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17
18 **UNITED STATES DISTRICT COURT**
19 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
20 **WESTERN DIVISION**

21
22

23 UNITED STATES OF AMERICA,) Case No. 2:05-cr-00017 (ABC)
24)
25 Plaintiff,) **MEMORANDUM OF POINTS AND**
26) **AUTHORITIES IN SUPPORT OF**
27 v.) **MOTION OF NON-PARTIES**
28) **CONGRESSMEN JOE BARTON**
29) **AND GREG WALDEN TO UNSEAL**
30 ANNE MASTERS SHOLTZ,) **PLEADINGS**
31)
32 Defendant.) **Hearing Date: Dec. 21, 2009**
33) **Hearing Time: 2:00 p.m.**
34) **Before: Hon. Audrey B. Collins**
35

Memorandum of Points and Authorities in Support of Motion to Unseal Pleadings

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1 By their Motion to Unseal, Congressmen Joe L. Barton and Greg Walden –
2 respectively, the Ranking Members of the Committee on Energy and Commerce of
3 the U.S. House of Representatives and its Subcommittee on Oversight and
4 Investigations – seek access to all sealed pleadings filed by the United States and
5 defendant Anne Masters Sholtz in this now-closed criminal case.
6

7
8 The *Sholtz* case concerns fraudulent activities that were carried out in the
9 context of a Southern California carbon cap-and-trade system – the Regional
10 Clean Air Incentives Market (“RECLAIM”) – that was put in place in 1993. As
11 the Court is no doubt aware, Congress is now considering climate change
12 legislation that would, if enacted, implement a carbon cap-and-trade system for the
13 nation as a whole. Under these circumstances, the sealed pleadings in the *Sholtz*
14 case may provide insights into the RECLAIM system’s vulnerabilities to fraud that
15 could be very valuable to the Congress as it considers national climate change
16 legislation.
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21 As explained below, the two Members have a presumptive right to judicial
22 records under both the First Amendment and the common law right of access, and
23 there are no countervailing interests that could overcome their presumptive right
24 of access, particularly now that this case is closed. Accordingly, the Court should
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1 promptly unseal all pleadings that were previously sealed in this case.

3 BACKGROUND

4 Climate change is one of the most complex and controversial issues of our
5 time. In an effort to address climate change concerns, Congress is now
6 considering legislation aimed at reducing U.S. and global greenhouse gas
7 emissions. Earlier this year, for example, the House Committee on Energy and
8 Commerce, and then the House itself, passed a bill – H.R. 2454, “The American
9 Clean Energy and Security Act of 2009,” 155 Cong. Rec. H7471, H7686 (2009) –
10 that addressed climate change.¹ According to the Congressional Budget Office
11 (“CBO”), H.R. 2454

12 would limit or cap the quantity of certain greenhouse
13 gases (GHGs) emitted from facilities that generate
14 electricity and from other industrial activities over the

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21 ¹ Pursuant to Rule X.1(f), Rules of the House of Representatives, 111th Cong.
22 (2009), *available on-line at*
23 http://www.rules.house.gov/111/LegText/111_hres_ruleschnge.pdf, the
24 Committee has initial jurisdiction over, among other things, the exploration,
25 production, storage, supply, marketing, pricing and regulation of energy resources
26 including all fossil fuels, solar energy, and other unconventional or renewable
27 energy resources; conservation of energy resources; energy information generally;
28 the generation and marketing of power (other than by federally chartered or
federal regional power marketing authorities); national energy policy generally;
and public health.

1 2012-2050 period. The Environmental Protection
2
3 Agency (EPA) would establish two separate regulatory
4
5 initiatives known as cap-and-trade programs -- one
6
7 covering emissions of most types of GHGs and one
8
9 covering hydrofluorocarbons (HFCs). EPA would issue
10
11 allowances to emit those gases under the cap-and-trade
12
13 programs. Some of those allowances would be auctioned
14
15 by the federal government, and the remainder would be
16
17 distributed at no charge.

18
19 CBO Cost Estimate, H.R. 2454, American Clean Energy and Security Act of 2009
20
21 at 1 (June 5, 2009), *available on-line at*
22
23 <http://www.cbo.gov/ftpdocs/102xx/doc10262/hr2454.pdf>.

24 H.R. 2454 would create the largest carbon credit trading market in the
25
26 world, and CBO has estimated the costs associated with it at approximately \$821
27
28 billion and the revenue associated with it at \$846 billion over the next 10 years.
29
30 *Id.* at 2. If ultimately enacted and signed into law, this legislation would represent
31
32 the most substantial change in U.S. environmental policy since enactment of the

1 Clean Air Act in 1970.²

2
3 The Senate has also begun to move on climate change legislation. For
4 example, the Senate Committee on Environment and Public Works recently passed
5 S. 1733, "The Clean Energy Jobs and American Power Act." See Press Release,
6 Senate Committee on Environment and Public Works, Boxer Statement on
7 Committee Passage of S. 1733 – The Clean Energy Jobs and American Power Act
8 (Nov. 5, 2009), available on-line at
9 [http://epw.senate.gov/public/index.cfm?FuseAction=Majority.PressReleases&Con](http://epw.senate.gov/public/index.cfm?FuseAction=Majority.PressReleases&ContentRecord_id=c512ac4d-802a-23ad-4884-2b95a8405efe)
10 tentRecord_id=c512ac4d-802a-23ad-4884-2b95a8405efe. The Senate bill is
11 conceptually similar, although not identical, to H.R. 2454.³
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16 It is also common knowledge that passage of comprehensive climate change
17 legislation is a high priority for the Obama Administration. See, e.g.,
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20 ² See, e.g., Chip Jacobs, *An Air of Deceit*, Pasadena Weekly, Aug. 20, 2009,
21 available on-line at
22 http://www.pasadenaweekly.com/cms/story/detail/an_air_of_deceit/7616; John
23 Carey, *House Passes Carbon Cap-and-Trade Bill*, BusinessWeek, June 26,
24 2009, available on-line at
25 http://www.businessweek.com/blogs/money_politics/archives/2009/06/house_passes_ca.html.

26 ³ See, e.g., Bradford Plumer, *The New Republic: The Senate vs. House Climate*
27 *Bill*, NPR, Oct. 1, 2009, available on-line at
28 <http://www.npr.org/templates/story/story.php?storyId=113376311&ft=1&f=1057>.

1 <http://www.whitehouse.gov/issues/energy-and-environment>. And, finally, the
2
3 United States will participate in international negotiations regarding climate
4 change beginning December 7, 2009 in Copenhagen. *See* Bruce Stokes,
5 *Countdown to Copenhagen*, National Journal, Oct. 31, 2009, *available on-line at*
6 http://www.nationaljournal.com/njmagazine/cs_20091031_9295.php.
7
8

9 It is against this momentous and rapidly moving backdrop that the two
10 Members come before this Court. Congressman Barton – currently the Ranking
11 Member and formerly the Chairman of the House Committee on Energy and
12 Commerce – is keenly aware of and deeply involved in the issues at stake in
13 climate change legislation. Congressman Barton has been a leader of efforts in the
14 House to pass comprehensive national energy policy legislation, and is committed
15 to passing legislation that will promote an environment of high energy supply, low
16 demand, consumer-friendly prices and environmental protection. *See* Biography,
17 U.S. Representative Joe L. Barton, *available on-line at*
18 <http://joebarton.house.gov/Back.aspx?Page=Biography>.⁴ Congressman Walden,
19 as Ranking Member of the Subcommittee on Oversight and Investigations, is
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25 ⁴ *See also* John J. Fialka, *GOP Offers Democrats Swap for Alaska Oil-Drilling*
26 *Rights*, Wall Street Journal, Oct. 3, 2002, *available online at*
27 <http://online.wsj.com/article/SB1033597004408817033.html?mod=googlewsj>
28 (Barton is “House GOP’s leading expert on energy policy”).

1 similarly focused on climate change issues and energy policy.
2

3 While the two Members recognize that establishing a national carbon
4 trading market that is intended to curb greenhouse gas emissions is a staggeringly
5 complex task, they also recognize that, as a result of RECLAIM, Southern
6 California already has experience with carbon cap-and-trade.⁵ The two House
7 Members believe it is critical that Congress understand RECLAIM and its
8
9 vulnerabilities to fraud as Congress considers legislation that, by some estimates,
10 will create a market for greenhouse-gas permits worth more than \$5 trillion by
11
12 2035. *See* Chip Jacobs, *An Air of Deceit, supra*. In particular, they are concerned
13 that as Congress considers legislation that would require EPA to establish a broad,
14
15 national cap-and-trade program, not enough is known about the difficulties that
16
17 EPA and other regulatory authorities may face in protecting a national cap and
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19 trade program against the kinds of fraudulent activities that are at the heart of the
20
21 *Sholtz* case.
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23
24 ⁵ We understand that the South Coast Air Quality Management District
25 (“SCAQMD”) – a state agency charged with regulating air quality in Southern
26 California – established RECLAIM in 1993, Indictment ¶¶ 1-3 (Jan. 12, 2005),
27 pursuant to which regulated stationary sources of air pollution received
28 RECLAIM trading credits that represented a revocable license – which could be
bought, sold or transferred – to emit a specific amount of pollution. *Id.* ¶ 3.

1 Ms. Sholtz apparently recognized early on that there was a business
2 opportunity in the world of pollution credit trading and, according to the
3 Indictment in this case, she founded several companies to pursue that opportunity.
4 Indictment ¶ 4. By all accounts, Ms. Sholtz was at the forefront of “harness[ing]
5 Wall Street-style incentives” to reduce greenhouse gas emissions. Chip Jacobs,
6 *Keeping Their Distance*, Pasadena Weekly, Mar. 28, 2003, available online at
7 <http://chipjacobs.com/articles/environmental/keeping-their-distance/>.
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10 Within a relatively short period of time, however, it appears that complaints
11 began to surface about Ms. Sholtz’s business dealings. In 2002, SCAQMD
12 notified the EPA about complaints that Ms. Sholtz had defrauded nine companies
13 of millions of dollars. See Chip Jacobs, *Up in Smoke*, Pasadena Weekly, May 1,
14 2008, available online at
15 http://www.pasadenaweekly.com/cms/story/detail/up_in_smoke/5927/. In June
16 2004, a criminal complaint charging Ms. Sholtz with seven counts of wire fraud
17 related to her pollution credit trading activity was filed with this Court. In January
18 2005, she was indicted on six counts of wire fraud, but ultimately plead guilty to
19 just one count of wire fraud. See Plea Agreement for Defendant Anne Masters
20 Sholtz (April 25, 2005). Ms. Sholtz was not sentenced until April 2008. See
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1 Judgment and Probation/Commitment Order (Apr. 15, 2008). Both before and
2 after the filing of the Indictment, a number of pleadings were filed under seal by
3 both the Justice Department and Ms. Sholtz.
4

5
6 Earlier this year, Congressmen Barton and Walden began examining the
7 *Sholtz* case as part of their effort to inform themselves and their colleagues about
8 issues likely to be important in the debate over cap-and-trade legislation. They
9 and their staffs gathered and examined press reports and the unsealed portions of
10 the record in this case. They also wrote to the EPA to request additional
11 information. *See* Letter from the Honorable Joe Barton and the Honorable Greg
12 Walden to Lisa Jackson, Administrator, EPA (May 7, 2009), attached as Exhibit 1.
13 While the EPA answered some questions, it declined to comment on other aspects
14 of the *Sholtz* case on the ground that the Justice Department had handled the
15 litigation. *See* Letter from Arvin R. Ganesan, Deputy Associate Administrator,
16 EPA to the Honorable Joe Barton (June 8, 2009), attached as Exhibit 2. The two
17 Members then attempted to reach out to the Justice Department for additional
18 information but were rebuffed.
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25 As a result of the partially sealed record in this case, and the EPA's and the
26 Justice Department's unwillingness to share more information about the case, the
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1 Congressmen at this time have only an incomplete understanding of the fraud
2 perpetrated by Ms. Sholtz, and an imperfect understanding of the difficulties state
3 and federal regulators faced in rooting out and prosecuting this fraud. Unsealing
4 the complete record in this now-closed case would help to remedy this information
5 gap to the benefit of the Congress, and the public more generally.
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8 9 ARGUMENT

10 “A legislative body cannot legislate wisely or effectively in the absence of
11 information respecting the conditions which the legislation is intended to affect or
12 change; and where the legislative body does not itself possess the requisite
13 information – which not infrequently is true – recourse must be had to others who
14 do possess it.” *McGrain v. Daugherty*, 273 U.S. 135, 175, 47 S. Ct. 319, 329
15 (1927). While Congress has many ways to obtain information, it is appropriate in
16 this case for the two House Members to seek recourse from this Court since the
17 records they seek have been sealed by the Court.
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22 The two Members, along with the public generally, have a general right to
23 inspect and copy judicial records and documents. *Nixon v. Warner Commc’ns,*
24 *Inc.*, 435 U.S. 589, 597, 598 n.7, 98 S. Ct. 1306, 1312 and n.7 (1978). This right
25 is grounded in the First Amendment as well as in the common law, and extends to
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1 documents filed in pre-trial proceedings, in the trial itself, and in post-trial
2 proceedings. See, e.g., *Kamakana v. City & County of Honolulu*, 447 F.3d 1172,
3 1178-79 (9th Cir. 2006); *CBS, Inc. v. U.S. Dist. Court*, 765 F.2d 823, 825 (9th Cir.
4 1985); *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143, 1145-46 (9th Cir.
5 1983). Each right is grounded in a different theory of access, but the underlying
6 purpose is the same: public access promotes trustworthiness in the judicial
7 process, helps curb abuses, and provides the public with a more complete
8 understanding of the judicial system. *Nixon*, 435 U.S. at 597-98.

9
10 At the same time, the federal courts have an inherent supervisory power
11 over their own records, which encompasses the authority to seal records which
12 “might . . . become a vehicle for improper purposes.” *Nixon*, 435 U.S. at 598. As
13 a result, the two Members’ presumptive right of access to the sealed *Sholtz*
14 pleadings can be overcome, but only by a showing of a strong countervailing
15 interest. *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995). As we now
16 show, there is no such countervailing interest here.⁶

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24 ⁶ The two Members clearly have a right to be heard on this issue. See, e.g.,
25 *Globe Newspaper Co., v. Superior Court*, 457 U.S. 596, 609 n.25, 102 S. Ct. 2613,
26 2621 n.25 (1982); *Phillips v. Gen. Motors Corp.*, 289 F.3d 1117, 1123-24 (9th Cir.
27 2002); *Oregonian Publ’g Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1466 (9th Cir.
28 1990); *Wilson v. Am. Motors Corp.*, 759 F.2d 1568, 1570 (11th Cir. 1985); *United*
(continued...)

1 **I. The House Members Have a First Amendment Right of Access.**

2
3 Two considerations govern the issue of whether the two House Members
4 have a First Amendment right of access to the pleadings filed in the *Sholtz* case:
5 first, whether the documents at issue are traditionally open to public inspection
6 and, second, whether public access plays a significant positive role in the
7 functioning of the particular process in question. *See, e.g., Press-Enterprise Co. v.*
8 *Superior Court*, 464 U.S. 501, 510-12, 104 S. Ct. 819, 825-26 (1984); *Globe*, 457
9 U.S. at 605; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580-81, 100 S.
10 Ct. 2814, 2829-30 (1980).
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15 While virtually all proceedings and records in a criminal case have
16 traditionally been open to the public, *id.* at 576-78, *Globe*, 457 U.S. at 603-07, a
17 narrow range of documents are not subject to disclosure because they are of the
18 type of records “traditionally . . . kept secret for important policy reasons.” *Times*
19 *Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989). This Circuit has
20 identified two such categories of documents: grand jury transcripts and warrant
21 materials in the midst of a pre-indictment investigation. *Id.*
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26 ⁶(...continued)
27 *States v. McVeigh*, 918 F. Supp. 1452, 1456-57 (W.D. Okla. 1996); *Daines v.*
28 *Harrison*, 838 F. Supp. 1406, 1408 (D. Colo. 1993).

1 While the docket sheet does not reveal the exact nature of all the documents
2
3 that have been sealed in this case, there is no indication that any of them are grand
4 jury transcripts or warrant materials. Rather, the sealed documents appear to be
5 routine motions, orders, transcripts and briefs, that is, precisely the kinds of
6 records to which a constitutional right of access clearly attaches. *See, e.g., In re*
7 *Copley Press, Inc.*, 518 F.3d 1022 (9th Cir. 2008) (plea colloquy transcripts);
8 *Oregonian*, 920 F.2d 1462 (plea agreement); *Seattle Times Co. v. U.S. Dist. Court*,
9 845 F.2d 1513 (9th Cir. 1988) (briefs for pretrial detention hearing); *In re Wash.*
10 *Post Co.*, 807 F.2d 383, 389-90 (4th Cir. 1986) (plea and sentencing documents);
11 *CBS*, 765 F.2d 823 (motion to reduce sentence and response). Indeed, most of the
12 sealed documents were filed after the plea agreement was entered, and this Circuit
13 has found “no principled basis for affording greater confidentiality to post-trial
14 documents and proceedings than is given to pretrial matters,” *CBS*, 765 F.2d at
15 825, nor is this Circuit “readily add[ing] classes of documents” to those which
16 qualify for sealing. *Kamakana*, 447 F.3d at 1185.

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23 In addition, it is clear that public access plays a significant positive role in
24 the functioning of the type of pre- and post-trial proceedings in which the sealed
25 documents were filed in this case. *See, e.g., Waller v. Georgia*, 467 U.S. 39, 45-
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28

1 47, 104 S. Ct. 2210, 2214-16 (1984) (applying right of access to pretrial
 2 suppression hearing); *Press-Enterprise*, 464 U.S. at 505-11 (voir dire proceedings
 3 should be open based on importance of right of public access to criminal trials);
 4 *United States v. Brooklier*, 685 F.2d 1162, 1170-71 (9th Cir. 1982) (refusing to
 5 distinguish between pre-trial proceedings and trial itself for First Amendment
 6 purposes). The importance of public access is enhanced in this case because the
 7 information the two Members seek may be instructive on a public policy issue of
 8 significant interest and import to the nation as a whole.⁷

13 **II. The House Members Have a Common Law Right of Access.**

14 The two House Members also have a presumptive common law right of
 15 access to the sealed *Sholtz* records. *Hagestad*, 49 F.3d at 1434; *Valley Broad. Co.*
 16 *v. U.S. Dist. Court*, 798 F.2d 1289, 1293 (9th Cir. 1986). This common law right
 17 attaches to all documents filed in a criminal case and exists even if a First
 18 Amendment right is lacking. *See, e.g., United States v. Schlette*, 842 F.2d 1574,
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 24 ⁷ Although this Court must take both considerations into account – and while
 25 both counsel in favor of unsealing in this case – the Supreme Court has never held
 26 that both must be satisfied in order for a First Amendment right to attach. *See,*
 27 *e.g., Globe*, 457 U.S. at 605 n.13 (finding argument that specific proceeding did
 28 not enjoy a tradition of public access “unavailing” because “as a general matter
 criminal trials have long been presumptively open”).

1 1582-84 (9th Cir. 1988).

2
3 To assert a common law right, the two House Members need only “make a
4 threshold showing of a legitimate need for disclosure,” *United States v. Kaczynski*,
5 154 F.3d 930, 931 (9th Cir. 1998), and clearly they have done that here. *See supra*
6 at 2-7. The Members’ presumptive right of access can only be overcome ““on the
7 basis of articulable facts known to the court, not on the basis of unsupported
8 hypothesis or conjecture.”” *Hagestad*, 49 F.3d at 1434 (quoting *Valley Broad.*,
9 798 F.2d at 1293). We are aware of no such articulable facts.
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13 The only indication in the public record of this case of the original basis for
14 the sealing of various pleadings is a declaration of Ms. Sholtz’s attorney, attached
15 to an *ex parte* application for leave to file a pleading under seal, which cites
16 general concerns about “sensitive information regarding the status of [the]
17 litigation” and the possibility that the submission might be “misinterpreted” given
18 the case’s pretrial publicity. Declaration of Richard M. Callahan, Jr., ¶ 3 (Oct. 18,
19 2004), attached to *Ex Parte* Application By Defendant Sholtz to File Document
20 Under Seal (Oct. 18, 2004).
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25 While we assume for purposes of this motion that the sealed records to
26 which the two Members now seek access were properly sealed in the first instance,
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1 *cf. Press-Enterprise*, 464 U.S. at 513 (vacating order closing pre-trial proceedings
2 and sealing transcripts), the law of this Circuit makes clear that records “of
3 properly closed proceedings must be released when the danger of prejudice has
4 passed.” *Brooklier*, 685 F.2d at 1172 (citing *Gannett Co., Inc. v. DePasquale*, 443
5 U.S. 368, 393, 99 S. Ct. 2898, 2812 (1979)). And clearly any initial concerns that
6 related to the status of the litigation or the possibility of misinterpretation in light
7 of pretrial publicity have long since evaporated now that Ms. Sholtz has plead
8 guilty and been sentenced, and the case has been closed. *See, e.g., Foltz v. State*
9 *Farm Mut. Ins. Co.*, 331 F.3d 1122, 1136 (9th Cir. 2003) (“[a] litigant who might
10 be embarrassed, incriminated, or exposed to litigation through dissemination of
11 materials is not, without more, entitled to the court’s protection” (quoting *Nestle*
12 *Foods Corp. v. Aetna Cas. & Sur. Co.*, 129 F.R.D. 483, 486 (D.N.J. 1990)); *United*
13 *States v. Northrop Corp.*, 746 F. Supp. 1002, 1006 (C.D. Cal. 1990) (granting
14 newspaper’s motion to unseal exhibits to defendant’s plea agreement which listed
15 investigations for which government agreed not to prosecute: “[G]iven the
16 lessened interest in protectibility [since the case has ended] and the heightened
17 interest in [defendant’s] conduct, unsealing is appropriate as to those matters on
18 which the government declined prosecution and which formed some part of the
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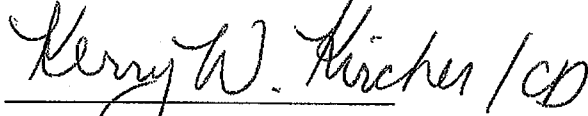
1 consideration for the plea agreement.”).

2
3 **CONCLUSION**

4
5 For all of the foregoing reasons, Congressmen Barton’s and Walden’s
6 Motion to Unseal should be granted.

7
8 Respectfully submitted,

9
10 IRVIN B. NATHAN, General Counsel

11  /cd

12 KERRY W. KIRCHER, Deputy General
13 Counsel

14 CHRISTINE DAVENPORT, Assistant
15 Counsel

16
17 Office of General Counsel

18 U.S. House of Representatives

19 219 Cannon House Office Building

20 Washington, D.C. 20515

21 202/225-9700 (telephone)

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23 kerry.kircher@mail.house.gov

24 Counsel for Non-Parties Congressmen Joe
25 L. Barton and Greg Walden

26
27 November 23 , 2009

28
Memorandum of Points and Authorities in Support of Motion to Unseal Pleadings

CERTIFICATE OF SERVICE

I certify that on November 23, 2009, I served the foregoing Memorandum of Points and Authorities in Support of Motion of Non-Parties Congressmen Joe L. Barton and Greg Walden to Unseal Pleadings, by Federal Express and by email (.pdf format), on each of the following:

Joseph Johns, Assistant U.S. Attorney
Office of the U.S. Attorney for the Central District of California
1500 United States Courthouse
312 N. Spring Street
Los Angeles, CA 90012
Joseph.Johns@usdoj.gov

Richard M. Callahan, Jr., Esq.
225 South Lake Avenue
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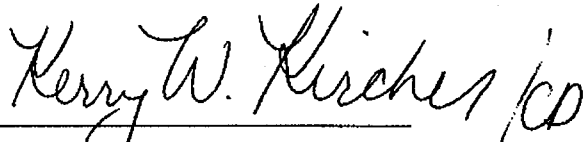

KERRY W. KIRCHER, Deputy General
Counsel

Exhibit 1

Case No. 2:05-cr-00017 (ABC)

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CHAIRMANJOE BARTON, TEXAS
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ZACHARY T. SPACE, OHIO
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Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

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May 7, 2009

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JOHN SHIMMUS, ILLINOIS
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STEVE SCALISE, LOUISIANA

The Honorable Lisa Jackson
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Dear Administrator Jackson:

We write to request information related to a closed criminal case, U.S. v. Anne Masters Sholtz, CR 05-17-ABC, resulting from an investigation conducted in part by the EPA's Criminal Investigation Division. The case arises from fraud in the sale of counterfeit pollution credits in an emissions trading program established by the South Coast Air Quality Management District pursuant to EPA regulation and known as the Regional Clean Air Incentives Market (RECLAIM) program. EPA's public website lists RECLAIM as a cap-and-trade program (see <http://www.epa.gov/captrade/programs.html>).

We believe this case has great relevance in the context of pending legislation on climate change. It is important that Congress assess not only whether EPA has an adequate regulatory regime and surveillance capacity over pollution credit trading but also whether there are any factors (e.g., resources, legal restrictions) constraining federal law enforcement in combating criminal cap-and-trade fraud.

According to a Department of Justice press release dated June 20, 2004, Ms. Anne Masters Sholtz was arrested by federal agents, and a criminal complaint was filed accusing Ms. Sholtz of seven counts of wire fraud. The affidavit in support of the complaint outlined a scheme in which Ms. Sholtz used forged documents and her knowledge of trading pollution credits to defraud AG Clean Air, a New York-based company that traded in energy credits. About six months after her arrest, Ms. Sholtz was indicted on six counts of wire fraud in January 2005.

The attached Department of Justice press release, dated April 26, 2005, indicates Ms. Sholtz pled guilty to one count of wire fraud, a charge that under sentencing guidelines carried a

Letter to the Honorable Lisa Jackson
Page 2

potential penalty of five years in federal prison. By entering this plea, Ms. Sholtz admitted involvement in a scheme in which she defrauded AG Clean Air through the use of forged documents and other documentation. In particular, she operated an Internet site called the Automated Credit Exchange (ACE) which was a forum for companies to trade and sell RECLAIM Trading Credits (RTCs). On Ms. Sholtz's representations that Mobil Corporation (now ExxonMobil Corporation) needed to buy a large quantity of RTCs for use at a Southern California refinery, AG Clean Air purchased \$12.5 million worth of RTCs over two years. Ms. Sholtz represented that Mobil would purchase those RTCs for \$17.5 million. As part of her scheme, Ms. Sholtz sent faxes and e-mails to AG Clean Air that purported to document negotiations between ACE and Mobil Corporation, including a purchase and sale agreement with a forged signature.

As noted by the EPA Regional Administrator in his January 24, 2008 letter to U.S. District Court Judge Audrey B. Collins (see attached), "The crimes committed by Ms. Sholtz in creating and selling counterfeit credits threaten the integrity of the RECLAIM program as a mechanism to reduce air pollution in the Los Angeles air basin as the credits she created did not represent genuine emission reductions. Her crimes thus have the potential to undermine confidence, not only in RECLAIM itself, but in all environmental regulatory programs which use market mechanisms.... Much of the proposed climate change legislation currently before Congress would create 'cap and trade' market mechanisms which would be very similar to the RECLAIM program. Individuals who would illegally attack the integrity of such programs for illegitimate personal gain must be deterred from such activity."

Although she was indicted on six counts of wire fraud felonies, Ms. Sholtz pled guilty to just one count in April 2005 and received no punishment for approximately three years until she was sentenced in April 2008. Ms. Sholtz was eventually sentenced to only five years of probation and a single year of home detention. She received no prison sentence. The prosecutor even reportedly noted, "I [have] been prosecuting environmental crimes for eighteen years and this stands out as the single exception to pleading a defendant out to your most significant count . . . I [have] never had a case . . . when the obvious strategy was [not] the winning one . . . We see this as a prison case."

Given Congress is currently considering broad proposed cap-and-trade legislation that would require EPA to establish a major national and international emissions trading program, we are writing to request information concerning this case and EPA's oversight of the RECLAIM pollution credit trading market. We are concerned with the difficulties that EPA and other federal authorities have in preventing, investigating, and/or prosecuting fraud in relatively small pollution credit trading markets, and how EPA would help ensure the integrity of a proposed cap-and-trade market that would be enormous in scale. Further, because so many of the documents remain under seal in this case, we have very limited information concerning the case and accordingly are writing to request further information. Please provide the following information within two weeks of receipt of this letter:

1. Please describe EPA's regulatory oversight activities relating to the RECLAIM program since RECLAIM went into effect. Has EPA made any changes to its oversight activities of the RECLAIM program? If so, were any of these changes the result of the Sholtz case?

Letter to the Honorable Lisa Jackson
Page 3

2. When and how did the EPA come to learn about the allegations against Ms. Sholtz of potential criminal misconduct? What are the procedures and mechanisms in place for EPA to ensure the integrity of the RECLAIM program?
3. According to a June 25, 2004, article in Inside EPA, officials at the U.S. Attorney's office and EPA Region IX estimated that the investigation of Ms. Sholtz at the time of her arrest had cost upwards of \$80 million. How much did the investigation and prosecution of Sholtz ultimately cost the federal government? How much did the EPA spend in all its activities in support of the Sholtz case?
4. How much money was Ms. Sholtz alleged to have defrauded victims in connection with the RECLAIM program? How many EPA criminal investigators were involved in investigating the Sholtz case? How much time and resources does the EPA currently assign to monitoring and detecting fraud in connection with the RECLAIM program?
5. Does EPA have sufficient authority and resources to monitor and deter fraudulent conduct in the RECLAIM program?
6. There was a three-year gap between Ms. Sholtz's guilty plea in 2005 and her sentencing in 2008. Why was there such a delay in the sentencing phase?
7. Are there any other filed EPA criminal cases involving emissions trading programs, including the RECLAIM program? Please identify and describe the status of those cases, including any settlements or judgments.
8. According to a June 25, 2004, article in Inside EPA, an EPA air official reportedly said that illegal activity similar to the Sholtz case "may have already occurred in other programs without being investigated." This source reportedly said, "There should have been similar cases in New Jersey, but everyone agreed to just close up shop." Does EPA agree that there were similar cases of illegal activity that EPA was unable to investigate? If so, why?
9. Are there mechanisms in place to ensure that individuals who have engaged in fraudulent conduct relating to the RECLAIM program are prevented from participating in the future in emissions trading markets? Has Ms. Sholtz been prohibited from future trading involving the RECLAIM program and/or from any other emission trading programs established under EPA regulations? Does EPA keep a list of groups or individuals debarred from participating in emissions trading programs or bidding for government contracts? If not, why not? Is the list available to the public? If not, why not? Under what circumstances does the EPA begin the debarment process? Has Ms. Sholtz been debarred from participating in any emission trading programs or bidding for any Government contracts?
10. Why were so many of the documents (including the sentencing hearing transcript) in the criminal proceeding involving Ms. Sholtz placed under seal? Does the government plan to request that the documents be unsealed? If not, how can these documents be unsealed?

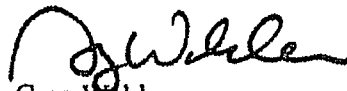
Letter to the Honorable Lisa Jackson
Page 4

11. EPA's public website provides press releases about the sentencing of defendants in EPA criminal cases. However, it does not appear that EPA has posted any information on its public website about the sentence in the Sholtz case. Why?

Given the timeliness of these issues, please contact Alan Slobodin of the Minority Committee staff at (202) 225-3641 on any questions involving the EPA response letter. Your prompt attention to this request is appreciated.

Sincerely,


Joe Barton
Ranking Member


Greg Walden
Ranking Member
Subcommittee on Oversight and Investigations

Attachments

cc: The Honorable Henry Waxman, Chairman
The Honorable Bart Stupak, Chairman
Subcommittee on Oversight and Investigations

Exhibit 2

Case No. 2:05-cr-00017 (ABC)



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN - 8 2009

OFFICE OF CONGRESSIONAL AND
INTERGOVERNMENTAL RELATIONS

The Honorable Joe Barton
Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

JUN 4 2009

Dear Congressman Barton:

Thank you for your May 7, 2009 letter to Administrator Jackson requesting information regarding the closed criminal case, United States v. Anne Masters Sholtz, involving fraudulent activity relating to the Regional Clean Air Incentives Market (RECLAIM) program, an emissions credit trading program run by the South Coast Air Quality Management District (SCAQMD) to control emissions that contribute to ozone and particulate pollution in Los Angeles and Orange Counties. I appreciate your interest in this matter as it pertains to pending legislation on climate change.

In your letter, you express concern about the potential implications of the Sholtz case for cap and trade programs generally and for the greenhouse gas cap and trade programs being considered by Congress as part of energy legislation this year. To address your concerns, it is helpful to provide some background on RECLAIM and on EPA's cap and trade programs.

RECLAIM is one form of a cap and trade program. It is different in several ways from the cap and trade programs that are run by EPA and that are models for the cap and trade programs being considered by Congress for reducing greenhouse gases. For example, in the RECLAIM program, each business faces an emissions cap for the year. Credits are assigned each year and can be bought or sold for use within that year. Facilities must hold credits equal to their actual emissions for the year. They can sell excess credits to firms that may not otherwise meet their limits. As a State Implementation Plan (SIP) program, RECLAIM is run by SCAQMD with oversight provided by the California Air Resources Board and EPA's Region 9.

In EPA's federal cap and trade programs, caps apply to the universe of affected facilities. Allowances are either allocated or auctioned, and can be traded among facilities and banked for future use. The first federal cap and trade program was proposed by President George H. W. Bush and mandated by Congress in the 1990 Clean Air Act Amendments. Subsequently, EPA by regulation established the NOx Budget Trading Program under Title I of the Clean Air Act.

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Exhibit 2

EPA runs both programs at the federal level, with states providing assistance through the operating permit programs required by Title V of the Clean Air Act.

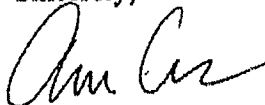
Your letter states that the "...[Sholtz] case arises from fraud in the sale of counterfeit pollution credits...". We would like to note that Ms. Sholtz represented herself as having pollution credits which she did not have and she forged documents between buyers and sellers. Since every RECLAIM trading credit is identified by vintage, compliance cycle, and zone, counterfeit credits could not have been substituted in the environmental program. In EPA's cap and trade programs, each allowance is identified by both vintage and a unique serial number, and anyone can verify online that the correct vintage and quantity of allowances are in the relevant account before any funds are exchanged. The job of the agencies responsible for the cap and trade programs is to make certain that, in the case of RECLAIM, a trading credit surrendered for compliance is equivalent to a pound of emissions, and in the case of the Acid Rain Program, a trading credit surrendered for compliance is equivalent to a ton of emissions, thus ensuring the environmental integrity of the programs.

EPA's experience has demonstrated the importance of adhering to several fundamental principles in the design and implementation of cap and trade programs: simplicity, transparency, accountability, and certainty. Stringent monitoring requirements, efficient electronic tracking systems for emissions and allowances, efficient allowance auctions, source-by-source compliance determinations, effective enforcement of monitoring and allowance holding requirements, and public availability of compliance information have allowed EPA's programs to achieve significant emissions reductions and very high levels of compliance by industry, while providing sources the flexibility to devise individual strategies to cost-effectively meet the program caps.

EPA understands the importance of ensuring that any greenhouse gas cap and trade program included in legislation be designed to operate with appropriate regulatory oversight and transparency, the hallmark of federal cap and trade programs since the 1990s. We welcome the opportunity to work with Congress in structuring a cap and trade program that Americans can trust will achieve its environmental objectives.

Thank you for the opportunity to answer your questions and respond to your concerns. Enclosed are responses to the specific questions in your letter. If you have any further questions, please contact Tom Dickerson in my office at (202) 564-3638.

Sincerely,



Arvin R. Ganesan
Deputy Associate Administrator

Enclosure

Question 1: Please describe EPA's regulatory oversight activities relating to the RECLAIM program since RECLAIM went into effect.

EPA approved the South Coast Air Quality Management District's (SCAQMD's) RECLAIM program as part of the California State Implementation Program (SIP) on November 8, 1996 (see 61 FR 57775). The SCAQMD's RECLAIM program is one of several emissions reduction strategies that are being implemented by the District in order to achieve attainment with California and Federal air quality standards. By approving the RECLAIM program into the California SIP, EPA Region 9 ensured that all of the program's requirements applicable to covered facilities are federally enforceable.

Region 9's oversight activities with respect to RECLAIM are based on the Clean Air Act framework created by Congress for attaining and maintaining national ambient air quality standards (NAAQS). That framework gives states a leading role in developing, implementing, and enforcing SIPs that contain control measures needed to attain and maintain the NAAQS. For RECLAIM, the SCAQMD has the primary role of implementing and enforcing the program. During the design of the RECLAIM program, Region 9 assisted the District in developing appropriate evaluation provisions that would monitor the overall effectiveness of the program. Under these provisions, the SCAQMD submits annual reports to EPA's Region 9 on key indicators of program effectiveness including credit costs, compliance issues, and technical issues. The Region reviews these reports and, based on the information supplied by the District or otherwise obtained by Region 9, investigates specific compliance-related matters.

In addition to the efforts described above, Region 9 also conducted an evaluation of the RECLAIM program and issued a report in November 2002 based on interviews with representatives of SCAQMD, EPA, industry and environmental groups. In the report Region 9 described the program and recommended potential improvements. The report is available at <http://www.epa.gov/region09/air/reclaim/index.html>.

Has EPA made any changes to its oversight activities of the RECLAIM program? If so, were any of these changes the result of the Sholtz case?

As mentioned above, EPA's role is to monitor SCAQMD's implementation of the area's approved state implementation plan and the area's progress toward attainment of the national ambient air quality standards. The Sholtz case has not altered that role.

Question 2: When and how did the EPA come to learn about the allegations against Ms. Sholtz of potential criminal misconduct?

EPA's Office of Criminal Enforcement, Forensics and Training (OCEFT) opened its criminal investigation of Anne Sholtz on August 1, 2002. The criminal enforcement office learned about this case from the SCAQMD, which, as noted above, has primary responsibility for implementing and enforcing the RECLAIM program.

Region 9's air enforcement resources are most often managed by industry sector. For this reason, the resources and time that Region 9 devotes to monitoring and detecting fraud in connection with the RECLAIM program is difficult to measure because the RECLAIM program encompasses several source categories or industry types. This results in focusing on both facilities which are subject to RECLAIM as well as those which are not subject to RECLAIM.

Question 5: Does EPA have sufficient authority and resources to monitor and deter fraudulent conduct in the RECLAIM program?

EPA's OCEFT agents have authority to investigate any alleged federal crime, including violations of the criminal code provisions most often used to combat fraud: 18 USC Sections 1001 (the false statement statute), 1341 (mail fraud) and 1343 (wire fraud). More specifically, EPA's authority to monitor and deter fraudulent conduct in the RECLAIM program is identical to that of any federally-approved SIP program. The Clean Air Act provides authority for inspection, entry, and information-gathering, which has proven effective in identifying areas of concern and also provides very substantial civil and criminal enforcement authority for pursuing and deterring violations. The resources devoted to enforcement of the Clean Air Act and SIP programs like RECLAIM have proved to be effective and sufficient.

Question 6: There was a three-year gap between Ms. Sholtz's guilty plea in 2005 and her sentencing in 2008. Why was there such a delay in the sentencing phase?

DOJ prosecuted the Sholtz case, and we therefore defer to DOJ to answer questions pertaining to sentencing in the case.

Question 7: Are there any other filed EPA criminal cases involving emissions trading programs, including the RECLAIM program?

Currently, there are no EPA criminal cases with filed charges involving emissions trading crimes.

Question 8: Does EPA agree with a statement reportedly made by an EPA air official in a June 25, 2004 article that there were similar cases of illegal activity that EPA was unable to investigate?

EPA's criminal enforcement program is unaware of any allegations of illegal activity similar to the Sholtz case, and we do not believe that there were similar criminal cases that EPA was unable to investigate.

Question 9: Are there mechanisms in place to ensure that individuals who have engaged in fraudulent conduct relating to the RECLAIM program are prevented from participating in the future in emissions trading markets?

One of the terms of Ms. Sholtz's probation is that for five years she not engage in any business that purchases, sells or trades in the RECLAIM program or other programs involving Emission

Reduction Credits under the jurisdiction of SCAQMD without the prior written approval of her Probation Officer. She must provide her Probation Officer with access to any and all business records to verify compliance with this provision. EPA expects that Ms. Sholtz's probation officer will consult with the Agency as well as the SCAQMD prior to granting Ms. Sholtz permission to resume participation in the RECLAIM or other ECR programs. Given the seriousness of Ms. Sholtz's misconduct, it is unlikely that EPA would support allowing her to resume emission trading.

Has Ms. Sholtz been prohibited from future trading involving the RECLAIM program and/or from any other emission trading programs established under EPA regulations?

Please see the response immediately above.

Does EPA keep a list of groups or individuals debarred from participating in emissions trading programs or bidding for government contracts? If not, why not?

The Agency, along with other Federal agencies, uses a database maintained by the General Services Administration to list parties who are excluded from participating in Federal procurement and assistance programs, which includes bidding on government contracts. This database, known as the Excluded Parties List System (EPLS) may be found at www.epls.gov.

EPA does not maintain a list of parties excluded from emission trading markets at this time. EPA has broad authority to exclude parties from federal programs when necessary to protect the integrity of the program. In the Acid Rain Program, EPA has by regulation reserved the right "to take any action necessary to protect the orderly and competitive functioning of the allowance system, including actions to prevent fraud and misrepresentations." 40 CFR 72.4(b).

Is the list available to the public? If not, why not?

You may access the GSA list of parties excluded from federal procurement and assistance programs (as well as other programs) at www.epls.gov. To our knowledge the Federal government does not currently maintain a list parties who are excluded from emission trading markets.

Under what circumstances does the EPA begin the debarment process?

EPA opens debarment matters in cases when information indicating a party poses a risk to the integrity of Federal procurement, assistance or environmental laboratory programs comes to the attention of the Agency suspension and debarment program. Cases typically involve fraud, waste, abuse or serious performance failures on EPA procurement contracts or assistance agreements or laboratory analyses that EPA would rely on for a regulatory decision. In addition, the Agency takes actions in response to environmental crimes committed by an entity that may enter into a Federal procurement or assistance transaction. EPA has a well-established suspension and disbarment program. For example, since the beginning of fiscal year 2005, EPA has suspended 156 parties and debarred 257.

Has Ms. Sholtz been debarred from participating in any emission trading programs or bidding for any Government contracts?

As discussed above, Ms. Sholtz is currently precluded from participating in the RECLAIM and other ECR programs under the jurisdiction of SCAQMD by the terms of her probation. The EPA opened a debarment case involving Ms. Sholtz in November 2008, and is in the process of reviewing the risk she may pose to the integrity of Federal procurement and assistance programs

Question 10: Why were so many of the documents (including the sentencing hearing transcript) in the criminal proceeding involving Ms. Sholtz placed under seal? Does the government plan to request that the documents be unsealed? If not, how can these documents be unsealed?

Questions pertaining to the prosecution and sentencing of the case should be addressed to DOJ.

Question 11: EPA's public website provides press releases about the sentencing of defendants in EPA criminal cases. However, it does not appear that EPA has posted any information on its public website about the sentence in the Sholtz case. Why?

Most environmental crimes are prosecuted by the Offices of the United States Attorneys, so the majority of press releases regarding criminal cases are issued by them. EPA's criminal enforcement program will often post the U.S. Attorney press releases on its website. In this case, the U.S. Attorney's Office, Central District of California, did not issue a press release on Anne Sholtz's sentencing.