Advisory Committee (CAAAC), a senior-level policy committee established in 1990 to advise EPA on implementing the Clean Air Act Amendments.¹⁵⁰

On December 7, 2010, the Department of Justice Public Integrity Unit reported to the EPA OIG that Brenner received the discount on the Mercedes-Benz.¹⁵¹ On December 15, 2010, the OIG attempted to interview Brenner; however, citing the advice of his attorney, Brenner refused to be interviewed.¹⁵² Thereafter, the OIG started an investigation to determine whether there was an administrative violation or if any other employee in OAR had accepted such a discount.¹⁵³ According to the OIG, the investigation also raised allegations of bribery and improper acceptance of a gratuity.¹⁵⁴

d. The Escape Plan: Joint “Retirement”

Beale recalled that they had the joint retirement party because he, Brenner, and Clark had been “like the three Musketeers on the Clean Air Act.”¹⁵⁵

– Deposition of John Beale

While the EPA OIG was investigating Brenner and suspicions of Beale ramped up among career staff, the two announced their impending retirements. After the OIG attempted to interview Brenner about the Mercedes-Benz discount in December 2010, Brenner announced his retirement.¹⁵⁶ Despite the fact that Brenner was being investigated by the FBI and EPA OIG, in connection with his acceptance of an illegal gift, then-EPA Administrator Lisa Jackson still awarded Brenner a Distinguished Career Service Award.¹⁵⁷ After accepting this final accolade from the Obama Administration, Brenner officially retired on August 13, 2011.¹⁵⁸ According to the OIG, “[b]ecause Brenner had retired from the EPA before the criminal investigation was declined for prosecution by the DOJ, the matter was administratively moot and no further investigation or findings were made.”¹⁵⁹ On February 3, 2012, the DOJ declined the case for criminal prosecution.¹⁶⁰

¹⁵⁰ Interview by Rep. Staff, S. Comm. on Env’t & Pub. Works.

¹⁵¹ Short-Form Report of Investigation from Office of Inspector Gen., Env’tl. Prot. Agency 1 (Feb. 2013) (on file with Committee).

¹⁵² *Id.* at 2.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Deposition of John C. Beale, *supra* note 7, at 191.

¹⁵⁶ *Id.*

¹⁵⁷ PANEL BIOGRAPHIES: ROBERT D. BRENNER, EPA’S CARE PROGRAM 100TH GRANT CELEBRATION PARTNERSHIP PANEL BIO SKETCHES (2011), available at <http://www.epa.gov/care/documents/2011Panelbios.pdf>.

¹⁵⁸ Short-Form Report of Investigation from Office of Inspector Gen., Env’tl. Prot. Agency 2 (Feb. 2013) (on file with Committee).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

Following the lead of his mentor and friend, Beale announced his retirement in May 2011.¹⁶¹ On May 4, 2011, McCarthy approved a draft email to be sent to all OAR staff announcing Beale’s imminent retirement from the Agency:

As you all know, John has been a vital part of EPA and the OAR leadership for more years than he cares to remember. He is beginning to look forward to his retirement in the near future, but thankfully has agreed to work on some key efforts in the near-term.¹⁶²

Beale stopped showing up to work at EPA in June 2011.¹⁶³ On September 22, 2011, Beale, Brenner, and Jeff Clark, another career official within OAR, held a retirement party on the “Celebrity Yacht” on the Potomac River. Many senior EPA officials, including Bob Perciasepe and Gina McCarthy, were present to celebrate.¹⁶⁴ McCarthy described the retirement party as a “big deal.”¹⁶⁵ However, Beale, one of EPA’s highest paid employees, never filed his retirement paperwork.¹⁶⁶ His ability to continue to collect his salary without doing any work for EPA was facilitated by the arrangement he made with McCarthy before he “left” the Agency, as he had no set termination date.¹⁶⁷



Photo of *Celebrity*, the second largest yacht in the Capitol Yacht Charters fleet.

¹⁶¹ E-mail from Gina McCarthy to John Beale (May 3, 2011, 21:00 EST) (on file with Committee).

¹⁶² *Id.*

¹⁶³ Statement of the Offense, *supra* note 87, at 4.

¹⁶⁴ Oversight & Gov’t Reform Hearing, *supra* note 11 (statement of Patrick Sullivan).

¹⁶⁵ Memorandum of Interview of Gina McCarthy from Office of Inspector Gen., Env’tl. Prot. Agency 2 (Feb 27, 2013) (on file with Committee).

¹⁶⁶ Oversight & Gov’t Reform Hearing, *supra* note 11 (statement of Patrick Sullivan).

¹⁶⁷ See Press Release, S. Comm. on Env’t & Pub. Works Minority Office, Eye on the EPA: Gina McCarthy’s Role in the John Beale Saga (Feb. 4, 2014), available at http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.Blogs&ContentRecord_id=f0b4633d-b9d0-9c23-24b3-f3f31e0ccb62.

On March 29, 2012, an OAR official raised concerns about Beale's retirement when he informed McCarthy that Beale was still on payroll.¹⁶⁸ Despite being aware of the fact that one of her subordinates was collecting a paycheck without providing any work product, this arrangement continued for seven more months before McCarthy ever contacted Beale.¹⁶⁹ In December 2012, McCarthy met with Beale for the first time in nearly fifteen months, and he informed her that he was no longer planning on retiring.¹⁷⁰ Two more months passed before concerns with Beale were officially reported to the OIG.¹⁷¹ On April 30, 2013, McCarthy had cause to fire Beale, but instead elected to allow him to voluntarily retire with full benefits.¹⁷² Beale did not confess that he had been lying about his affiliation with the CIA until June 14, 2013¹⁷³ — only after the OIG arranged for him to come to CIA headquarters in Langley to verify his claims.¹⁷⁴

As a testament to the bond between Beale and Brenner, Brenner permitted Beale to reside with him in Arlington, Virginia, throughout Beale's court proceedings and testimony before Congress.¹⁷⁵ While testifying before the U.S. House of Representatives Committee on Oversight and Government Reform, Brenner repeatedly declined to answer questions from the Committee Chairman, narrowly defining the scope of his supposed cooperation.¹⁷⁶ Additionally, Brenner has declined to respond to EPW Republican requests for information regarding Beale. In response to a series of questions posed in a letter from Senator David Vitter (R-LA),¹⁷⁷ Brenner responded with only short, perfunctory answers, frequently citing his prepared statement for the House hearing and repeatedly asserting that he was "unable to recount" or "recall" the answers to the questions.¹⁷⁸ In response to a follow-up letter from Senator Vitter, Brenner refused to cooperate on any level, simply stating: "Your six-page letter of October 15, 2013, seeks details of events from many years ago and references issues that have no connection to Mr. Beale's time and attendance fraud. Given these circumstances we respectfully decline your request for further information."¹⁷⁹

Even after Beale's voluntary confession and subsequent conviction on December 18, 2013, many of his former colleagues refuse to view him as a criminal. Some at EPA have clung to the narrative that Beale was CIA, and believe that Beale was being abandoned by his former

¹⁶⁸ E-mail from Scott Monroe to Gina McCarthy (Mar. 29, 2012, 09:59 AM EST) (on file with Committee).

¹⁶⁹ See Eye on the EPA: Gina McCarthy's Role in the John Beale Saga, *supra* note 171.

¹⁷⁰ Notes provided by Scott Monroe to Office of Inspector Gen., Env'tl. Prot. Agency 4 (2013) (on file with Committee).

¹⁷¹ Oversight & Gov't Reform Hearing, *supra* note 11 (testimony of Arthur Elkins).

¹⁷² *Id.* (statement of Patrick Sullivan).

¹⁷³ *Id.* (testimony of Patrick Sullivan).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* (testimony of Robert Brenner).

¹⁷⁶ *Id.* (questions of Rep. Issa and testimony of Robert Brenner) (illustrating how Brenner refused to answer questions unless he considered them "directly related" to matters that he defined as within the scope of his agreement to appear as a witness).

¹⁷⁷ See Letter from Sen. Vitter to Robert Brenner (Sept. 9, 2013) (on file with Committee).

¹⁷⁸ See Initial Letter from Justin Shur (citing Oversight & Gov't Reform Hearing, *supra* note 11 (statement of Robert Brenner)).

¹⁷⁹ See Letter from Justin Shur to Rep. Staff, S. Comm. on Env't & Pub. Works (Nov. 8, 2013).

agency.¹⁸⁰ Moreover, former colleagues, including Lydia Wegman, Aron Anthony Golberg, and Kate Kimball, submitted letters to the Court asking for leniency in his sentencing.¹⁸¹ Shockingly, Mr. Goldberg, who was a career attorney in EPA’s Office of General Counsel from 1988 to 2010, wrote the court: “[E]ven though I did not work with him very long, I found him to be one of the most capable people whom I knew during my career at EPA.”¹⁸² Disturbingly, these officials’ reaction to the scandal suggests that an individual can steal a million dollars from taxpayers and perpetrate a crime for nearly two decades, but still be considered — by some — as an environmental legend.



Photo of John Beale before the House Committee on Oversight and Government Reform, in which he invoked his Fifth Amendment right against self-incrimination (October 1, 2013).

¹⁸⁰ Robin Bravender, *Newsmaker: The name is Beale. John Beale*, E&E PUBLISHING, Oct. 28, 2013, <http://www.eenews.net/stories/1059989515>.

¹⁸¹ See Sentencing Memorandum of John C. Beale, *supra* note 3, at Exhibits 2, 6–7.

¹⁸² See Sentencing Memorandum of John C. Beale, *supra* note 3, at Exhibit 2.

III. ESTABLISHING EPA’S PLAYBOOK: BEALE AND 1997 NAAQS

In each instance of deceit, Beale and Brenner relied on their stature and reputation within the Agency to insulate them from scrutiny. While their work on the 1990 Clean Air Act Amendments made them relevant at EPA and within the environmental community, their position as EPA legends was solidified only after finalizing the 1997 national ambient air quality standards (NAAQS) for Ozone and Particulate Matter (PM). This work was cited time and again as the basis for Beale’s promotions and bonuses. In fact, it appears these efforts enabled Beale to maintain his distinction for years to come without the need to substantially produce any additional work product. Given the significance of this work, EPW Republicans have investigated Beale’s involvement in the Clinton Administration’s 1997 NAAQS process. The findings, as detailed in this section, reveal Beale and Brenner’s leadership throughout the NAAQS process, which raises new questions about the science underlying the standards.

a. Beale and Brenner’s Tentacles Through EPA

OPAR was Brenner’s “fiefdom” where he was considered to be the “most influential career person at [the] Agency, [as] head of OPAR.”

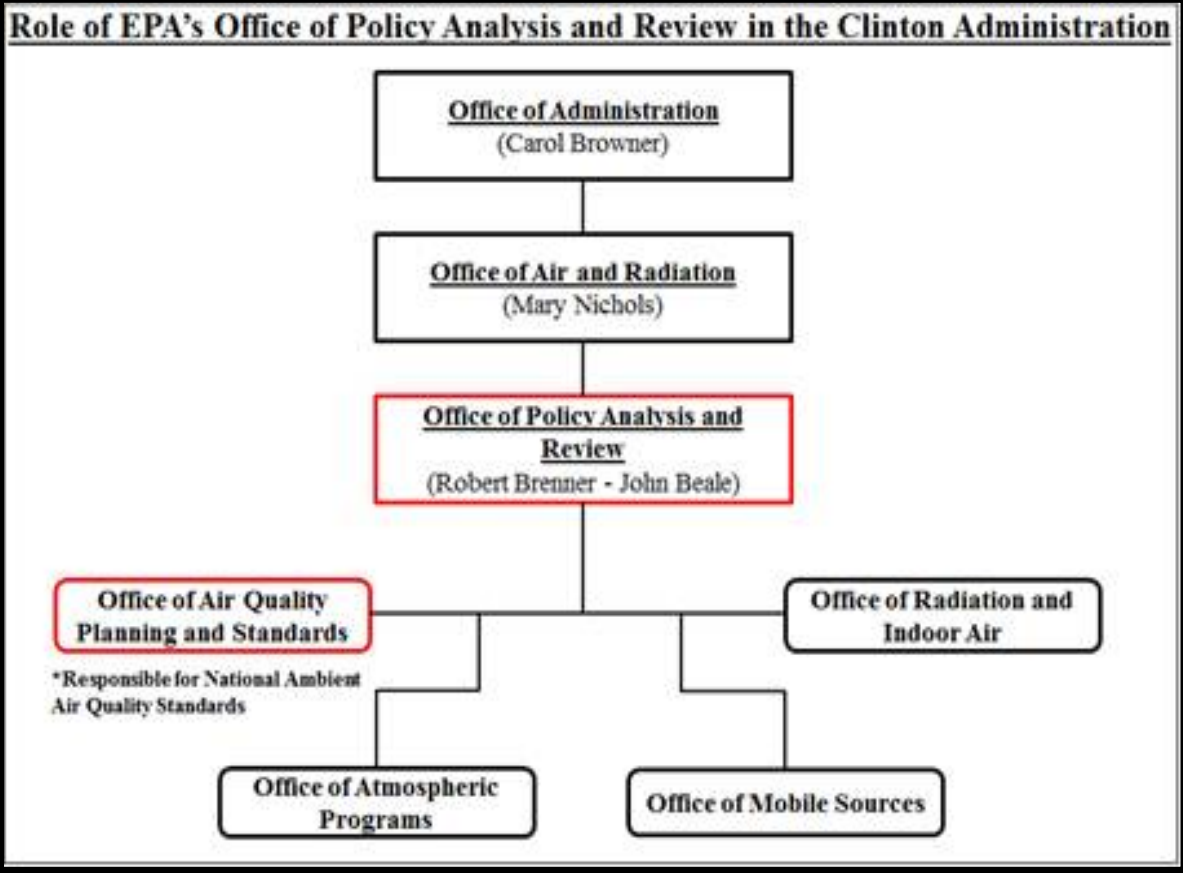
– Former High Ranking EPA Official

Beale and Brenner’s reign within the Office of Air and Radiation (OAR) at EPA truly began when they took ownership of the process to develop and promulgate the NAAQS in 1997. This opportunity was set in motion when Brenner assumed the position of Office of Policy, Analysis, and Review (OPAR) Director within OAR in 1988. Soon after obtaining his new title, Brenner hired Beale as a Senior Policy Advisor, specially housed under Brenner in OPAR.¹⁸³ By 1991, Beale was given the title of Deputy Director for OPAR.¹⁸⁴ Over the years, Beale and Brenner’s influence permeated the Agency because of their post in OPAR, an office that was subsequently dismantled after Brenner’s retirement and Beale’s absence from the Agency.¹⁸⁵

¹⁸³ Oversight & Gov’t Reform Hearing, *supra* note 11 (statement of Patrick Sullivan). *But see* Sentencing Memorandum of John C. Beale, *supra* note 3, at 7 (claiming that Beale was hired as a “Policy Analyst”); Beale Senior Leader Application, *supra* note 6 (asserting that Beale was promoted to Senior Policy Analyst in January of 1994).

¹⁸⁴ *See* Rob Brenner & John Beale, *Pizza at Midnight*, EPA JOURNAL, Jan.–Feb. 1991, at 54, 54.

¹⁸⁵ After the 2010 elections, a former Democratic staffer on the House Energy and Commerce Committee, Lorie Schmidt, was hired as Deputy Director of OPAR, *see* Darren Samuelsohn, *EPA beefs up policy shop with Hill aide*, POLITICO, Jan. 20, 2011, <http://www.politico.com/news/stories/0111/47921.html>, and after Brenner’s retirement, she succeeded him as Director of OPAR. *See* CARROLL PUBLISHING, FEDERAL DIRECTORY: EXECUTIVE, LEGISLATIVE, JUDICIAL 517 (2012 annual ed.). However, by 2013, OPAR was de-listed from the EPA staff directory, *see* CARROLL PUBLISHING, FEDERAL DIRECTORY: EXECUTIVE, LEGISLATIVE, JUDICIAL (Summer 2013 ed.), and Schmidt had assumed the portfolio of Associate General Counsel for Air and Radiation. *See Lorie Schmidt*, AM. BAR ASS’N SECTION OF ENV’T, ENERGY, AND RES. 42ND ANNUAL SPRING CONFERENCE, http://abaseerspring.conferencespot.org/Lorie_Schmidt (last visited Feb. 2, 2014). EPA is now seeking to contract out the OPAR portfolio. *See Analytical Support Services for Air & Radiation Programs—Solicitation Number: SOL-NC-14-00001—Original Synopsis*, FEDERAL BUSINESS OPPORTUNITIES, https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=a7c7ba70b785d5b4f5dd0c0640b2752d&_cview=0 (last visited Mar. 6, 2014).



OPAR's exact role within OAR remains somewhat opaque, and descriptions offered of its role have ranged from the ambiguous to the downright cryptic. Beale referred to the "primary mission" of OPAR as "provid[ing] policy and program support, whether in the form of analysis or review, to [OAR]."¹⁸⁶ Brenner offered this description of OPAR:

That office is in charge of coordinating some of the regulatory activities that go on in the Office of Air and Radiation. It also helps coordinate some of the work we do along with the [C]ongressional office, with Congress, answering questions and providing analyses requested by Congress in assessing legislation. We assist with communications and outreach work and various--we try to help improve OAR's capabilities in several analytic areas such as risk assessment and economics.¹⁸⁷

According to those outside the Agency, OPAR was "structured to be flexible, with the capability of responding quickly and efficiently to the priorities of the Agency and especially the

¹⁸⁶ Sentencing Memorandum of John C. Beale, *supra* note 3, at 5.

¹⁸⁷ Transcript of Interview of Robert David Brenner at 5–6, H. Comm on Oversight & Gov't Reform, 110th Cong. (Feb. 8, 2008) (emphasis added) (on file with Committee).

Assistant Administrator of OAR.”¹⁸⁸ The office provided support “at times[] directly to the Administrator and Deputy Administrator of the EPA.”¹⁸⁹ These nebulous descriptions are consistent with the notion that OPAR’s lack of a clearly defined mission allowed Brenner and Beale to intervene and influence the trajectory of any number of projects throughout OAR and EPA.

Under Beale and Brenner’s control, OPAR grew in both scope and influence within the Agency. Brenner was known as a “policy guy” and Beale was a “hybrid policy and knowledgeable/institutional guy.”¹⁹⁰ Yet, Beale has described Brenner as “a much better economist than [he] . . . and [Beale] did basically everything else.”¹⁹¹ Interestingly, Brenner was initially hired to work on economic analysis,¹⁹² while neither he nor Beale had any formal economics education or experience.¹⁹³ Despite these deficiencies, they were known as an extremely effective pair who could “get things done.”¹⁹⁴ According to Lydia Wegman, one of their close colleagues from the 1990s, Beale “could be counted upon to learn the substance of the issues at hand, explain them clearly and forcefully to others both within and outside EPA.”¹⁹⁵

As for Brenner, former EPA official Bob Sussman recounted that “[m]ost people would say that [Brenner] made a very big contribution and was really one of the pillars of the air office.”¹⁹⁶ Colleagues considered him “ubiquitous”¹⁹⁷ and assert that he developed a “Machiavellian”¹⁹⁸ network — not just in OAR but throughout EPA. Career officials “felt beholden to him.”¹⁹⁹

For nearly two decades, Beale and Brenner stretched the boundaries of OPAR’s authority. In particular, following the 1990 Clean Air Act Amendments, which Beale and Brenner pioneered, the duo could claim ownership of all regulations implementing the amendments. According to Beale, upon passage of the amendments, he “took over the overall management of the implementation of those Amendments. Working as chairman of the Clean Air Work Group, [Beale] managed the efforts of several hundred EPA technical staff in four OAR Program Offices to ensure the necessary implementing regulations were developed and published as directed by the legislation.”²⁰⁰ His role was elaborated upon by current Deputy

¹⁸⁸ *Office of Policy Analysis and Review (OPAR)*, CENTER FOR A NEW AMERICAN SECURITY: THE BIG ENERGY MAP WIKI, <https://sites.google.com/site/bigenergymap/independent-agencies-and-government-corporations/environmental-protection-agency/office-of-air-and-radiation/office-of-policy-analysis-and-review-opar> (last visited Mar. 6, 2014).

¹⁸⁹ *Analytical Support Services for Air & Radiation Programs*, *supra* note 188.

¹⁹⁰ Interview by Rep. Staff, S. Comm. on Env’t & Pub. Public Works.

¹⁹¹ Deposition of John C. Beale, *supra* note 7, at 172–73.

¹⁹² Interview by Rep. Staff, S. Comm. on Env’t & Pub. Works.

¹⁹³ *See supra* Section I.

¹⁹⁴ Interview by Rep. Staff, S. Comm. on Env’t & Pub. Works.

¹⁹⁵ Sentencing Memorandum of John C. Beale, *supra* note 3, at 24.

¹⁹⁶ Robin Bravender, *EPA: A close friendship riven by lies*, GREENWIRE (Mar. 12, 2014), <http://www.eenews.net/greenwire/stories/1059996021>.

¹⁹⁷ Interview of former high-ranking Env’tl. Prot. Agency official by Rep. Staff, S. Comm. on Env’t & Pub. Works.

¹⁹⁸ Interview of Marcus Peacock by Rep. Staff, S. Comm. on Env’t & Pub. Works.

¹⁹⁹ Interview of former high-ranking Bush Admin. Env’tl. Prot. Agency official, by Rep. Staff, S. Comm. on Env’t & Pub. Works.

²⁰⁰ Beale Senior Leader Application, *supra* note 6.

Administrator Bob Perciasepe, in his former position as AA for OAR during the Clinton Administration, who stated:

Beale [was] responsible for EPA’s Clean Air programs . . . He [was] responsible for assisting the Assistant Administrator in planning, policy implementation, direction and control of EPA’s programs in these areas. These programs are both national and international in scope, involve numerous variables, and have a significant bearing on the pollution control programs of the Agency. . . . Beale coordinates the overall strategy for the Clean Air Act amendments analyses and develops strategic planning initiatives for Clean Air issues. He is also responsible for planning, developing, organizing, and assisting in the implementation of EPA’s air pollution control programs.²⁰¹

While “everyone in OPAR was fully engaged in the [CAA] Amendments,”²⁰² Beale and Brenner distinguished themselves from the crowd by carefully crafting certain amendments’ implementing regulations. In particular, by spearheading the 1997 NAAQS for ozone and PM, Beale and Brenner established their reputations that sustained through later years of unproductivity and malfeasance at EPA.

b. 1997 NAAQS Made Beale an EPA Legend

*“To his colleagues at the Environmental Protection Agency, John Beale was always a man of great import. Beginning in the early 1990s, he enjoyed one policymaking triumph after another, eventually establishing himself as a towering figure within the agency.”*²⁰³

– *Washingtonian Magazine*

As the pinnacle of their careers, the duo hand-picked the most high profile program in OAR to advance their influence at the Agency. In 1995, they took ownership of the National Ambient Air Quality standards (NAAQS) for Ozone and PM.²⁰⁴ Under the Clean Air Act EPA must create NAAQS for criteria pollutants, including ground-level ozone and PM.²⁰⁵ Ozone is created when sunlight mixes with volatile organic compounds (VOCs) and nitrogen oxides.²⁰⁶ Notably, VOCs, one of the two precursors to ozone formation, is also considered particulate matter.²⁰⁷ PM is a “mixture of extremely small particles and liquid droplets”²⁰⁸ in air which vary

²⁰¹ Memorandum from Bob Perciasepe to Romulo Diaz, Assistant Adm’r, Office of Admin. & Res. Mgmt., Env’tl. Prot. Agency, Retention Allowance (June 22, 2000) (emphasis added) (on file with Committee).

²⁰² Deposition of John C. Beale, *supra* note 7, at 172.

²⁰³ Gaynor, *supra* note 59.

²⁰⁴ Sentencing Memorandum of John C. Beale, *supra* note 3, at 13.

²⁰⁵ See 42 U.S.C. § 7408 (2006); National Ambient Air Quality Standards for Ozone, 61 Fed. Reg. 65,716 (proposed Dec. 13, 1996) (later codified at 40 C.F.R. pt. 50).

²⁰⁶ *Ozone and Your Patients’ Health Training for Health Care Providers*, ENVTL. PROT. AGENCY, <http://www.epa.gov/apti/ozonehealth/what.html> (last visited Mar. 10, 2014).

²⁰⁷ *Id.*

²⁰⁸ *Particulate Matter (PM)*, ENVTL. PROT. AGENCY, <http://www.epa.gov/pm/> (last visited Mar. 10, 2014).

in size and include, for example, “smoke, fumes, soot, and other combustion byproducts” as well as “natural particles such as windblown dust, sea salt, pollen, and spores.”²⁰⁹

For each criteria pollutant, EPA must set a primary and secondary standard to ensure “an adequate margin of safety” for the public health, public welfare, and the environment. Every five years, EPA is required to review the scientific literature to determine if the present standard for each pollutant needs revision. When conducting such review, the Administrator has the option to keep the standard the same, increase the standard, or lower the standard. In the case of the 1997 NAAQS for ozone and PM, under Beale’s leadership EPA took the unprecedented action of proposing standards for the two pollutants in tandem and aggressively tightened the standards to controversial levels.

**Nearly two decades after
Beale’s triumph on the
1997 NAAQS, EPA
continues his strategy.**

The 1997 Ozone and PM NAAQS set in motion a permanent practice of EPA promulgating burdensome regulations under the Clean Air Act. Under their control, Beale and Brenner demonstrated how far EPA’s regulatory arm could reach. Namely, the duo set in motion a strategy to game the new system by compressing OIRA’s review, relying on secret science, and inflating benefits while underestimating costs. Nearly two decades later, EPA continues to engage in this strategic behavior and has relied on health benefits associated with decreases in PM_{2.5} and ozone to justify the majority of their Clean Air Act rules.

Beale and Brenner not only led EPA’s internal process for finalizing the NAAQS, they served as the face of EPA in advocating for these changes before stakeholders.²¹⁰ Brenner described the standards as one of the CAA Amendments’ “most challenging regulations: . . . [the] planning process for achieving air quality standards.”²¹¹ Yet Beale has admitted that among OPAR staff, only he and Brenner were involved in the process;²¹² Brenner “dealt with the impact statements and the economic analysis and review, and [Beale] did basically everything else on the NAAQS.”²¹³

Despite the fact that Brenner outranked Beale, it appears that Brenner purposefully handed the reins over to his acolyte, who was clearly beholden to him. Beale served as “the lead staff person”²¹⁴ with “day-to-day participation”²¹⁵ on the 1997 NAAQs, Beale’s authority was

²⁰⁹ Douglas W. Dockery, *Health Effects of Particulate Air Pollution*, 19 ANNALS OF EPIDEMIOLOGY 257, 257 (2009), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3367838/#R10>.

²¹⁰ Illustratively, at Inside EPA’s conference Clean Air 2000: Regulation and Politics, Beale and Brenner were selected as panelists to discuss the 1997 Ozone and PM NAAQS: “The NAAQS panels will d[u]g into the issues surrounding the proposed new standards themselves and their implementation. . . . John C. Beale, Deputy Director, EPA O[PAR], . . . discuss[ed] the standards themselves. Then the standards’ implementation w[ere] analyzed by . . . Robert D. Brenner, Director, EPA O[PAR].” *Clean Air 2000 Conference to Feature Two Panels on Proposed NAAQS*, INSIDE EPA, Mar. 28, 1997, at 14.

²¹¹ Oversight & Gov’t Reform Hearing, *supra* note 11 (statement of Robert Brenner).

²¹² Interview by Rep. Staff, S. Comm. on Env’t & Pub. Works.

²¹³ Deposition of John C. Beale, *supra* note 7, at 172–73.

²¹⁴ *Id.* at 172.

²¹⁵ Sentencing Memorandum of John C. Beale, *supra* note 3, at 13.

broad in scope. Evidence suggests that Beale used the NAAQS as a vehicle for his own self-aggrandizement. Through the NAAQS process, Beale rose above reporting just to Brenner and began to work alongside Mary Nichols, the AA for OAR at the time.²¹⁶ EPW staff has learned from sources familiar with the 1997 NAAQS process that “Beale acted as Nichols’ Deputy and had some real clout.”²¹⁷

Beale’s handling of the 1997 NAAQS extended his influence for the first time to the EPA Administrator. Prior to the NAAQS, Beale never worked directly with the EPA Administrator.²¹⁸ Beale explained that during the “early years” of the Clinton Administration, he only met with Administrator Browner “maybe five or six times a year.”²¹⁹ However, according to Beale’s sentencing memorandum, “due to the importance of the NAAQS, Mr. Beale often worked directly with then-Administrator of the EPA [Carol Browner] to report on the progress of the project and to ensure that it achieved the Agency’s regulatory policies.”²²⁰ Beale explained that after he initiated the NAAQS process, he and Browner met “several times a week.”²²¹

As the capstone of his EPA career, Beale took ownership of the 1997 NAAQS for Ozone and Particulate Matter.

While the 1997 NAAQS ultimately proved to be a boon for Beale’s reputation at EPA, his management of the process codified an environmental regulatory behemoth that has continued to burden the American economy.

i. Beale’s PM_{2.5} “Policy Choice” Made History

Beale’s ascent at EPA was not seamless; there was a great deal of controversy over the process EPA used to set the 1997 NAAQS. Beale’s sentencing memorandum explains that “EPA had not previously worked on two major air quality standards simultaneously, and the time table for the project took on a degree of urgency due to a strict, court-ordered schedule”²²² set by an American Lung Association (ALA) lawsuit.²²³ As such, the 1997 NAAQS for PM and ozone

²¹⁶ Deposition of John C. Beale, *supra* note 7, at 59. Nichols previously served as a senior staff member at the Natural Resources Defense Council and is now chair of the California Air Resources Board. *See Mary Nichols*, UCLA INSTITUTE OF THE ENVIRONMENT AND SUSTAINABILITY, http://www.environment.ucla.edu/people/person.asp?Facultystaff_ID=10 (last visited Mar. 7, 2014).

²¹⁷ Interview of former Counsel, H. Comm. on Commerce, by Rep. Staff, S. Comm. on Env’t & Pub. Works.

²¹⁸ *See* Deposition of John C. Beale, *supra* note 7, at 174.

²¹⁹ *Id.*

²²⁰ Sentencing Memorandum of John C. Beale, *supra* note 3, at 13.

²²¹ Deposition of John C. Beale, *supra* note 7, at 174.

²²² Sentencing Memorandum of John C. Beale, *supra* note 3, at 13.

²²³ On Oct. 6, 1994, the ALA sued to force the EPA to make a decision about ozone and PM. The case resulted in consent decree ordering proposed PM standards by November 29, 1996 and final rule by July 19, 1997. *See Am. Lung Ass’n v. Browner*, 884 F. Supp. 345 (D. Ariz. 1994).

illustrate one of the first examples of EPA employing the practice of “sue and settle,”²²⁴ whereby friendly plaintiffs sue the Agency and agree to settle on mutually agreeable terms reached behind closed doors without public participation.²²⁵

In the case of the 1997 NAAQS, the ALA lawsuit resulted in a consent decree ordering EPA to propose standards for PM by November 29, 1996, and to issue final standards by July 19, 1997.²²⁶ The consent decree was silent on the deadline for Ozone NAAQS. When EPA sent the proposed standards to the Office of Management and Budget (OMB) for review on November 4, 1996, the proposal included not just standards for PM, but ozone as well.²²⁷ EPA was not required to reconsider the ozone standard until 1998, since the Agency had just completed a review of ozone in 1993.²²⁸ However, it appears that Beale and Brenner made a “policy call”²²⁹ and determined that the Agency should propose standards for ozone in conjunction with the PM standards, which were subject to the court-imposed deadline. In proposing the Ozone and PM NAAQS in tandem, many scientific and analytical uncertainties were overlooked or deliberately ignored to comply with the compressed timeline.

EPA also admitted in court papers filed pursuant to the ALA lawsuit that any period shorter than December 1, 1998, for final promulgation of the PM standard “would require the EPA to reach conclusions on critical scientific and policy issues with enormous consequences for society before it has had an adequate opportunity to collect and evaluate pertinent scientific data” and further reiterated that the time was needed to reach “a sound and scientifically supportable decision.”²³⁰ Further, the Clean Air Scientific Advisory Committee (CASAC), which is required under the CAA to review existing scientific literature and recommend NAAQS to the Administrator informed EPA in January 1996:

It should be emphasized that the Panel feels strongly that EPA should negotiate with the plaintiffs for a meaningful extension of the court-imposed deadlines for review . . . In the present review, the Panel had less than a month to review a

²²⁴ See Press Release, S. Comm. on Env’t & Pub. Works Minority Office, 2013 Year End Review: Advancing the Dialogue on Sue and Settle (Dec. 19, 2013), *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=7934F304-9FAF-7EE2-D0FF-47BB105D2893.

²²⁵ ALA received close to five million dollars in EPA grants from 1990 to 1995. See ANGELA ANTONELLI, THE HERITAGE FOUNDATION, BACKGROUND: CAN NO ONE STOP THE EPA? 2 (1997).

²²⁶ See *Am. Lung Ass’n*, 884 F. Supp. at 345.

²²⁷ See National Ambient Air Quality Standards for Ozone, 61 Fed. Reg. 65,716 (proposed Dec. 13, 1996) (later codified at 40 C.F.R. pt. 50).

²²⁸ See 42 U.S.C. § 7409(d)(1) (2006). The EPA agreed as part of a court case in 1993 to expedite the next Ozone review. See Memorandum from Andrew Wheeler to S. Comm. on Env’t & Pub. Works, Subcomm. on Clean Air, Wetlands, Private Property, & Nuclear Safety, Clean Air Act Oversight Hearing on Ozone and Particulate Matter Science Issues (Feb. 5, 1997) (on file with Committee)..

²²⁹ CAA provides the Administrator with the authority to promulgate new standards either earlier or more frequently than required. See 42 U.S.C. § 7409(d)(1) (2006).

²³⁰ *Clean Air Act: Ozone and Particulate Matter Standards: Hearings Before the Subcomm. on Clean Air, Wetlands, Private Property and Nuclear Safety and the S. Comm. on Env’t & Pub. Works*, 105th Cong. 297 (1997) [hereinafter February 1997 EPW Hearing] (questions of Sen. Inhofe) (quoting *Am. Lung Ass’n*, 884 F. Supp. at 345).

voluminous amount of material. Some of the material was not adequately reviewed because of time constraints.²³¹

Despite these concerns over the tight deadline expressed by EPA and its scientific advisors, Beale and Brenner were able to push the standards forward relying on scientific data that 17 years later has yet to see the light of day.

1. Ignoring Inconvenient Science

The “policy choice” to simultaneously propose standards for ozone and PM was challenged on multiple fronts. In the first instance, scientific support was lacking due to the abbreviated analysis. According to CASAC, the science supporting a more stringent ozone standard was not sufficient.²³² Despite this pushback from CASAC, EPA moved forward with the standards which had two major flaws: EPA ignored key health effects of reduced ozone and dramatically downplayed the costs of the standard. Overall it has been characterized that “EPA’s decision appears to be an overzealous grab for more administrative authority and a willingness to ignore unpleasant facts.”²³³

Specifically, EPA did not consider negative health impacts of decreased ozone, which included an increase in malignant and non-melanoma skin cancers and cataracts from increased exposure to ultraviolet B (UV-B) rays.²³⁴ Other federal entities, such as the President’s Council of Economic Advisors as well as CASAC, brought the omission to EPA’s attention. According to the Department of Energy, EPA’s ozone standard would cause “twenty-five to fifty new melanoma-related fatalities per year, 130 to 260 new cases of cutaneous melanoma, and 2,000 to 11,000 new cases of non-melanoma skin cancer, as well as 13,000 to 28,000 new cases of cataracts yearly.”²³⁵ CASAC concluded that there was no “bright line” on the appropriate standard for ozone since EPA’s proposal was too close to background levels (naturally occurring) of ozone.²³⁶ At the time, 86 percent of volatile organic compounds — a key ingredient in ozone production — were naturally emitted from plants and trees.²³⁷ Accordingly,

²³¹ Letter from George T. Wolff, Chair, Clean Air Scientific Advisory Comm., to Carol Browner, Clean Air Scientific Advisory Committee (CASAC) Comments on the November, 1995 Drafts of the Air Quality Criteria for Particulate Matter and the Review of the National Ambient Air Quality Standards for Particulate Matter: Policy Assessment of Scientific and Technical Information (OAQPS Staff Paper) 4 (Jan. 5, 1996), *available at* [http://yosemite.epa.gov/sab/sabproduct.nsf/BF3677846E679602852571A90065CC94/\\$File/casac03.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/BF3677846E679602852571A90065CC94/$File/casac03.pdf).

²³² See Letter from Clean Air Scientific Advisory Committee to Carol Browner, CASAC Closure on the Primary Standard Portion of the Staff Paper for Ozone (Nov. 30, 1995) [hereinafter CASAC Ozone Closure Letter] (on file with Committee).

²³³ Randall Lutter, *Economic Analysis and the Formulation of U.S. Climate Policy*, in PAINTING THE WHITE HOUSE GREEN: RATIONALIZING ENVIRONMENTAL POLICY INSIDE THE EXECUTIVE OFFICE OF THE PRESIDENT 46, 48 (Randall Lutter & Jason F. Shorgen eds., 2004).

²³⁴ See MICHAEL FUMENTO, POLLUTED SCIENCE: THE EPA’S CAMPAIGN TO EXPAND CLEAN AIR REGULATIONS 48 (1997) (citing Letter from Ari Patrinos, Assoc. Dir. for Health & Evtntl. Research, Dep’t of Energy, to John Bachman, Office of Air Quality Planning & Standards, Evtntl. Prot. Agency (Jan. 4, 1995)).

²³⁵ *Id.*

²³⁶ CASAC Ozone Closure Letter, *supra* note 232, at 2.

²³⁷ FUMENTO, *supra* note 234, at 47 (citing Tom Spears, *Trees Contribute to Smog*, OTTAWA CITIZEN, Feb. 14, 1994, at A1).

CASAC determined that none of EPA’s proposed standards for ozone were “significantly more protective of public health.”²³⁸

Beyond the public health aspects, EPA also downplayed costs associated with the ozone standard. Although EPA continued to assert that the statute did not require a consideration of cost or benefits, under Executive Order 12866, EPA still had to measure the costs and benefits of the standards. As such, EPA strategically counted the cost of partial attainment of the standards, but measured this against the benefits to be derived from full attainment of the standards. However, there is no basis in the law that would permit partial compliance with the standard, so there was no basis for EPA’s abbreviated analysis of cost. According to the Council of Economic Advisors at the time, the ozone standard could cost up to \$60 billion a year, as opposed to EPA’s \$2.5 billion annual cost estimate that was based only on partial attainment of the standard.²³⁹

2. Beginning of PM_{2.5} Purported Benefits

As for the proposed PM NAAQS, EPA sought to regulate fine particulates (PM_{2.5}) in addition to larger particles (PM₁₀) for the first time under the NAAQS;²⁴⁰ however, neither CASAC nor the White House Office of Science and Technology Policy supported the decision to focus on PM_{2.5}. At the time of the 1997 NAAQS, there was no precedent at the Agency to regulate PM_{2.5} under the NAAQS. Previously, EPA regulated PM₁₀, which is equivalent in size to a piece of pollen or dust. The 1997 NAAQS marked the first time EPA regulated PM_{2.5}, which is a fourth of the size of PM₁₀ particles — so small it cannot be seen with the human eye. CASAC again challenged EPA’s decision to regulate PM_{2.5} due to the weak scientific evidence on PM_{2.5} health effects. Despite the significant scientific concern, EPA — led by Beale — maintained its unwavering strategy for the standards.

CASAC’s closure statement on the PM_{2.5} standard emphasized that based on the scientific literature EPA provided; they could not distinguish between adverse health effects of PM_{2.5} and PM₁₀.²⁴¹ One CASAC member maintained that “the selection of 2.5m cutpoint was arbitrary, and that the Agency should consider other cutpoints.”²⁴² According to the CASAC Chair, “There [did] not appear to be any compelling reason to set a restrictive PM_{2.5} NAAQS at [the] time,”²⁴³ also highlighting that CASAC’s “understanding of the health effects of PM[_{2.5}] is far from complete,” “the deadlines did not allow adequate time to analyze, integrate, interpret, and debate the available data on this very complex issue,” and “the previous NAAQS review

²³⁸ CASAC Ozone Closure Letter, *supra* note 232, at 2.

²³⁹ See Draft Memorandum from Alicia Munnell, Council of Econ. Advisers, Exec. Office of the President, to Art Fraas, Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, Exec. Office of the President (Dec. 13, 1996).

²⁴⁰ See Revisions to the National Ambient Air Quality Standards for Particulate Matter, 52 Fed. Reg. 24,634 (July 1, 1987) (codified at 40 C.F.R. pt. 50).

²⁴¹ See CASAC Ozone Closure Letter, *supra* note 232, at 2–3.

²⁴² Letter from George T. Wolff to Carol Browner 3 (Jan. 5, 1996), *available at* [http://yosemite.epa.gov/sab/sabproduct.nsf/BF3677846E679602852571A90065CC94/\\$File/casac03.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/BF3677846E679602852571A90065CC94/$File/casac03.pdf).

²⁴³ George T. Wolff, *The Particulate Matter NAAQS Review*, 46 J. OF THE AIR & WASTE MGMT. ASS’N 926 (1996).

took eight years to complete.”²⁴⁴ This time CASAC only had roughly a year and half to review the materials on PM before EPA had to propose the standards pursuant to the ALA lawsuit.²⁴⁵

Another concern with EPA’s proposed standards was the lack of data on actual human exposure to PM_{2.5}. In Congressional testimony, one CASAC member called on EPA to stop making such assertions because “that causal relationship has not been proven” and explained that there is “a consensus [among CASAC members] that, in the strictest sense, causality has not been proven.”²⁴⁶ Administrator Browner eventually admitted to the Senate EPW Committee that monitors for measuring human exposure to PM_{2.5} were limited to only 55 cities.²⁴⁷ By contrast, there were 1,700 cities equipped with PM₁₀ monitors.²⁴⁸ Given the lack of data resulting from the limited number of monitors, EPA was also unable to assess how many counties would be in nonattainment, something the Agency would need to know in order to calculate whether the standards achieved the requisite benefits.

These complaints were supported by the fact that EPA set the standards by relying on only a couple of studies. According to the President’s science advisors in the Office of Science and Technology Policy, “The database for actual levels of PM_{2.5} is also very poor, and only a handful of studies have actually studied PM_{2.5} per se.”²⁴⁹ In fact, of the five studies EPA relied upon in setting the PM NAAQS, only two of them conducted primary research on the effects of PM_{2.5}, while the conclusions of the other three were based solely on the primary research conducted by the other two.

3. Known Problems with Key Studies

The two studies EPA relied upon, known as the Harvard “Six Cities” and American Cancer Society (ACS II or CPS II) studies, were and remain controversial as they rely on primary research that was conducted more than 15 years prior to their selection by EPA — well before advancements in air quality. The Six Cities study was a long-term cohort study of the health effects associated with airborne pollutants, which dated back to 1970. Subjects were 8,069 randomly-selected adults living near coal-burning power plants in six U.S. cities that had a wide range of levels of ambient particles and gaseous pollutants. According to the study, there was a statistically significant relationship between PM and adverse health effects in three of the six cities, which formed the basis for a conclusion that those residing in polluted cities have a

²⁴⁴ Letter from Gerge T. Wolff to Carol Browner, Closure by the Clean Air Scientific Advisory Committee (CASAC) on the Staff Paper for Particulate Matter (June 13, 1996) [hereinafter CASAC PM Closure Letter], available at [http://yosemite.epa.gov/sab/sabproduct.nsf/C146C65BA26865A2852571AA00530007/\\$File/cas19608.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/C146C65BA26865A2852571AA00530007/$File/cas19608.pdf).

²⁴⁵ *Review of the EPA’s Proposed Ozone and Particulate Matter NAAQS Revisions: Joint Hearings before the Subcomm. on Health & the Env’t and the Subcomm. on Oversight & Investigations of the H. Comm. on Commerce*, 105th Cong. 40 (1997) [hereinafter April 1997 Commerce Hearing] (statement of George T. Wolff).

²⁴⁶ *Id.* at 132 (testimony of Joe Mauderly).

²⁴⁷ February 1997 EPW Hearing, *supra* note 230, at 297 (written response by Carol Browner to questions of Sen. Thomas).

²⁴⁸ *Id.*

²⁴⁹ Memorandum from Rosina Bierbaum, Acting Assoc. Dir., Office of Sci. & Tech. Pol’y, Exec. Office of the President, to Sally Katzen, Adm’r, Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, Exec. Office of the President, OSTP Questions for EPA On Its Proposed Revisions to the Ozone and Particulate Matter Air Quality Standards (Nov. 16, 1996), *quoted in* ANTONELLI, *supra* note 225.

26% greater chance of premature mortality than those in non-polluted cities.²⁵⁰ The ACS II study²⁵¹ had one cohort that looked at 295,000 adults recruited from 50 U.S. cities from 1982 to 1989 and was designed to study the impact of various factors on cancer development by looking at the relationship between mortality and air pollution.²⁵² The ACS II study identified a 17% higher mortality rate among those residing in the most polluted cities.²⁵³

Even though EPA relied on the 17–26% risk probability to justify the PM NAAQS, such low risk probabilities are statistically insignificant.²⁵⁴ Even Douglas Dockery, one of the authors of the Six Cities study, stated that these were “very weak effects.”²⁵⁵ In fact, at a February 12, 1997, EPW Committee hearing, Administrator Browner conceded that the five studies EPA relied upon failed to consider larger particles, such as PM₁₀, that could have been responsible for the alleged health effects. At the same hearing, Browner referenced a chart on the studies and highlighted the Six Cities study as finding a positive correlation; however, the study found alleged adverse health effects in only three of the six cities, so to the extent proof existed, it was merely a tie and not a positive correlation.²⁵⁶

In addition to the weak correlation between premature deaths and PM_{2.5} illustrated by these studies, the mortality estimates EPA used based on the ACS study were blatantly incorrect. In the November 1996 proposal, EPA estimated the standards would prevent approximately 40,000 premature deaths, which was reduced to 20,000 deaths in December 1996.²⁵⁷ By April 2, 1997, Mary Nichols, the Assistant Administrator for the Office of Air and Radiation, corrected the record to explain that the estimate should be 15,000.²⁵⁸

This correction spawned from a reanalysis by Dr. Kay Jones, a former senior advisor to the President’s Council on Environmental Quality during the Ford and Carter Administrations, who found that the ACS study contained a miscalculation. According to Dr. Jones, “EPA recently admitted it made a statistical error which resulted in a 25-percent over-estimation, or 5,000 annual deaths, of the annual long-term mortality from PM_{2.5}.”²⁵⁹ Thereafter, CASAC members stated that the changes to the findings demanded that EPA revisit the underlying data of the study. Specifically, CASAC member Roger McClellan told Congress he “would urge EPA not just to go back and change these points

Evidence suggests EPA inflated their original benefits estimates fortyfold.

²⁵⁰ See Douglas W. Dockery et al., *An Association between Air Pollution and Mortality in Six U.S. Cities*, 329 NEW ENG. J. MED. 1753 (1993).

²⁵¹ C. Arden Pope et al., *Particulate Air Pollution As a Predictor of Mortality in a Prospective Study of U.S. Adults*, 151 AM. J. RESPIRATORY & CRITICAL CARE MED. 669 (1995).

²⁵² See *id.* at Tables 1–2.

²⁵³ See *id.*

²⁵⁴ See February 1997 EPW Hearing, *supra* note 230, at 201 (statement of Ronald Wyzga, Elec. Power Research Inst.); *id.* at 146–89 (statement of Anne E. Smith).

²⁵⁵ John Merline, *Clean Air Rules Under Attack*, INVESTOR’S BUS. DAILY, Dec. 11, 1996.

²⁵⁶ See Dockery et al., *supra* note 250.

²⁵⁷ See February 1997 EPW Hearing, *supra* note 230, at 222 (testimony of Carol Browner).

²⁵⁸ See Statement of Mary Nichols (Apr. 2, 1997) (on file with Committee).

²⁵⁹ KAY JONES, CITIZENS FOR A SOUND ECONOMY, IS THE EPA MISLEADING THE PUBLIC ABOUT THE HEALTH RISKS FROM PM 2.5?: AN ANALYSIS OF THE SCIENCE BEHIND EPA’S PM 2.5 STANDARD 1 (1997).

as where they are plotted. They ought to go back and take a look at what were the actual measurements in those 50 cities.”²⁶⁰

When Dr. Jones refined EPA’s estimates based on the new formula, he found that rather than 15,000 deaths per year, the estimate should be less than 1,000.²⁶¹ As Dr. Jones explained, “the agency has failed to recognize that the correction of the error causes the justification for the proposed PM_{2.5} standard to disappear.”²⁶² Moreover, Sally Katzen, Administrator of the Office of Information and Regulatory Affairs (OIRA), informed Congress that there was such “substantial scientific uncertainty in the risk analyses” that “additional work had to be done.”²⁶³ However, EPA did not conduct “additional work” and failed to acknowledge Dr. Jones findings, thereby finalizing the rule based on the incorrect estimate of 15,000 deaths per year, therefore, EPA dramatically inflated the benefits associated with reductions in PM_{2.5}.

Aside from the problematic findings of these studies, their design and methodology reveal that they were truly unreliable. The main issues with the studies include confounding variables that do not take into account such things as smoking history, physical fitness, or exact levels of exposure to pollutants, as well as levels of humidity and allergens in the air. They also did not take into account income differences among participants, which has been known to impact health status. As such, EPA experienced considerable opposition from CASAC and the public on the integrity of the science. However, in response to requests for the underlying data, EPA refused to share the data, as well as the underlying analysis, in the studies.

As for confounding variables, Douglas Dockery, one of the authors of the Six Cities study, said, “The potential for bias from confounding factors or variables we didn’t measure is certainly very large in these studies.”²⁶⁴ Moreover, the study found that among nonsmokers there was no statistically significant increase in mortality between the most polluted city and the cleanest city.²⁶⁵ In fact, if the authors had excluded participants who were exposed to “gases, fumes, or dust” at work, there was no increase in mortality at all.²⁶⁶ Therefore the only way the authors could draw affirmative conclusions about mortality was by including current and former smokers as well as those with exposures through their occupations as participants in the underlying health surveys.²⁶⁷

Moreover, the studies failed to apply the same level of exposure to all individuals in each city.²⁶⁸ In other words, the studies assumed that all participants received equal exposure to outdoor air rather than looking at individual exposure data. Had the authors considered

²⁶⁰ April 1997 Commerce Hearing, *supra* note 245, at 114 (testimony of Roger McClellan).

²⁶¹ JONES, *supra* note 259, at 1.

²⁶² *Id.*

²⁶³ April 1997 Commerce Hearing, *supra* note 245, at 176–77 (testimony of Sally Katzen).

²⁶⁴ Merline, *supra* note 255.

²⁶⁵ See Dockery et al., *supra* note 250, at 1753–59; see also FUMENTO, *supra* note 234, at 19–20 (commenting on this finding).

²⁶⁶ See Dockery et al., *supra* note 250, at 1753–59; see also FUMENTO, *supra* note 234, at 19 (commenting on this finding as well).

²⁶⁷ See Dockery et al., *supra* note 250, at 1753–59; see also FUMENTO, *supra* note 234, at 19–20 (explaining how statistical significance can only be derived by blurring the distinction between smokers, former smokers, and non-smokers).

²⁶⁸ See February 1997 EPW Hearing, *supra* note 230, at 204 (statement of Ronald Wyzga).

individual exposure, it would have been revealed that some individuals spent more time indoors than outdoors.²⁶⁹ Those spending more time indoors were more susceptible to the sorts of indoor pollution known to cause detrimental health effects.²⁷⁰

The Six Cities study also failed to consider changes in humidity and temperature, which would have been constructive given that higher temperatures were associated with a 30% increase in mortality.²⁷¹ This issue was broached by Senator Jeff Sessions (R-AL) during a February 1997 EPW Committee hearing in which one author of the Six Cities study, Dr. Schwartz, explained that they did not calculate for dewpoint, which is a measure of humidity, because “frankly [he] hadn’t seen humidity being put in lots of other studies.”²⁷² However, EPA even noted in its analysis provided to CASAC that “most [short-term PM studies] include temperature and dewpoint as covariates in their studies.”²⁷³

Rather than take responsibility of the process, Browner and Nichols deferred major decision making to Beale.

In addition, EPA encountered considerable opposition from CASAC for their continued reliance on such non-peer reviewed studies. CASAC warned EPA that the Six Cities study, in fact, was “not in the peer-reviewed literature” during CASAC’s review and noted it was unusual for EPA to “rely so heavily on non-peer-reviewed reports” and “numerous unpublished reports, many of which are recent EPA contractor reports.”²⁷⁴ Indeed, it was known that the scientists authoring the studies had an incentive to reach results that would force EPA to strengthen the standards, as some of the authoring scientists held posts on EPA Federal Advisory Committees and some received EPA research grants to produce the very data being used to justify the standards.²⁷⁵ Accordingly, the CASAC Chair George Wolff explained that “as a result, it is hard to judge the scientific credibility of many key studies that the Agency uses as a basis for their conclusions.”²⁷⁶

Given the uncertainties associated with such scientific literature, the CASAC chair explained that EPA’s decision was truly a “policy call.”²⁷⁷ Moreover, Nichols clarified that “while EPA does not base its decisions on the views of any individual CASAC member,” it is “a policy choice.”²⁷⁸ Who made the policy call seems unclear as senior EPA officials were not well versed on the science. Administrator Browner admitted that she did not read the studies, though

²⁶⁹ *See id.*

²⁷⁰ *See id.* at 202–03.

²⁷¹ Telephone interview by Michael Fumento with Roger McClellan (Apr. 11, 1997), *discussed in FUMENTO*, *supra* note 234, at 20.

²⁷² February 1997 EPW Hearing, *supra* note 230, at 83 (testimony of Joel Schwartz).

²⁷³ OFFICE OF AIR QUALITY PLANNING STANDARDS, ENVTL. PROT. AGENCY, REVIEW OF THE NATIONAL AMBIENT AIR QUALITY STANDARDS FOR PARTICULATE MATTER: POLICY ASSESSMENT OF SCIENTIFIC AND TECHNICAL INFORMATION V-44 (1996).

²⁷⁴ Letter from George T. Wolff to Carol Browner 3–4 (Jan. 5, 1996), *available at* [http://yosemite.epa.gov/sab/sabproduct.nsf/BF3677846E679602852571A90065CC94/\\$File/casac03.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/BF3677846E679602852571A90065CC94/$File/casac03.pdf).

²⁷⁵ *See id.*

²⁷⁶ *Id.*

²⁷⁷ April 1997 Commerce Hearing, *supra* note 245, at 34 (statement of George Wolff).

²⁷⁸ *Id.* at 163 (statement of Mary Nichols).

a couple months later she added that Mary Nichols, the Assistant Administrator for the Office of Air and Radiation, had read them.²⁷⁹ However, during a separate Congressional hearing, Mary Nichols testified that on certain issues with the NAAQS she deferred to John Beale, saying she “didn’t feel comfortable because [she] didn’t have as much detailed knowledge.”²⁸⁰ Accordingly, it appears that Browner and Nichols deferred to the “expertise” of EPA’s career staff — Beale and Brenner — to make this “policy call.”

4. A Process to Empower Unelected Bureaucrats

The process employed by EPA during the 1997 Ozone and PM NAAQS marked another important effort to undermine true scientific analysis: namely, reliance on the Staff Paper. The CAA directs EPA’s scientists in the Office of Research and Development to compile what is known as the Criteria Document, which includes all the relevant scientific literature on the standards for CASAC review.²⁸¹ There is no statutory basis for the Staff Paper; rather, EPA administratively created the document as an opportunity for career staff within OAR to summarize the lengthy and highly technical Criteria Document and recommend policy options for the Administrator.²⁸²

Some have argued that “EPA bureaucrats, without proper public input, drafted the paper, which included important recommendations about the science and the levels at which NAAQS should be set. Once completed, EPA’s [CASAC] reviewed it. By that time, the bureaucratic momentum to tighten the standard was difficult to resist.”²⁸³ According to the 1996 Staff Paper for PM NAAQS, authored by former OAR official John Bachmann, the document was “intended to help bridge the gap between the scientific review contained in the [Criteria Document] and the judgments required of the Administrator in setting ambient standards for PM.”²⁸⁴ Under Beale’s leadership on the 1997 NAAQS, the Staff Paper empowered career staff and limited information given to CASAC and the Administrator. For example, the fact that the 1997 PM NAAQS relied on only five studies, three of which were based on the underlying data from the Harvard Six Cities and ACS studies, was determined by the authors of the Staff Paper. The ploy worked, as Browner accepted standards listed in the Staff Paper.²⁸⁵

²⁷⁹ FUMENTO, *supra* note 234, at 34 (citing *Hearing of Subcomm. on Health & Env’t & Subcomm. on Oversight & Investigations, H. Comm. on Commerce*, 105th Cong. (May 15, 1997) (statement of Carol Browner)).

²⁸⁰ April 1997 Commerce Hearing, *supra* note 245, at 220 (testimony of Mary Nichols).

²⁸¹ See 42 U.S.C. § 7408(a)(2) (2006) (“Air quality criteria [documents] for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying qualities.”).

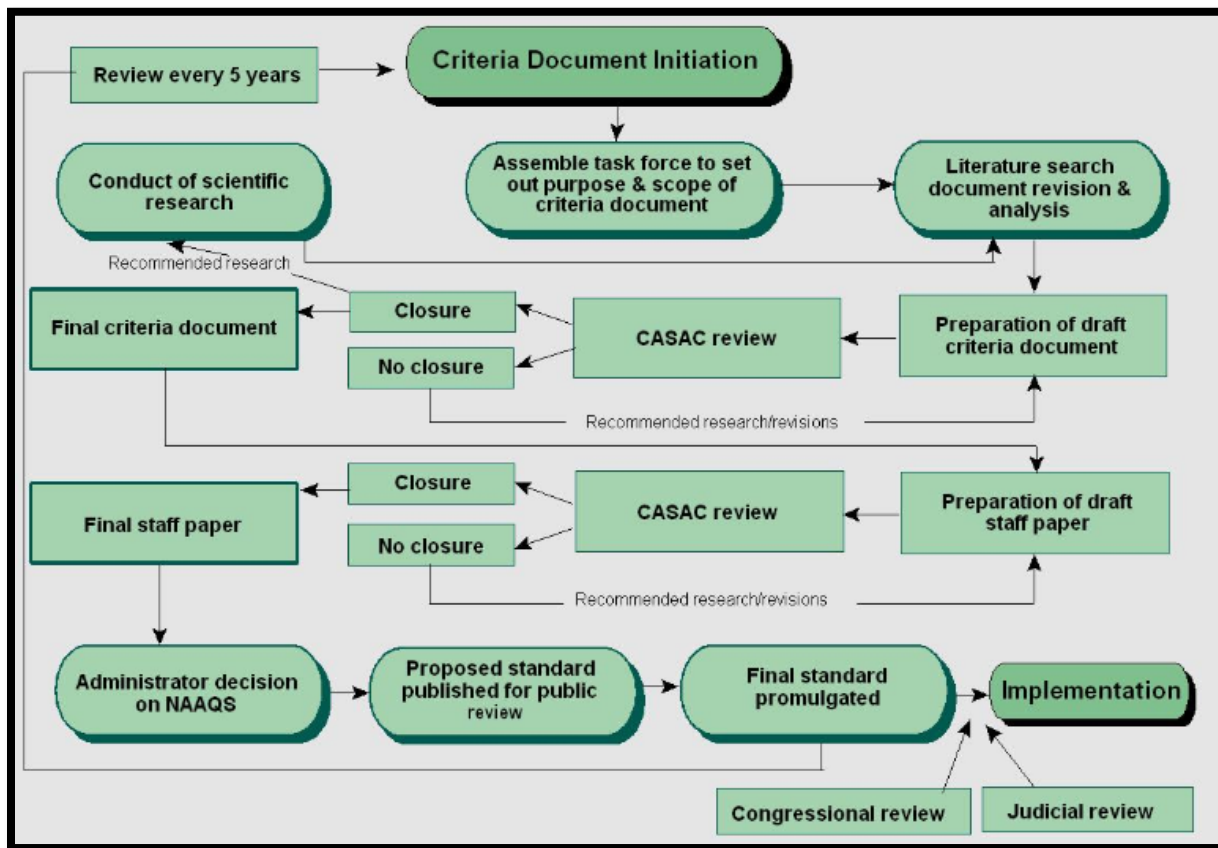
²⁸² JOHN BLODGETT & LARRY PARKER, CONG. RESEARCH SERV., 97-722, AIR QUALITY STANDARDS: THE DECISIONMAKING PROCESS 7–8 (2002).

²⁸³ *Fact of the Day: EPA Uses a Secretive Process to Set Ozone Standards*, CENTER FOR REGULATORY SOLUTIONS, <http://centerforregulatoryolutions.org/fact-of-the-day-march-4-2014/> (last visited Mar. 17, 2014).

²⁸⁴ OFFICE OF AIR QUALITY PLANNING & STANDARDS, ENVTL. PROT. AGENCY, REVIEW OF THE NATIONAL AMBIENT AIR QUALITY STANDARDS FOR PARTICULATE MATTER: POLICY ASSESSMENT OF SCIENTIFIC AND TECHNICAL INFORMATION (OAQPS STAFF PAPER) I-1 (1996) [hereinafter PM STAFF PAPER], available at <http://www.epa.gov/ttn/naaqs/standards/pm/data/1996pmstaffpaper.pdf>.

²⁸⁵ JAMES E. MCCARTHY, CONG. RESEARCH SERV., RL33807, AIR QUALITY STANDARDS AND SOUND SCIENCE: WHAT ROLE FOR CASAC? 7–8 (2008).

In an effort to restore the statutory requirements for setting NAAQS, the Bush Administration sought to reform the NAAQS process and eliminate the Staff Paper.²⁸⁶ Thereafter, the NAAQS process included a more focused and transparent policy assessment that would be published as an Advance Notice of Proposed Rulemaking in the Federal Register, open to public comments.²⁸⁷ However, as one of the first actions of the Obama EPA, then-Administrator Jackson almost immediately rescinded these reforms and reinstated the Staff Paper.²⁸⁸ Thus, following the approach of the Clinton Administration, the Obama Administration resurrected the Staff Paper to allow unaccountable EPA career staff primary control over the underlying science and standards — the exact model envisioned by Beale and Brenner.



NAAQS setting process depicted by Congressional Research Service Report 97-722 (April 9, 2002).

²⁸⁶ See Memorandum from Marcus Peacock to George Gray, Assistant Adm'r, Office of Research and Dev., & Bill Wehrum, Process for Reviewing National Ambient Air Quality Standards (Dec. 7, 2006), available at http://www.epa.gov/ttn/naaqs/pdfs/memo_process_for_reviewing_naaqs.pdf; see also MCCARTHY, supra note 285, at 9–10.

²⁸⁷ *Id.*

²⁸⁸ Press Release, Env'tl. Prot. Agency, EPA Administrator Lisa P. Jackson Brings Science, Transparency Back to Air Quality Standards Decisions (May 21, 2009), available at <http://yosemite.epa.gov/opa/admpress.nsf/0/20A6491703E9172E852575BD00585B81>.

ii. Beale Practices Damage Control over PM and Ozone NAAQS

While reviewing the Ozone and PM NAAQS, there was little to no consensus among those inside EPA or within the Administration on the appropriate level at which to set the standards. However, it appears Beale and Brenner ran a tight ship involving only key staff who could help the messaging and follow the strategy for advancing both standards as proposed. As head of OPAR, Brenner was known to have “an objective on NAAQS and would have done whatever to get the right outcome.”²⁸⁹ Beale’s sentencing memorandum noted that “[he] and several other senior managers, OPAR and the Air Office coordinated the efforts of EPA staff and scientists from across the Agency to put together a carefully planned and thoroughly researched set of proposed standards to recommend to the EPA Administrator.”²⁹⁰ Beale has further stated that under the direction of Mary Nichols, he took “the lead on managing that whole process, and that involves dealing with our scientists, our technicians, our engineers, everybody, and putting the whole package together.”²⁹¹

As for those outside the Agency, Beale “worked closely with the White House, OMB, and EPA’s constituents in industry and the environmental community.”²⁹² According to one EPA colleague, “John took the lead for EPA in the discussions with OMB and other agency reviewers.”²⁹³ At the time, OIRA had roughly three weeks to complete its review of the PM standards to meet the court-ordered deadline.²⁹⁴ Under Executive Order 12866, OIRA should have had 90 days to review a major proposed rule.²⁹⁵ Yet in this case, OIRA completed their review of the PM and ozone standards in less than 30 days, in time for the Agency to issue the proposed standards on the day before Thanksgiving, November 26, 1996,²⁹⁶ before the ALA imposed deadline. Given the added ozone standards and delayed submission to OIRA, OIRA’s review of the standards may have been compromised by the tight deadline. However, OIRA Administrator Sally Katzen argued that the review was adequate as “other obligations of the office were temporarily put aside so we could focus on these rules.”²⁹⁷ Despite Katzen’s claim that OIRA’s review was adequate, it appears that part of the benefit of the joint rule strategy for EPA was to minimize OIRA’s ability to review and influence the rule.

²⁸⁹ Interview by Rep. Staff, S. Comm. on Env’t & Pub. Works.

²⁹⁰ Sentencing Memorandum of John C. Beale, *supra* note 3, at 13–14 (emphasis added).

²⁹¹ Deposition of John C. Beale, *supra* note 7, at 172.

²⁹² Sentencing Memorandum of John C. Beale, *supra* note 3, at 13–14.

²⁹³ *Id.* at Exhibit 7.

²⁹⁴ The proposal was sent to OMB on November 4, 1996, and the proposed rule for PM was due by November 29, 1996. See ANTONELLI, *supra* note 225, at 8.

²⁹⁵ Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted as amended in* 5 U.S.C. § 601 app. at 88–92 (2012).

²⁹⁶ See ANTONELLI, *supra* note 225, at 8.

²⁹⁷ April 1997 Commerce Hearing, *supra* note 245, at 156 (testimony of Sally Katzen).

In addition to gaming the amount of time OIRA had to review the complicated proposals, evidence shows that Beale and Brenner even choreographed OIRA's role throughout the NAAQS review process. EPW staff has learned that at the time "there was a substantial disagreement between EPA and OIRA over analytical practices in the 1990s."²⁹⁸ The fundamental disagreement was exacerbated by the 1997 NAAQS for ozone and PM, which was one of the first major air regulations subject to the cost-benefit analysis requirement under Clinton's Executive Order 12866 on Regulatory Planning and Review. According to OIRA economists working on the NAAQS review, "EPA's ozone standard set a low in the use of bad analysis. . . . EPA's analytic errors [were] not inadvertent. They [were] the result of efforts to

Beale and Brenner orchestrated OIRA's role throughout the NAAQS review process.

convince the public that the [ozone] rule was reasonable when the facts indicated otherwise. EPA manipulated its scientific advisers and the public review process."²⁹⁹

As Brenner handled the "impact statements and the economic analysis and review" of the NAAQS,³⁰⁰ it is no surprise that EPA's "estimates increased benefits and decreased costs and Brenner would always defend it."³⁰¹ In fact, during the NAAQS review, OPAR had "enforced a certain

discipline [during] this period of time: analysis presented the best face of the Agency."³⁰² A prime example of such presentation, and the level in which Beale and Brenner misled the public on the NAAQS, is illustrated by what is known as the "Beale Memo."

1. Beale Choreographs EPA's Response to Serious Concerns

Immediately after OIRA approved EPA's proposed NAAQS for PM and ozone, Congress raised concerns about the integrity of OIRA's review. Among the challengers, former House of Representatives Committee on Commerce, Chairman Thomas Bliley (R-VA), wrote OIRA requesting an independent assessment of EPA's economic analysis.³⁰³ According to an EPA official "heavily"³⁰⁴ involved in the NAAQS, Beale "took a leadership role in working with OMB, other executive branch agencies, Congressional staff, and outside stakeholders to address their concerns with the draft EPA standards."³⁰⁵ EPW staff has learned that when it came to regulatory review of the 1997 Ozone and PM NAAQS, "EPA officials made a concerted effort to suppress criticism of its proposals from OIRA."³⁰⁶ Such suppression is exemplified by the controversy surrounding and the content of the Beale Memo.

²⁹⁸ Interview by Rep. Staff, S. Comm. on Env't & Pub. Works.

²⁹⁹ Lutter, *supra* note 233, at 46, 47, 61–62 (emphasis added).

³⁰⁰ Deposition of John C. Beale, *supra* note 7, at 172.

³⁰¹ Interview by Rep. Staff, S. Comm. on Env't & Pub. Works.

³⁰² Interview by Rep. Staff, S. Comm. on Env't & Pub. Works.

³⁰³ See April 1997 Commerce Hearing, *supra* note 245, at 230–34.

³⁰⁴ Deposition of John C. Beale, *supra* note 7, at 173.

³⁰⁵ Sentencing Memorandum of John C. Beale, *supra* note 3, at Exhibit 7.

³⁰⁶ Interview by Rep. Staff, S. Comm. on Env't & Pub. Works.

Beale went to great lengths to shape OIRA's response to Chairman Bliley. OIRA originally drafted a 27-page detailed analysis critical of EPA's proposed rules,³⁰⁷ which was then edited down to 15 pages based on advice from OIRA's general counsel. However, the final

Beale intentionally subverts transparency on cost-benefit analysis.

version OIRA sent to Bliley on January 15, 1997, was a fraction of the original letter, just seven pages of vague generalities favoring EPA's position.³⁰⁸

Bliley subsequently learned that someone at EPA had interfered with OIRA's response.³⁰⁹ The Chairman immediately questioned Mary Nichols on EPA's involvement.³¹⁰ At the time, Nichols explained that Brenner and Gary Guzy helped OMB with its response to Bliley;³¹¹ however, it was soon revealed that Beale was the EPA official who altered the

response. Specifically, Beale reviewed the draft OIRA letter and faxed OIRA the Beale Memo,³¹² explaining in no uncertain terms that OIRA had to alter the letter, stating:

[A]s written, the OMB's response could be very damaging to the PM and Ozone effort. Thus we strongly recommend that the OMB employ language much more similar to the language previously submitted by the EPA to the OMB in their response to Chairman Bliley . . . We are prepared to sit down with you and discuss the letter line by line.³¹³

Upon a review of the three versions of the letter, it appears that Beale was successful in extracting significant changes from OIRA. For instance, the original letter included a finding that EPA did not fully conform to the principles in the Best Practices document,³¹⁴ whereas the final version said it was consistent with the Best Practices document.³¹⁵ Moreover, statements that EPA may have overstated benefits and understated costs of fully attaining the standards, as well as virtually the entire assessment of EPA's cost and benefit analysis was excluded from the final letter.³¹⁶

Also curious is how the EPA hid Beale's involvement in altering the OIRA response. Mary Nichols' original response to Bliley excluded any reference to Beale.³¹⁷ Only after Bliley publicly released the Beale Memo and questioned Nichols under oath did she admit:

³⁰⁷ See April 1997 Commerce Hearing, *supra* note 245, at 234–60.

³⁰⁸ See *id.* at 282–88.

³⁰⁹ Interview by Rep. Staff, S. Comm. on Env't & Pub. Works.

³¹⁰ See April 1997 Commerce Hearing, *supra* note 245, at 291–94.

³¹¹ See *Leaked Memos Show Heavy EPA Influence on OMB's PM/Ozone Review*, INSIDE EPA.COM, Mar. 6, 1997.

³¹² See *id.* at 261–79.

³¹³ *Id.* (emphasis added).

³¹⁴ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, ECONOMIC ANALYSIS OF FEDERAL REGULATIONS UNDER EXECUTIVE ORDER 12866 (1996).

³¹⁵ See April 1997 Commerce Hearing, *supra* note 245, at 248, 250–51.

³¹⁶ See *id.* at 282–88.

³¹⁷ See *id.* at 295–300.

[Beale] had called me expressing his concern that the OMB draft was going to be very critical in a way that he thought was unfair based on communications. . . . Beale expressed . . . his frustration. . . . [H]e asked whether I would talk to [OIRA head] Sally Katzen. I said I didn't feel comfortable because I didn't have as much detailed knowledge to do that, and that if he had concerns he ought to put them in writing and send them to [OIRA].³¹⁸

The Beale Memo was also excluded from EPA's original document production to Bliley.³¹⁹ Yet, in Nichols' response, she stated that the Agency went to "all the people that were believed to have had docs in response to Bliley's letter and those people searched their files and produced docs."³²⁰ However, an Administration source who knew that a responsive document had been wrongfully withheld, arranged for a secret meeting with a House staffer at a diner in the Virginia suburbs in order to turn over the Beale Memo.³²¹

Nichols later clarified that "there were people away or on vacation who had materials responsive."³²² Apparently, Beale was one of these individuals. At the time this drama was unfolding Beale had been lying to the Agency about having malaria, ostensibly to make himself unavailable for work when convenient.³²³ In this instance, it appears Beale's absence insulated himself from producing responsive documents, such as his memorandum, to Congress. EPW staff learned that at the time, EPA informed Bliley's staff that Beale had malaria, saying, "give us a break, he has malaria."³²⁴

When Bliley called for a hearing on the NAAQS, an EPA official said that EPA Administrator Carol Browner was "not the best person to testify on the matter, as she was not directly involved . . . Mary Nichols . . . and John Beale . . . should testify."³²⁵ Accordingly, Bliley invited both Beale and Nichols to testify for the Committee.³²⁶ Five days before the scheduled hearing, Nichols informed the Committee that neither she nor Beale would be available because she would be traveling and Beale had allegedly been ill³²⁷ — presumably from malaria. Beale never testified before Congress on the matter.

Beale was protected by his EPA colleagues and the process he engineered, as it appears he was never held accountable for altering OIRA's presentation of its NAAQS analysis.

³¹⁸ *Id.* at 219–20.

³¹⁹ Interview by Rep. Staff, S. Comm. on Env't & Pub. Works.

³²⁰ April 1997 Commerce Hearing, *supra* note 245, at 302.

³²¹ Interview with former Chief Counsel for Oversight & Investigations, H. Comm. on Commerce, by Rep. Staff, S. Comm. on Env't & Pub. Works.

³²² *Id.* at 301.

³²³ Interview by Rep. Staff, S. Comm. on Env't & Pub. Works.

³²⁴ Interview of former Counsel, H. Comm. on Commerce, by Rep. Staff., S. Comm. on Env't & Pub. Works.

³²⁵ *Commerce Panel May Subpoena Browner To Testify On EPA Discussions With OMB*, BNA, Mar. 14, 1997.

³²⁶ *Id.*

³²⁷ *Id.*

c. A Sustainable Strategy: Beale and Secret Science Above Reproach

*After his work on the 1997 NAAQS, Beale “had free reign . . . no one questioned Mr. Beale, ever. No one questioned his vouchers, no one questioned his time away from the office, no one questioned his work product.”*³²⁸

– Assistant Inspector General for Investigations, Patrick Sullivan

Soon after President Clinton endorsed the Ozone and PM NAAQS, the standards were finalized in July 1997 in compliance with the sue and settle deadline.³²⁹ EPA’s victory on NAAQS proved the effectiveness of Beale’s design of the EPA Playbook, which has empowered EPA’s career staff to expand the Agency’s regulatory reach in many instances beyond what sound science justifies. EPA celebrated the 1997 NAAQS standards as a turning point for air regulations.

The 1997 NAAQS ratified EPA’s Playbook and empowered career staff to expand the Agency’s regulatory reach beyond what science justifies.

As for Beale, he used his work on the 1997 NAAQS as the foundation necessary to secure his colleagues’ confidence, which paved the way for his future lies and abuse of his leadership position at the agency. At his sentencing hearing, Beale’s attorney stated as much, asserting that Beale’s fraud was a “result of the trust he gained from work on CAA in the 90s”³³⁰ Beale himself elaborated that “for over a decade of service I was honest and gained trust of my coworkers . . . then I exploited management at EPA.”³³¹ During the NAAQS process, Beale won the respect of environmentalists and key stakeholders, which he parleyed into promotions, bonuses, and unquestioning respect at the EPA.

i. EPA Shielded the Secret Science

The studies EPA relied upon for the 1997 Ozone and PM NAAQS were clearly vulnerable to even the most basic scrutiny, which prompted CASAC and others to probe EPA for the underlying data. Even before EPA proposed the standards, CASAC explained that given EPA’s reliance on “certain [non-peer-reviewed] studies,” they were “left with uncertainty as to

³²⁸ Oversight & Gov’t Reform Hearing, *supra* note 11 (testimony of Patrick Sullivan).

³²⁹ National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (July 18, 1997) (later codified at 40 C.F.R. pt. 50); National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (July 18, 1997) (later codified at 40 C.F.R. pt. 50).

³³⁰ Transcript of Sentencing Hearing, United States v. Beale, No. 1:13-cr-00247-ESH (D.D.C. Sept. 27, 2013) [hereinafter Beale Sentencing Hearing].

³³¹ *Id.*

the validity of either reported analysis” for the studies.³³² Accordingly, CASAC told EPA that “[t]he answer to this dilemma seems clear: The EPA should take the lead in requesting that investigators make available the primary data sets being analyzed so that others can validate the analyses.”³³³

In response to CASAC’s request, EPA promised they would work on getting the data and more studies, but reinforced that CASAC needed to finish its review.³³⁴ CASAC completed its review; however, EPA did not fulfill its promise. As EPA moved forward with the proposed standards, the Agency sought to protect the underlying data rather than comply with these requests to ensure scientific integrity.

At the time, EPA’s reason to withhold the data was questionable and seemed to be an outgrowth of the type of policy decisions made by Beale and Brenner. For example, in response to Congressional requests for the underlying data, Mary Nichols failed to provide a sound justification; she simply proclaimed “EPA does not believe that review of the raw data underlying these studies is necessary.”³³⁵

EPA actively obstructed transparency, shielding the studies from any meaningful review.

Moreover, Nichols deferred to the institutions, claiming that she “urged them to make the data underlying their studies available to interested parties.”³³⁶ This request was a charade as Nichols knew the authors would not provide others access to their cherished data. Unsurprisingly, Harvard asserted that the law prevented them from releasing participants’ personal information; despite the fact that the law permitted them to provide the data so long as they removed any personal information.³³⁷

Once the standards were close to being finalized, Mary Nichols moved to protect the underlying data, stating:

While EPA believes that, as a general principle, data underlying these and other studies should be made available, the Agency respects the fact that revealing underlying data can raise significant proprietary, legal and ethical issues concerning confidentiality. Many of these studies use highly personal information, including medical data, which were obtained through promises of confidentiality.³³⁸

³³² Letter from George T. Wolff & Roger McClellan to Carol Browner 2 (May 16, 1994), *available at* [http://yosemite.epa.gov/sab/sabproduct.nsf/A0D2AE11E6AD6E44852571BD00581CE8/\\$File/PM10+DATA+SET+S++CASAC-COM-94-005_94005_4-27-1995_38.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/A0D2AE11E6AD6E44852571BD00581CE8/$File/PM10+DATA+SET+S++CASAC-COM-94-005_94005_4-27-1995_38.pdf).

³³³ *Id.*

³³⁴ Interview by Rep. Staff, S. Comm. on Env’t & Pub. Works.

³³⁵ April 1997 Commerce Hearing, *supra* note 245, at 166.

³³⁶ *Id.*

³³⁷ *See* Letter from James H. Ware, Dean for Academic Affairs, Harvard Univ., to Dan Greenbaum, Health Effects Inst. 2 (Apr. 8, 1997) (on file with Committee).

³³⁸ April 1997 Commerce Hearing, *supra* note 245, at 166.

With this proclamation, Nichols and EPA took a position that obstructed transparency, shielding the studies from any meaningful review. The Six Cities authors reinforced EPA's position when they claimed that the law prevented them from releasing participants' personal information; however, the data could have been provided as long as any personal information was removed. This apparent coordination to hide the science brought EPA's Playbook full circle.

The perpetual excuses did not satisfy the public and other stakeholders' desire to confirm the integrity of the underlying data and the studies' results. In response to building public criticism, the institutions made an agreement to allow the Health Effects Institute (HEI) to conduct a reanalysis of the studies.³³⁹ Thereafter, EPA pointed to the pending HEI reanalysis in response to requests for the underlying data and claimed that such reanalysis "appropriately accommodates these interests."³⁴⁰ However, it would take several years for this analysis to be completed, buying time for Beale and Brenner to push forward with their aggressive air regulations under the Clinton Administration.

ii. Beale Made Friends in the Right Places During NAAQS

As a result of his work on NAAQS, Beale made several important friends within the Agency who paved the way for his future abuses. Such individuals include EPA officials in OAR: Lydia Wegman; John Bachmann; and Jeff Clark. These individuals were part of OAR's Office of Air Quality Planning Standards (OAQPS) based in North Carolina — and are the primary gatekeepers for the science used to justify NAAQS standards. These individuals continued to support Beale throughout his career at EPA, even after he was exposed as a felon facing criminal charges.

As a senior official in OAQPS, Lydia Wegman lived and worked out of EPA's Research Triangle, North Carolina. Lydia was "close to Beale" and became his "ally."³⁴¹ In her own words, Wegman said, "[i]n 1996 and 1997, I worked with John on developing revised NAAQS for ozone and particulate matter."³⁴² EPW staff has learned that during the NAAQS process, "Lydia was 'part of Air braintrust,'"³⁴³ and similar to Beale, she was known as a "policy person."³⁴⁴

³³⁹ See Letter from James H. Ware, Dean for Academic Affairs, Harvard Univ., to Dan Greenbaum, Health Effects Inst. (Apr. 8, 1997) (on file with Committee).

³⁴⁰ April 1997 Commerce Hearing, *supra* note 245, at 166.

³⁴¹ Interview by Rep. Staff, S. Comm. on Env't & Pub. Works.

³⁴² *Id.*

³⁴³ Interview of Marcus Peacock by Rep. Staff, S. Comm. on Env't & Pub. Works.

³⁴⁴ *Id.*



Photo of Lydia Wegman aired on C-SPAN 2 (August 21, 2001).

During the sixteen years Wegman and Beale were jointly employed by EPA's air office, the two did not work together after the 1997 NAAQS.³⁴⁵ Accordingly, it appears the short period of time the two worked together on the 1997 NAAQS had a lasting impact on their friendship: they frequently communicated via email or phone and spent time together outside of their EPA employment. For example, in January 2012, during a period of time in which Beale's supervisors believed he had retired while he actually remained on EPA payroll, Lydia emailed him on his EPA account saying that she left him a voicemail and wanted to give him a "hug" and was "hoping I might see you again tomorrow AM if you were coming here to meet Harnett and Bachmann . . . please know that I am sending you a hug and hoping that we'll see each other again before too long."³⁴⁶ Beale replied that he would call her later and told her:

You are a very special person to me and I hope we will be able to stay in touch over the years to come. You and Jeff and a handful of folks in DC EPA mean so much to me. You are such a strong person and an unfailing force for the public interest, honoring the science, and treating all with the respect and courtesy deserved. . . . You are a role model for me in many ways.³⁴⁷

³⁴⁵ Sentencing Memorandum of John C. Beale, *supra* note 3, at Exhibit 7 ("I did not work closely with [Beale] on other projects after the conclusion of the NAAQS regulatory process in 1997.").

³⁴⁶ E-mail from John Beale to Lydia Wegman (Jan. 6, 2012, 03:50 EST) (on file with Committee).

³⁴⁷ *Id.*

Interestingly, after more than 30 years of employment at EPA, Wegman announced her retirement in August 2013 soon after the Department of Justice filed its charges against Beale.³⁴⁸ Wegman's retirement was effective just before Beale pled guilty to fraud on September 27, 2013.³⁴⁹

Another key official in the NAAQS who was close to both Wegman and Beale was John Bachmann. Like Wegman, Bachmann was an EPA career official who resided and worked in North Carolina for OAQPS. EPW staff has learned that Bachmann was “the real mastermind behind PM.”³⁵⁰ In fact, Bachmann was the primary author of the 1997 PM NAAQS Staff Paper.³⁵¹ EPW staff has learned that besides Beale, Bachmann was the only other official in OAR known to hold a SL position.³⁵² As previously explained, SL employees were not subject to the same constraints as SES employees, but received an equally extravagant pay as SES employees.

Beale also became particularly close to another longtime EPA career official, Jeff Clark. Notably, in 1994 Clark was promoted to a high level policy position in OAQPS and worked closely on the NAAQS.³⁵³ Clark was the third person to join Beale and Brenner's retirement cruise on the Potomac in September 2011. According to Beale; he, Brenner, and Clark were “like the three Musketeers on the Clean Air Act.”³⁵⁴ Like many of the allies Beale collected, Clark maintained close ties to environmentalist groups³⁵⁵ and shared his friend's disdain for the Bush Administration's lack of hyper-regulatory zeal.³⁵⁶

iii. Beale Used NAAQS to Advance Fraud

Aside from the close friendships acquired during the 1997 NAAQS process, Beale used his leadership on the Ozone and PM NAAQS as a justification for nearly all of his monetary awards. In 2000, Beale's work on the NAAQS was referenced in his retention incentive bonus application, explaining that his “key role” in “air-quality-control activity is now in a critical period” due to Congressional and judicial challenges to the NAAQS.³⁵⁷ That same year Beale used the NAAQS in his application for a promotion to SL, stating:

³⁴⁸ Jason Plautz, *Will retirement of 2 senior scientists hinder critical air reviews?*, GREENWIRE, Aug. 30, 2013, <http://www.eenews.net/greenwire/stories/1059986569/search>.

³⁴⁹ *Id.*

³⁵⁰ Interview by Rep. Staff, S. Comm. on Env't & Pub. Works.

³⁵¹ PM STAFF PAPER, *supra* note 284, at I-1.

³⁵² Interview by Rep. Staff, S. Comm. on Env't & Pub. Works.

³⁵³ See FEDERAL EXECUTIVE DIRECTORY 393 (Sept./Oct. 1994 ed.).

³⁵⁴ Deposition of John C. Beale, *supra* note 7, at 191.

³⁵⁵ For example, one of Clark's emails to Beale forwarded a message from Vickie Patton of the Environmental Defense Fund regarding a “rising star” in environmental efforts for the individual's generous donations to Pres. Obama and Democratic candidates. See E-mail from Jeff Clark to John Beale (July 14, 2008, 03:11 EST) (on file with Committee).

³⁵⁶ E-mail from Jeff Clark to John Beale (Aug. 19, 2008, 04:29 EST) (on file with Committee).

³⁵⁷ Sentencing Memorandum of John C. Beale, *supra* note 3, at Exhibit 11.

I managed the efforts of several groups of EPA senior managers and staff to develop several of EPA's most significant initiatives. As part of these efforts, I also managed the preparation of Congressional testimony and briefed Congressman and their staffs, high-ranking EPA and Administration officials, (including the EPA Administrator) [among] the most significant of the initiatives I managed . . . was the development of new, more stringent National Ambient Air Quality Standards (NAAQS) for ozone and particles. . . . The project involved the development and assessment of major scientific research products from both EPA researchers and outside contractors, as well as intensive discussions with senior White House officials, senior industry managers, environmental scientists, state and local governments, public interest groups, and Members of Congress and their staffs. This project included the direct involvement of President Clinton, who formally charged EPA with implementing the new standards according to a cost effective plan that I designed and negotiated. The result was the successful completion of what would normally be a five-year rulemaking process in less than four years, the product being two new air-quality standards that will make the air cleaner for millions of Americans. Once the standards were completed, I managed the Presidentially mandated implementation process, again leading a large team of EPA managers and staff to ensure that the standards will be met in a cost effective manner.³⁵⁸

Over a decade later, Beale would still cling to his glory days with the 1997 NAAQS. A 2010 email — prepared by Beale and sent to EPA staff from then-AA for OAR Gina McCarthy announcing Beale's role as the immediate office's lead for all of OAR's international work — highlighted the fact that Beale had "lead roles in the 1990 Clean Air Act Amendments, the early implementation of the Act, the development and negotiation of the National Low Emission Vehicle Program, and the 1997 NAAQS review."³⁵⁹

Even after Beale's fraud was exposed and he pled guilty to stealing nearly one million dollars from the American people, Brenner reminded Congress of Beale's work on the NAAQS, as if it provided some sort of excuse for Beale's illegal behavior. Specifically, Brenner's written Congressional testimony stressed:

From 1995 to 1997, John played a key role in the development of new national air quality standards for ozone and particulates. John established cross-agency processes to ensure that the EPA Administrator could carefully evaluate the extensive array of health science and receive additional input from scientists and stakeholder groups outside the Agency . . . I am aware that John has recently signed a plea agreement acknowledging that he received certain salary and bonus payments from the EPA to which he was not entitled. . . . The fact that John's good works and contributions will be overshadowed by these events is unfortunate."³⁶⁰

³⁵⁸ Beale Senior Leader Application, *supra* note 6 (emphasis added).

³⁵⁹ E-mail from Gina McCarthy to Office of Air and Radiation, Env'tl. Prot. Agency (Dec. 3, 2010, 07:44 EST) (emphasis added) (on file with Committee).

³⁶⁰ Oversight & Gov't Reform Hearing, *supra* note 11 (statement of Robert Brenner) (emphasis added).

Notably, Brenner's statement was also submitted as part of Beale's leniency request to the United States District Court for the District of Columbia.³⁶¹ Lydia Wegman also submitted a letter to Judge Huvelle of the United States District Court for the District of Columbia, requesting leniency in Beale's sentence.³⁶² In her letter, she dedicates an entire paragraph to praise Beale's leadership on the NAAQS.³⁶³

Despite his allies' efforts, Beale was sentenced to thirty-six months in prison for his crimes; however, the American people have not come remotely close to being fully compensated for all of the harm caused by Beale. In the words of one former EPA official, "unfortunately, [Beale] was able to use his position to betray the public trust in a most shameful way."³⁶⁴ Accordingly, EPW Republicans are concerned by Beale's management of the 1997 Ozone and PM NAAQS and have delved deeper into the consequences flowing from the process and data behind those standards.



Photo from John Beale segment on *The Daily Show with Jon Stewart* (December 18, 2013).

³⁶¹ Sentencing Memorandum of John C. Beale, *supra* note 3, at Exhibit 3.

³⁶² *Id.* at 7.

³⁶³ *Id.*

³⁶⁴ *Id.* at Exhibit 2.

IV. SECRET AGENT AND SECRET SCIENCE: Still Plaguing Americans

For more than fifteen years, Congress and the American people have requested the data underlying the controversial Six Cities and ACS II studies, which served as the scientific foundation of the 1997 PM NAAQS regulation. EPA has consistently denied the public and Congress access to such data. However, EPA's basis for the vast majority of proclaimed benefits for CAA regulations are inextricably tied to these two studies and EPA has relied on updates from these same two studies to support major new CAA rules. The lack of transparency on the underlying scientific data has aggravated the questionable use of these studies in justifying EPA regulations. These issues are not isolated to EPA, as OMB currently relies on the benefits of EPA's CAA regulations, specifically the benefits of PM_{2.5} reduction, to inflate alleged benefits of all federal regulations. Accordingly, EPA continues to utilize the secret science that helped establish Beale's reputation at EPA almost twenty years ago.

a. Inflated PM_{2.5} Benefits Provide Cover for EPA's Regulatory Agenda

*“[A]s EPA has used PM_{2.5} co-benefits to justify more and more of its non-PM_{2.5} rules, it has also moved to less and less scientifically-credible methods for estimating those co-benefits. These changes in methodology and assumptions have inflated the PM_{2.5} co-benefits estimates dramatically”*³⁶⁵

– Anne E. Smith, Ph.D., NERA Economic Consulting

Since Beale's success in pushing through the Ozone and PM NAAQS in 1997, EPA has increasingly relied upon benefits derived from reductions in fine particulates (PM_{2.5}) in order to inflate benefit calculations for regulations issued under the Clean Air Act (CAA). Under Executive Orders 12866 and 13563, federal agencies must provide a regulatory impact analysis (RIA) of major regulations that includes a review of the regulation's costs and benefits.³⁶⁶ Most of these regulations are “non-PM” rules, as they directly regulate other pollutants and only impact PM_{2.5} as an ancillary matter. In such regulations, “the bulk of the benefits estimates in their RIAs are attributable to reductions in already-low concentrations of ambient PM_{2.5} that EPA has predicted will occur coincidentally as a result of regulation of those non-PM pollutant(s).”³⁶⁷ When benefits accrue coincidentally, such as PM_{2.5} reduction, from a rulemaking that was not specifically intended to create such reduction, those benefits have been deemed “co-benefits.” The practice of using these co-benefits to inflate RIAs has been a key tactic used to execute the Obama Administration's regulatory agenda.

³⁶⁵ ANNE E. SMITH, NERA ECONOMIC CONSULTING, AN EVALUATION OF THE PM_{2.5} HEALTH BENEFITS ESTIMATES IN REGULATORY IMPACT ANALYSES FOR RECENT AIR REGULATIONS 16 (2011), available at http://www.nera.com/nera-files/pub_ria_critique_final_report_1211.pdf.

³⁶⁶ Exec. Order No. 12,866, 3 C.F.R. 638 (1993), reprinted as amended in 5 U.S.C. § 601 app. at 88–92 (2012); Exec. Order No. 13,563, 3 C.F.R. 215 (2012), reprinted in 5 U.S.C. § 601 app. at 101–02 (2006 & Supp. V 2011).

³⁶⁷ SMITH, *supra* note 364, at 7 (emphasis added).

Historically, EPA used co-benefits in major rules as one of several benefits quantified to justify a rule in the RIA.³⁶⁸ Yet, at the beginning of the Obama Administration, there was a “trend towards almost complete reliance on PM_{2.5}-related health co-benefits.”³⁶⁹ Instead of being an ancillary benefit, EPA started using PM_{2.5} co-benefits as essentially the only quantified benefit for many CAA regulations.³⁷⁰ Indeed, “these PM_{2.5} co-benefits not only dominate the majority of RIAs for EPA’s non-PM rules, but in many cases they are the only benefit that is being quantified at all.”³⁷¹ In fact, every RIA for major air rules between 2009 and 2011 listed PM_{2.5} benefits as the sole quantified benefit, with the exception of only five rules.³⁷²

Since Beale’s success in pushing through the 1997 NAAQS, EPA has increasingly relied upon benefits from reduced PM_{2.5} to inflate the benefits of costly regulations.

The Mercury Air Toxics Standard for coal and oil fired electric generating units, otherwise known as the Utility MACT, is a key example of EPA relying on PM co-benefits to justify a recent economically significant rule.³⁷³ EPA has claimed that “its proposal [was] justified based on cost-benefit analysis because the rule will provide benefits of up to \$130 billion ever[y] year” — while PM_{2.5} reduction comprises essentially all of the quantified benefits.³⁷⁴ EPA even “admits virtually all (i.e. 99+ percent) of the estimated \$53 to \$140 billion in annual benefits are due to reductions in PM_{2.5},”³⁷⁵ while the reduction in mercury emissions accounted for only \$500,000 to \$6.1 million in benefits.³⁷⁶

The reality is that in 2012, eighty-five coal-fired power plants retired.³⁷⁷ Five times as much coal-generating capacity is expected to retire in the next six years alone,³⁷⁸ even as electric grid reliability in the Northeast became a dangerous and costly issue this winter.³⁷⁹ According

³⁶⁸ *Id.* at Figure 1.

³⁶⁹ *Id.* The only times that EPA has deviated from this trend recently “have been rules addressing greenhouse gases (GHGs) under the CAA.” *Id.*

³⁷⁰ *Id.* at 8.

³⁷¹ SMITH, *supra* note 364, at 9 (emphasis added).

³⁷² *Id.* at Figure 1.

³⁷³ National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9,304 (Feb. 16, 2012) (to be codified at 40 C.F.R. pts. 60, 63).

³⁷⁴ *Id.* (internal citation omitted).

³⁷⁵ *Id.* (citing ENVTL. PROT. AGENCY, REGULATORY IMPACT ANALYSIS OF THE PROPOSED TOXICS RULE: FINAL REPORT 1-1 (2011)).

³⁷⁶ *Regulating to Regulators: Enforcing Accountability in the Rulemaking Process*, CENTER FOR REGULATORY SOLUTIONS, http://centerforregulatoryolutions.org/wp-content/uploads/2014/02/Regulating-the-Regulators_Enforcing-Accountability-in-the-Rulemaking-Process1.pdf (last visited Feb. 27, 2014).

³⁷⁷ See *AEO2014 projects more coal-fired power plant retirements by 2016 than have been scheduled*, ENERGY INFO. ADMIN., <http://www.eia.gov/todayinenergy/detail.cfm?id=15031> (last visited Mar. 17, 2014).

³⁷⁸ See *id.*

³⁷⁹ See Matthew L. Wald, *Coal to the Rescue, but Maybe Not Next Winter*, N.Y. TIMES, Mar. 10, 2014, http://www.nytimes.com/2014/03/11/business/energy-environment/coal-to-the-rescue-this-time.html?_r=0.

to the American Coalition for Clean Coal Electricity (ACCCE) things are soon to get more dangerous and far worse.³⁸⁰

EPA also used PM_{2.5} co-benefits to justify imposing costly control technology under the Regional Haze rule. Regional Haze, unlike the other provisions of the Clean Air Act, deals purely with visibility impairments and not health. However, EPA officials, including Robert Brenner, have encouraged the use of PM_{2.5} co-benefits to justify requiring power plants to install excessively costly pollution control.³⁸¹ Even so, the increased cost of such controls is known to yield no perceivable visibility benefits.³⁸²

Since the 1997 Ozone and PM NAAQS, EPA has relied on supposed PM_{2.5} benefits to defend 32 major rules.³⁸³ Despite these questionable PM co-benefits, under the Obama Administration, these rules have been associated with the greatest cost on the economy, including:

- Utility MACT — EPA estimated \$9.6 billion annualized costs,³⁸⁴
- Boiler MACT — EPA estimated \$1.9 billion annualized costs,³⁸⁵ and
- Tier III Gasoline Sulfur Rule — EPA estimated \$1.5 billion annualized costs.³⁸⁶

Critically, EPW staff anticipates that EPA will also use co-benefits of supposed PM_{2.5} reduction in justifying its 2015 Ozone NAAQS, which is expected to carry an annual cost of approximately \$19 to \$90 billion.³⁸⁷

EPA has also changed the standards and formulation for determining the value of PM_{2.5} co-benefits in recent years, further distorting EPA's cost benefit analysis. In 2009, for example, EPA modified its analysis and "greatly increased those co-benefits estimates-and did so in a way that [some] consider to have no scientific credibility."³⁸⁸ This change, coupled with increased reliance on PM_{2.5} co-benefits, has caused a drastic increase in the theoretical benefits estimates for a significant share of EPA's air regulations.³⁸⁹ This strategic behavior has allowed the

³⁸⁰ Memorandum by Am. Coalition for Clean Coal Electricity, Coal Unit Shutdowns (Jan. 26, 2014), *available at* http://www.cleancoalusa.org/sites/all/files/Coal_Unit_Retirements_JAN_26_2014.pdf.

³⁸¹ E-mail from Robert Brenner to Janet McCabe (Aug. 4, 2011 10:22 EST) (on file with Committee).

³⁸² WILLIAM YEATMAN, U.S. CHAMBER OF COMMERCE, EPA'S NEW REGULATORY FRONT: REGIONAL HAZE AND THE TAKEOVER OF STATE PROGRAMS 7 (2012).

³⁸³ *See* Appendix A (list of rules).

³⁸⁴ National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. at 9,304.

³⁸⁵ National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers 76 Fed. Reg. 15,554, 15,582 (Mar. 21, 2011) (to be codified 40 C.F.R. pt. 63).

³⁸⁶ Control of Air Pollution From Motor Vehicles: Tier 3 Motor Vehicle Emission and Fuel Standards, 78 Fed. Reg. 29,816 (proposed May 21, 2013) (to be codified at various pts. of 40 C.F.R.).

³⁸⁷ NAM D. PHAM & DANIEL J. IKENSON, NDP CONSULTING, A CRITICAL REVIEW OF THE BENEFITS AND COSTS OF EPA REGULATIONS ON THE U.S. ECONOMY 13 (2012), *available at* <http://www.nam.org/~media/423A1826BF0747258F22BB9C68E31F8F.ashx>.

³⁸⁸ *Quality Science for Quality Air: Hearing Before the Subcomm. on Energy and the Env't of the H. Comm. on Sci., Space, & Tech.*, 112th Cong. 5 (2011) (statement of Anne E. Smith).

³⁸⁹ *Id.*

Administration to disregard the high cost of CAA regulations as they are seemingly justified by inflated benefits.³⁹⁰

EPA is not the only federal agency taking advantage of PM_{2.5} co-benefits. The Office of Management and Budget (OMB) has routinely provided inflated analysis to Congress of the net benefits and costs of agency regulations, by not properly addressing the inflated use of PM_{2.5} co-benefits. Specifically, OMB's annual report to Congress on the costs and benefits of federal regulations has increasingly relied on PM_{2.5} reductions to justify burdensome rules.

Prescribed by statute, OMB must provide Congress an annual report on the costs and benefits, including quantifiable and non-quantifiable effects, of federal regulations.³⁹¹ In its most recent report, OMB found that “the rules with the highest benefits and the highest costs, by far, come from the Environmental Protection Agency and in particular its Office of Air and Radiation.”³⁹² OMB estimated that EPA's Office of Air and Radiation accounted for nearly \$109.4 to \$629.1 billion in benefits compared to \$29.4 to \$35.3 billion in costs.³⁹³ OMB also found that EPA rules over the past ten years, “account for 58 to 80 percent of the monetized benefits and 44 to 54 percent of the monetized costs” of all federal regulations.³⁹⁴ In 2012 alone, EPA was by far the largest contributor of benefits and costs related to major regulations.³⁹⁵ For example, OMB highlighted that EPA issued three rules totaling \$28.5 to \$77 billion in benefits and \$8.3 billion in costs.³⁹⁶ In comparison, the Department of Energy recorded the next highest balance of benefits and costs with two rules totaling \$1.8 to \$3.4 billion in benefits and \$0.3 billion to \$0.7 billion in costs.³⁹⁷

OMB recognizes that these air rule benefits are “mostly attributable to the reduction in public exposure to a single air pollutant: fine particulate matter” or PM_{2.5}.³⁹⁸ However, “PM_{2.5} benefits . . . figure prominently in regulations whose purpose is not to reduce PM_{2.5},” and OMB has acknowledged that these co-benefits may inflate benefit estimates.³⁹⁹ Further, in 2008, 2010, and 2012 “co-benefits comprise[d] over 50 percent of total benefits . . . and appear to be growing in prominence” under the Obama Administration.⁴⁰⁰ Susan Dudley, former Administrator of the Office of Information and Regulatory Affairs within OMB revealed:

³⁹⁰ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, 2013 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 18 (2013), *available at*

http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/draft_2013_cost_benefit_report.pdf.

³⁹¹ Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 624, 114 Stat. 2763, 2763A-161–62.

³⁹² 2013 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT, *supra* note 389, at 14

³⁹³ *Id.* at 13

³⁹⁴ *Id.* at 14.

³⁹⁵ *Id.* at 22.

³⁹⁶ *Id.* at Table 1-4. Additionally, EPA issued a joint rule with the Department of Transportation accounting for the second largest amount of benefits and costs.

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ Susan E. Dudley, *OMB's Reported Benefits of Regulation: Too Good to Be True?*, REGULATION, Summer 2013, at 28.

⁴⁰⁰ *Id.*

In 2008, 2010, and 2012 in particular, co-benefits from PM_{2.5} reductions represent significant portions of total upper bound benefits (in 2008, the NAAQS for another criteria pollutant, ozone, derived over 70 percent of its benefits from reductions in PM_{2.5}). In 2010, four regulations claimed 100 percent of their benefits from ancillary reductions in PM_{2.5}. . . . In 2012, 99 percent of the reported benefits from the EPA's mercury and air toxics rules . . . were co-benefits.⁴⁰¹

Dudley explained that “OMB’s role is to serve as a check against agencies’ natural motivation to paint a rosy picture of their proposed action.”⁴⁰² However, it appears that OMB, while acknowledging problems associated with the use of co-benefits, has nonetheless endorsed and perpetuated EPA’s inflationary practice. The OMB has essentially codified the efforts of Beale and Brenner. In doing so, the Administration hides the true costs of EPA regulations and undermines the legitimacy of the costs and benefits of all federal regulations. Importantly, nearly all these benefits are calculated using the same underlying data from the original two studies Beale and Brenner used to justify the 1997 NAAQS for PM and ozone. They are the exact same studies that remain hidden from independent analysis almost 20 years later.

b. EPA Continues to Shield Secret Science

“The main sticking point in the current standoff between [Congress] and the EPA appears to involve the protection of subject confidentiality. . . . In fact, the issue of confidentiality appears to be a dodge.”⁴⁰³

– Dr. Geoffrey Kabat, Senior Epidemiologist, Albert Einstein College of Medicine

The Six Cities and ACS II studies provided not only the backbone for EPA’s 1997 Ozone and PM NAAQS,⁴⁰⁴ they continue to be the basis for EPA’s claimed benefits for almost every subsequent major regulation under the CAA.⁴⁰⁵ In response to the continued reticence by the Clinton Administration’s EPA to publicly release the underlying data to the Six Cities and ACS II studies, Congress passed the Shelby Amendment, a rider to the Fiscal Year 1999 Omnibus Appropriations Act.⁴⁰⁶ Upon passage, the Shelby Amendment granted the federal government the right to “obtain, reproduce, publish or otherwise use the data produced from a federal grant [and to] authorize others to receive, reproduce, publish, or otherwise use” such data for federal

⁴⁰¹ *Id.*

⁴⁰² *Id.* at 30.

⁴⁰³ Geoffrey Kabat, Op-Ed., *What Is Really At Stake In The House Committee on Science, Space, and Technology Subpoena Of EPA Data*, FORBES, Sept. 23, 2013, <http://www.forbes.com/sites/geoffreykabat/2013/09/23/what-is-really-at-stake-in-the-republican-partys-subpoena-of-epa-data/>.

⁴⁰⁴ See INNOVATIVE STRATEGIES & ECON. GRP., OFFICE OF AIR QUALITY PLANNING & STANDARDS, ENVTL. PROT. AGENCY, REGULATORY IMPACT ANALYSES FOR THE PARTICULATE MATTER AND OZONE NATIONAL AMBIENT AIR QUALITY STANDARDS AND PROPOSED REGIONAL HAZE RULE (1997), available at <http://www.epa.gov/ttn/oarpg/naaqsfm/ria.html>.

⁴⁰⁵ *Id.*

⁴⁰⁶ Data Access Act, Pub. L. No. 105-277, tit. III, 112 Stat. 2681, 2681-495 (1998).

purposes.⁴⁰⁷ Moreover, the Shelby Amendment mandated that OMB amend Circular A-110 to require federal agencies to ensure that “all data produced under a [federally funded] award be made available to the public through the procedures established under FOIA.”⁴⁰⁸

On October 8, 1999, OMB published its final version of Circular A-110 regarding public access to scientific data underlying agency rule makings.⁴⁰⁹ This Circular implemented and interpreted the provisions of the Shelby Amendment, and dealt with the definition of several ambiguous terms including the meaning of “data,” “published,” and “used by the federal government in developing an agency action that has the force and effect of law.”⁴¹⁰ The effective date was November 8, 1999, and has not been changed in subsequent updates to the circular.⁴¹¹

Despite the enactment of the Shelby Amendment, EPA continued to thwart public access to the underlying data for the two health studies. In its comment on OMB’s proposed changes to Circular A-110, EPA’s Deputy Associate General Counsel, Howard Corcoran, asserted that EPA’s interpretation of the Shelby Amendment did not require EPA to make data available even if it was the result of federal grants, if the researchers relied on any amount of private funding.⁴¹² Interestingly, Mr. Corcoran soon thereafter took over the EPA’s office handling grants to the scientific community.⁴¹³

The same EPA official who argued that the Shelby Amendment did not apply to mixed-funding grants, is now EPA’s gatekeeper for grants.

In January 2000, EPA rejected a Chamber of Commerce FOIA request to access the data behind the Six Cities study.⁴¹⁴ In denying this request, Lydia Wegman, Beale’s ally in the NAAQS process, advanced a legal interpretation on behalf of EPA that the Shelby Amendment did not retroactively apply to rules issued before its enactment.⁴¹⁵ Moreover, Wegman explained that because EPA relied on the findings of the study, rather than the underlying health surveys,

⁴⁰⁷ OMB Circular A-110, “Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations” 64 Fed. Reg. 54,926, 54,930 (Oct. 8, 1999) (codified at 2 C.F.R. § 215.36(c)(1) (2013)).

⁴⁰⁸ Data Access Act, 112 Stat. at 2681-495.

⁴⁰⁹ OMB Circular A-110, 64 Fed. Reg. at 54,926.

⁴¹⁰ *Id.* at 54,930.

⁴¹¹ 2 C.F.R. § 215.36.

⁴¹² Comment by Env’tl. Prot. Agency, Against proposed revision to OMB Circular A-110 (Apr. 5, 1999), *available at* <http://www.thecre.com/ipd/access/agency/1999-04-05f.html>.

⁴¹³ *Id.* Corcoran had been working in the Office of General Counsel under the Grants Law Division since 1988. *See* MGMT. & ORG. DIV., OFFICE OF ADMIN., ENVTL. PROT. AGENCY, WHO’S WHO IN EPA: ORGANIZATION CHARTS AND LISTING OF PRINCIPAL OFFICERS 22 (Oct. 1998 ed.). Beginning in 2001, he became the Director of the Grants Office, *see* CARROLL’S FEDERAL DIRECTORY: EXECUTIVE, LEGISLATIVE, JUDICIAL 580 (Nov./Dec. 2001 ed.), and is still there today. *See* FEDERAL DIRECTORY: EXECUTIVE, LEGISLATIVE, JUDICIAL 488 (Summer 2013 ed.).

⁴¹⁴ Letter from Lydia Wegman, Dir., Air Quality Strategy and Standards Div., Env’tl. Prot. Agency, to William Kovaces, Vice President, Env’tl. & Regulatory Affairs, U.S. Chamber of Commerce 2-3 (Jan. 21, 2000), *available at* http://insideepa.com/index.php?option=com_iwpfile&file=/iwpextra/ee00073.pdf.

⁴¹⁵ *Id.* at 1.

the Agency did not have the underlying data in its possession.⁴¹⁶ Wegman also asserted that the participants in the survey were guaranteed privacy.⁴¹⁷ An OMB review of FOIA requests from 1999 to August 31, 2003, citing the Shelby Amendment found that EPA denied “requests it received because the requested data were generated by projects funded prior to the effective date of its regulation implementing the revision to OMB Circular A-110.”⁴¹⁸

The Agency, both by action and inaction, continually denied Congress and taxpayers their right to data used to justify costly air regulations, contrary to both statutory and OMB requirements. Accordingly, Congress has continued to request the data underlying these studies be made available to Congress and the public. In 2000, HEI finally completed its reanalysis of the Six Cities and ACS II studies, as a substitute for the full release of the data.⁴¹⁹ However, HEI did not have access to all original data, inputs, or outputs. Rather they worked with the original authors to replicate the studies, truncating their ability to perform an effective review. In 2004, the National Research Council issued a report that recommended that EPA discontinue relying on the two data sets.⁴²⁰

Since 1997, serious questions have been raised about the quality of the data, the validity of their use, and the perpetual refusal by EPA — and the researcher institutions — to be transparent with the science so that it could be independently reanalyzed. More than 15 years later, the nominee to be EPA Administrator, Gina McCarthy, would echo Carol Browner’s assertion that only “legitimate scientists” would be given access to the underlying data during her discussions with Senator David Vitter, just prior to a months-long battle to force the Agency to finally acquire and turn over the data for independent reanalysis.⁴²¹ 2013 would turn out to be the most significant year in nearly two decades for uncovering the depth at which the EPA, as well as Harvard and ACS, would go to prevent the public from acquiring or otherwise independently verifying the quality of their secret data.

⁴¹⁶ *Id.* at 2–3.

⁴¹⁷ *See id.* at 3.

⁴¹⁸ GOV’T ACCOUNTABILITY OFFICE, GAO-04-31, UNIV. RESEARCH: MOST FED. AGENCIES NEED TO BETTER PROTECT AGAINST FIN. CONFLICTS OF INTEREST 21–22 (2003), *available at* <http://www.gao.gov/assets/250/240568.pdf> (demonstrating that EPA requests included an attempt to access the data underlying the Harvard Six Cities Study).

⁴¹⁹ DANIEL KREWSKI ET AL., HEALTH EFFECTS INST., REANALYSIS OF THE HARVARD SIX CITIES STUDY AND THE AMERICAN CANCER SOCIETY STUDY OF PARTICULATE AIR POLLUTION AND MORTALITY (July 2000), *available at* <http://pubs.healtheffects.org/getfile.php?u=274>.

⁴²⁰ *See* COMM. ON RESEARCH PRIORITIES FOR AIRBORNE PARTICULATE MATTER, NAT’L RESEARCH COUNCIL, RESEARCH PRIORITIES FOR AIRBORNE PARTICULATE MATTER: IV. CONTINUING RESEARCH PROGRESS (2004).

⁴²¹ Meeting between Gina McCarthy and Sen. Vitter (Mar. 20, 2013).

c. Congress Fights for Transparency and Access to Secret Science

“For years EPA has stonewalled Congress and the American public from gaining access to the research behind a number of significant air regulations. The Agency’s excuses for failing to be transparent are wearing thin, and the underlying data needs to be made available so there can be independent reanalysis.”⁴²²

– Senator David Vitter, Ranking Member, Committee on Environment and Public Works

As Ranking Member of the EPW Committee, Senator Vitter, along with his EPW Republican colleagues made transparency, including data access, a priority throughout the confirmation process for EPA Administrator nominee, then-AA for OAR, Gina McCarthy.⁴²³ On March 4, 2013, Senator Vitter, along with Chairman Smith, sent a letter to McCarthy, seeking the science underpinning new air quality rules and criticizing the agency's lack of transparency and use of secret data.⁴²⁴ The letter pointed out that “high-ranking Administration officials have repeatedly backtracked and reneged on promises to Members of Congress to make the scientific information that underpins the Agency’s basic associations between air quality and mortality available to the public and independent scientists over the last year and a half,” further stating that “not only do these assumed relationships provide the scientific building blocks of virtually all air quality regulations that you have pursued,” but “they also provide a disproportionately significant role in claimed regulatory benefits across the federal government.”⁴²⁵

In response, EPA re-sent inadequate data previously provided to Congress, even while admitting that the data provided were not sufficient to replicate analysis. Furthermore, the Agency echoed the same argument made by former AA for OAR, Mary Nichols, during the 1997 PM and Ozone NAAQS controversy, arguing that the complete set of data underlying the studies is not held by EPA; rather, it is held by the scientific researchers that conducted the relevant research.⁴²⁶

On April 8, 2013, EPW Republicans reiterated their overarching concerns with EPA’s reliance on particular health studies to show that certain pollutants cause chronic mortality, and to calculate extraordinarily high benefit estimates to justify a number of costly CAA regulations.⁴²⁷ In the weeks leading up to April 10, 2013, the EPW Republicans, continued

⁴²² Press Release, S. Comm. on Env’t & Pub. Works Minority Office, Vitter Pushes for Resolution of “Secret Science” Behind Expensive EPA Air Rules (Mar. 17, 2014), *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=28fbcaf8-bfe1-6d91-5ec8-da554f9fa85f.

⁴²³ See *Hearing on the Nomination of Gina McCarthy to be Administrator of the U.S. Environmental Protection Agency Before the S. Comm. on Env’t & Pub. Works*, 113th Cong. (2013).

⁴²⁴ Letter from Sen. Vitter & Rep. Lamar Smith, Chairman, H. Comm. on Sci., Space, & Tech., to Gina McCarthy (Mar. 4, 2013), *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=f840b59e-c614-4ea2-b6a0-a9b16655b982.

⁴²⁵ *Id.* at 1.

⁴²⁶ Letter from Bob Perciasepe to Sen. Vitter 2 (May 1, 2013) (on file with Committee).

⁴²⁷ See Press Release, S. Comm. on Env’t & Pub. Works Minority Office, Eye on the EPA: Failure to Share Scientific Data with Congress, American Public (Apr. 8, 2013), *available at*

negotiations over McCarthy's confirmation, and remained focused on increasing transparency at the EPA.⁴²⁸ A key component of the negotiations: EPA needed to finally turn over the data — coded to mitigate disclosure of confidential information — from the Six Cities study, the ACS study, and additional research based on that data. Specifically, EPA was to release the full set of data files for the ACS study and the Six Cities study as well as the underlying data from additional long term cohort studies that relied on updates from the Six Cities and ACS studies, including: Krewski et al. (2009); Pope et al. (2002); Pope et al. (2009); Krewski et al. (2000); Laden et al. (2006); and Lepeule et al. (2012).

One of EPA's excuses for preventing release of the data was it contained personally identifiable information and could jeopardize the confidentiality of individuals that participated in the studies. However, from day one of the McCarthy negotiations, EPW Republicans made clear their request included the coding of Personal Health Information (PHI) to protect the identity of individuals included in the decades-old data sets. This is not a novel undertaking as the U.S. Department of Health and Human Services recently issued guidelines on how to de-identify medical records in order to implement elements of the new healthcare law. In addition, EPA itself worked with the Centers for Disease Control and Prevention (CDC) to remove personal identifiers from data provided by Harvard University and released information on deaths originally obtained from the National Death Index (NDI), providing evidence that data containing personal information can be de-identified and released.

Moreover, many of the input files to the models do not contain confidential information. This was confirmed by HEI in its 2000 reanalysis report,⁴²⁹ as the authors noted that certain input files (notably the Mor6C.file) “did not contain any information that could be used to identify the individual study participants.”⁴³⁰ The input and output files are fundamental to conducting reanalysis, so Congress repeatedly requested that EPA: (1) obtain all the data files; (2) determine which data files pose a threat to privacy; (3) immediately release all data files that do not pose a threat to privacy; and (4) investigate measures to remove all personal health information from the files that contain confidential data prior to release. However, EPA outright failed to obtain the full universe of data underlying these studies in spite of legal requirements and Congressional requests.

Another excuse EPA advanced was that it was unwilling to obtain and release certain data because the research was funded through a mixture of public and private money. However, OMB's Circular A-110 made clear that the data access provisions apply to mixed (public/private) funding research efforts, as “the amended Circular shall apply to all Federally-

www.epw.senate.gov/public/index.cfm?FuseAction=Minority.Blogs&ContentRecord_id=eb0a2a04-0e21-b220-1af2-61f5a501d46e&Region_id=&Issue_id=

⁴²⁸ See Press Release, S. Comm. on Env't & Pub. Works Minority Office, Vitter, EPW Committee Republicans Release Requests for Gina McCarthy (Apr. 10, 2013), *available at*

www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=f52a53ab-faa7-77e3-2e57-df15459b241b&Region_id=&Issue_id=

⁴²⁹ See KREWSKI ET AL., *supra* note 418.

⁴³⁰ *Id.* at 42.

funded research, regardless of the level of funding or whether the award recipient is also using non-Federal funds.”⁴³¹ Accordingly, EPA's mixed funding excuse contradicts OMB's guidance.

On May 9, 2013, the EPW Republicans boycotted the Committee nomination vote of McCarthy. The boycott was specifically related to the lack of transparency at the Agency, and in significant part to the EPA failing to uphold its agreement to finally acquire and release the underlying data to the key studies. In committing to the boycott, Senator John Barrasso (R-WY), said:

The new nominee to be EPA Administrator has been extremely unresponsive with the information we requested. We're not asking to amend any bedrock environmental laws. We're asking for access to the scientific data and reasoning behind the justification for expensive new rules and regulations that continue to cause high unemployment. We're simply requesting that Ms. McCarthy and this Administration honor its commitment to transparency-that's what they promised.⁴³²

In a letter dated June 12, 2013, EPW Republicans reiterated their request for the underlying data, saying, “EPA has continually refused to make public the basic scientific data underlying virtually all of the Agency's claimed benefits from Clean Air Act rules. Everyone agrees on the importance of clean air, but EPA needs to release the secret data they use in formulating rules.”⁴³³ In addition, the letter highlighted:

The EPA's new Clean Air regulations, including the upcoming ozone standard, are expected to be some of the most costly the federal government has ever issued. Relying on secret data to support these rules is not acceptable. The public and outside scientists must be able to independently verify the EPA's claims, especially when the results are contradicted by so many other studies.⁴³⁴

Finally, on July 9, 2013, the EPA acquiesced to EPW Republicans' transparency requests, including initiating the process of acquiring and turning over the data available to the Agency. EPW Republicans agreed to stop blocking nominee McCarthy in exchange for EPA initiating the process of obtaining the requested scientific information, as well as reaching out to relevant institutions for information on how to de-identify and code personally identifying information from any of the data the institutions and the Agency continued to withhold. The agreement included the understanding that for the first time outside verification would be possible so as to permit independent re-analysis of the benefits claims for a suite of major air regulations developed under the system established by Brenner and Beale.

⁴³¹ OMB Circular A-110, “Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,” 64 Fed. Reg. 5,684, 5,684 (Feb. 4, 1999).

⁴³² Press Release, S. Comm. on Env't & Pub. Works Minority Office, EPW Committee Delays Gina McCarthy Nomination Vote (May 9, 2013), *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=8aae983e-cb8e-03f6-0743-ce4913c8ca7e.

⁴³³ Press Release, S. Comm. on Env't & Pub. Works Minority Office, Vitter Reiterates Request for Release of EPA Secret Data (June 12, 2013), *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=3933c47c-beda-3e56-0923-e866c7879b04.

⁴³⁴ *Id.*

On August 1, 2013, after two years of requests, Chairman Lamar Smith (R-TX) of the House of Representatives Committee on Science, Space, and Technology (House SST Committee) subpoenaed EPA for essentially the same datasets EPW Republicans negotiated to receive from the Agency.⁴³⁵ On August 21, 2013, pursuant to the agreement regarding McCarthy's confirmation, EPW Republicans received the first tranche of scientific data in what was anticipated to be a series of responses from EPA.⁴³⁶ Over a period of several months, the EPA transferred data as they acquired it to both the Senate EPW Committee and the House SST Committee. Despite the House SST Committee issuing a subpoena, the data provided to both Committees was identical. Coincidentally, the eventual release of such data occurred around the same time EPW Republican staff learned of Beale's decades-long fraud against EPA and American taxpayers.

After fifteen years of delays and excuses, EPA finally reached out to the institutions (ACS, Harvard, and HEI) to request data, as well as solicit advice on possible coding techniques. EPA waited nearly three months to turn over the institutions' responses to its inquiry. EPA's cover letter to EPW Republicans once again listed all the same reasons why EPA — and by extension, the institutions — would not be able to transfer all the data despite the House SST Committee subpoena and EPW Republicans' agreement on McCarthy. The list of excuses are familiar: the data sets are not held or owned by the EPA;⁴³⁷ the institutions will not release complete, unmodified datasets because of concerns about confidential personal health information;⁴³⁸ and that the datasets are only available for legitimate scientists to apply for access to through the institutions.⁴³⁹

Individually, ACS disapproved of Congress's interest in accessing the data for independent verification,⁴⁴⁰ and HEI illustrated reasons why the datasets, if stripped of confidential information, would be insufficient for full replication.⁴⁴¹ Harvard echoed HEI, while also pointing out, "A great deal of time has elapsed since data collection began in these long-term air pollutions studies. Existing electronic data from the early years of the HSC study may have deteriorated, or may be stored on media that cannot now be read or deciphered by any available devices or software."⁴⁴² Accordingly, EPA, Harvard and ACS, have stated the data supporting these studies, which led to the creation and implementation of major CAA rules, either no longer exists, is of such poor quality that modeling results cannot be replicated, or has yet to go through de-identification of the data so as to facilitate independent analysis.

⁴³⁵ See Resolution Offered by Rep. Smith, H. Comm. on Sci, Space, & Tech., 113th Cong. (2013) (enacted).

⁴³⁶ Press Release, S. Comm. on Env't & Pub. Works Minority Office, EPA Takes First Steps in Acquiring and Releasing Secret Data (Aug. 21, 2013), *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=A122774F-A015-51D8-A7EE-8954668ABECD.

⁴³⁷ Letter from Lek Kadeli, Principal Deputy Assistant Adm'r, Office of Research & Dev., Env'tl. Prot. Agency, to Sen. Vitter 2 (Oct. 30, 2013) (on file with Committee).

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ See Letter from Otis W. Brawley, Chief Med. Officer & Exec. Vice-President for Research & Cancer Control Sci., Am. Cancer Soc., to Lek Kadeli (Aug. 19, 2013) (on file with Committee).

⁴⁴¹ See Letter from Daniel S. Greenbaum, President, Health Effects Inst., to Lek Kadeli (Aug. 27, 2013) (on file with Committee).

⁴⁴² Letter from Catherine Breen, Senior Dir., Office for Sponsored Program, Harvard University, to Lek Kadeli 2 (Sept. 25, 2013) (on file with Committee).

On March 11, 2014, Senator Vitter sent a letter to the EPA inquiring on the status of de-identifying the datasets.⁴⁴³ EPA should have taken critical steps to implement one of the numerous options for protecting personal health information. Currently, it should be possible to independently analyze all of EPA's health benefits claims as there should no longer be any excuse for withholding data from the public — particularly the excuses related to personal health information.

Although EPA is supposed to be adopting recommendations for de-identifying data to mitigate any sharing of personal health information pursuant to their agreement with EPW Republicans, it appears that Congress has acquired either all the data that still exists, or all data the institutions are willing to provide for fear of their data being discredited. Congress has received written confirmation from several scientists that attest to the fact that there exists no way to reanalyze the data provided thus far by the EPA.⁴⁴⁴ There continues to be no opportunity for independent scientific scrutiny of the conclusions EPA has made on major air regulations based on the data utilized from the time both Brenner and Beale were at the EPA.

In light of continued concerns, on March 17, 2014, Senator Vitter sent a letter to Dr. Francesca Grifo, EPA's Scientific Integrity Official, regarding concerns with EPA continuing to violate the Organization for Co-operation and Economic Development's (OECD) guidelines for "Best Practices for Ensuring Scientific Integrity and Preventing Misconduct."⁴⁴⁵ The letter particularly focused on data-related misconduct ("not preserving primary data," "bad data management, storage," "withholding data from the scientific community") and outlining the serious concern that Harvard, American Cancer Society, the researchers, and the EPA were likely responsible for similar data-related misconduct as an OECD member country.

⁴⁴³ Letter from Sen. Vitter to Bob Perciasepe (Mar. 11, 2014), *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=6de2a2b9-ad38-41bc-a0c4-c909b391a526.

⁴⁴⁴ *See, e.g.*, Letter from Julie E. Goodman, Principal, Gradient Corp., to Sen. Vitter, Harvard Six Cities and American Cancer Society Cancer Prevention II Study Data (Mar. 17, 2014) (on file with Committee); Letter from Stanley Young, Assistant Dir. for Bioinformatics, Nat'l Inst. of Statistical Sciences, to Sen. Vitter (Mar. 7, 2014) (on file with Committee); Letter from Michael Honeycutt, Dir., Toxicology Div., Tex. Comm'n on Env'tl. Quality, to Rep. Smith (Nov. 8, 2013) (on file with Committee).

⁴⁴⁵ Letter from Sen. Vitter, to Dr. Francesca Grifo (March 17, 2014), *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=28fbcaf8-bfe1-6d91-5ec8-da554f9fa85f.

CONCLUSION

The legacy of John Beale and his best friend Robert Brenner is a permanent tarnishing of the concept of public service as it is executed at Environmental Protection Agency (EPA). In sharp contrast to the ideal neutral, non-biased, highly specialized public servant, Beale's lack of training on the environment, economics, or science meant he did not have the competency to make the important judgment calls that the Agency delegated to him. By putting him in charge of critical and highly technical issues, it appears the EPA valued political outcomes above all else and abandoned a deliberate science-based process to create policies that best serve the public. In his personal fraud, Beale took advantage of his stature at the Agency and acted selfishly to advance his own personal agenda. In his professional capacity, Beale, along with certain EPA career staff, executed a similar strategy to accomplish the singular goals of extreme environmentalists. Disturbingly, Beale was lionized by career staff that witnessed and aided him in his efforts and was rewarded by his superiors. Beale received an excessive retention bonus and pay in excess of the statutory threshold because of the value EPA placed on the work he did on the 1997 National Ambient Air Quality Standards (NAAQS). Even when his web of lies began to disintegrate, his coworkers stuck their heads in the sand, refusing to acknowledge the painfully obvious fact that their hero was nothing more than a fraudster.

It is now clear that Beale, a convicted con artist, was a central player in one of EPA's most significant rulemakings, the 1997 NAAQS for Ozone and Particulate Matter (PM). This effort codified EPA's now customary practice of using fine particulates (PM_{2.5}) to inflate the benefits of nearly all regulations issued under the Clean Air Act. Yet the science supporting nearly all of EPA's alleged benefits remain hidden and unverified. Moreover, Beale and Brenner introduced a series of actions that collectively comprise what this report refers to as "EPA's Playbook" for pushing through controversial rulemakings. These actions include a heavy handed managing of the interagency review process in a way that compresses timelines through sue-and-settle agreements and deprives other stakeholders of the necessary time to conduct meaningful analysis; it is an outcome driven strategy, not one based in science; and whose ends justify whatever means are necessary to push through EPA staffs' desired outcome.

Since the Obama Administration assumed power, EPA's Playbook has been resurrected and implemented with zeal with dire consequences for some Americans. On March 10, 2014, *The New York Times* reported on the story of an 81-year-old Ernestine Cundiff of Columbus, Ohio, a diabetic with deteriorating health, living on a fixed income. Ms. Cundiff now struggles to pay her energy bills as a result of EPA air regulations that have shut down electricity generation in her part of the country. As the *Times* notes, situations like Ms. Cundiff's, "although particularly acute in the Northeast . . . ha[ve] spread to other regions of the country." It will continue to spread as EPA's efforts close scores of power plants, which negatively affects struggling Americans. According to the American Coalition for Clean Coal Electricity, EPA's draconian policies will force over 330 electric generating units to close or to be retrofitted with expensive conversions. The people impacted by these closures are everyday Americans like Ms. Cundiff, and so the legacy of John Beale lives on at EPA even though the man himself is currently behind bars.

APPENDIX A

EPA Regulations Justified by PM 2.5 Benefits Since 1997		
Year	Rule	FR Citation
1999	Regional Haze Standards	64FR35714
2000	Control of Air Pollution From New Motor Vehicles: Tier 2 Motor Vehicle Emissions Standards and Gasoline Sulfur Control Requirements	65FR6698
2001	Control of Air Pollution from New Motor Vehicles: Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements	66FR5001
2004	Interstate Ozone Transport: Response to Court Decisions on the NOX	69FR21603
2004	Control of Emissions of Air Pollution From Nonroad Diesel Engines and Fuel	69FR38957
2005	Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NOX	70FR25162
2005	National Emission Standards for Hazardous Air Pollutants: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors (Phase I Final Replacement Standards and Phase II)	70FR59402
2005	Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations	70FR39137
2006	Standards of Performance for Stationary Compression Ignition Internal Combustion Engines	71FR39154
2006	National Ambient Air Quality Standards for Particulate Matter	71FR61144
2007	Control of Hazardous Air Pollutants From Mobile Sources	72FR8428
2007	Clean Air Fine Particle Implementation Rule	72FR20586
2008	National Ambient Air Quality Standards for Ozone	73FR16436
2008	Control of Emissions of Air Pollution From Locomotive Engines and Marine Compression-Ignition Engines Less Than 30 Liters per Cylinder	73FR25098
2008	Control of Emissions From Nonroad Spark-Ignition Engines and Equipment	73FR59034
2008	National Ambient Air Quality Standards for Lead	73FR66964
2010	National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines	75FR9648
2010	Control of Emissions From New Marine Compression-Ignition Engines at or Above 30 Liters per Cylinder	75FR22896
2010	Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule	75FR25324
2010	Primary National Ambient Air Quality Standard for Sulfur Dioxide	75FR35520
2010	National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines	75FR51570
2010	National Emission Standards for Hazardous Air Pollutants From the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants	75FR54970
2011	NSPS/Emission Guidelines (EG) for Sewage Sludge Incinerators	76FR15372
2011	NESHAP for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters	76FR15608
2011	NESHAP for Area Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters	76FR15554
2011	Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units	76FR15704
2011	Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals	76FR48207
2011	Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles	76FR57105
2012	National Emission Standards and Standards of Performance: Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units	77FR9304
2012	Standards of Performance for Petroleum Refineries; Standards of Performance for Petroleum Refineries for Which Construction, Reconstruction, or Modification Commenced After May 14, 2007 (amendments of June 24, 2008 final rule)	77FR 56422
2012	2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards (joint rule with NHTSA)	77FR 62624
2013	National Ambient Air Quality Standards for Particulate Matter	78FR3085