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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

RYAN JACKSON, *MAJORITY STAFF DIRECTOR*
BETTINA POIRIER, *DEMOCRATIC STAFF DIRECTOR*

September 7, 2016

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Dear Administrator McCarthy:

Given the impending presidential transition, it is imperative that Congress and the American public have a clear understanding of the ongoing litigation and the regulatory and administrative actions that may be underway or planned by the U.S. Environmental Protection Agency (EPA or Agency). However, much of this important information is not publicly or readily available. Such a lack of transparency about EPA activities is especially concerning in light of the transparency commitments you made in 2013 to members of the U.S. Senate Committee on Environment and Public Works (EPW or the Committee) during the Senate's consideration of your nomination to serve as EPA Administrator. A recent review by the Committee's majority staff of the EPA website and publications suggests the EPA under your leadership has fallen short of these promises.

At the outset, we note that EPA's website does not provide any listing of ongoing litigation involving the Agency. As you are aware, during the process to confirm you as Administrator of the EPA in 2013, concerns were raised about the lack of transparency surrounding EPA's "sue-and-settle" agreements with environmental activist groups that were driving much of EPA's regulatory activities. As a result, you pledged to undertake several measures to increase transparency surrounding EPA's closed-door litigation settlements and rulemaking activities.¹ While EPA has made some litigation- and rulemaking-related information publicly available on its website pursuant to these commitments, the Agency has failed to ensure such information is current and accurate.

For example, you provided assurances that EPA would post to its website copies of the petitions received since January 1, 2013, to issue, amend, or repeal an EPA rule per the Administrative Procedure Act or to take specific rulemaking action per the various environmental laws EPA implements.² Although EPA launched this webpage in response to your commitment, according to a recent review, it appears that EPA may no longer be posting

¹ <https://www.vitter.senate.gov/newsroom/press/vitter-epw-republicans-get-major-agreements-from-epa-on-5-transparency-requests>.

² <https://www.epa.gov/aboutepa/petitions-rulemaking>.

accurate and up-to-date information about rulemaking petitions it has received. EPA has posted to this website only 13 rulemaking petitions received since January 1, 2013. Of this number, six petitions were for rulemakings under the Clean Air Act, the most recent of which was from April 21, 2014.³ In fact, the webpage listing the petitions for rulemakings under the Clean Air Act states, “[a]dditional petitions will be added on an ongoing basis;”⁴ yet, the same webpage adds it was last updated on May 30, 2014 – more than two years ago. Similarly, the other petitions EPA has posted online may not be current, as the most recent petition listed on the entire webpage is a January 23, 2015, petition to add a chemical to the Toxic Release Inventory.⁵

It strains the Agency’s credibility to suggest EPA has received only 13 rulemaking petitions since 2013 and none in the last year and a half. Indeed, a cursory review of news articles indicates EPA has continued to receive numerous petitions for rulemaking, including one filed in July 2016 to force EPA to issue a rule to reduce NOx emissions from heavy-duty trucks.⁶ It is unclear if EPA under your leadership has intentionally abandoned this transparency initiative or if the webpage is a victim of neglect.

As part of another transparency initiative, you agreed to maintain a webpage listing the notices EPA receives that indicate a member of the public intends to file a lawsuit against EPA if the Agency does not take a particular action, such as acting on a rulemaking petition or performing a non-discretionary duty, within a specified time frame, usually 60 days.⁷ In filing the required notice of intent (NOI) to sue, a person provides EPA a final opportunity to take administrative action to avoid a lawsuit, but in reality the NOI is often an invitation to enter a “sue-and-settle” agreement that will bind EPA to take the regulatory action by a specified date. Prior to 2013, EPA did not disclose to the public when it had received an NOI. As such, interested stakeholders, including states, were not always aware of potential settlement negotiations until a deal had been reached and dates for future EPA actions were announced.⁸ Even more, copies of settlement agreements are not available on a centralized EPA webpage.⁹

Currently, EPA’s NOI webpage shows that more than 100 NOIs have been received since January 1, 2013, many of which have resulted in lawsuits. However, based on a comparison of the NOI webpage to recent news articles and the Federal Register, it appears the webpage listing NOI information also is not current and complete, similar to EPA’s webpage for rulemaking petitions. A number of environmental groups filed an NOI with EPA on August 26, 2015, indicating their intent to file a lawsuit if EPA did not agree to update regulations for oil and gas sector under Subtitle D of the Resource Conservation and Recovery Act (RCRA);¹⁰ this NOI

³ <https://www.epa.gov/aboutepa/petitions-office-air-and-radiation>.

⁴ Id.

⁵ <https://www.epa.gov/aboutepa/petitions-office-environmental-information>.

⁶ See e.g., <http://insideepa.com/daily-news/agencies-petition-epa-align-heavy-duty-ghg-rule-strict-new-nox-limit>.

⁷ <https://www.epa.gov/noi>.

⁸ Under Section 113(g) of the Clean Air Act, for example, EPA must publish proposed settlement agreements in the Federal Register and take public comment on the proposed agreement for at least 30 days.

⁹ In a December 15, 2014, report about the impact of deadline suits on EPA’s rulemaking activities, the Government Accountability Office found neither EPA nor DOJ maintains a centralized database that links settlement agreements to rulemaking actions. See, <http://www.gao.gov/assets/670/667533.pdf>, at 2.

¹⁰ <http://environmentalintegrity.org/wp-content/uploads/2015-08-26-OG-Wastes-RCRA-Notice-Letter-FINAL.pdf>

does not appear on the webpage. The environmental groups subsequently filed a lawsuit on May 4, 2016, to require EPA to review and update as necessary the RCRA oil and gas rules; yet, a copy of this lawsuit also is not posted on EPA's NOI website. In fact, the NOI website almost exclusively shows matters involving the Clean Air Act and the Clean Water Act, but no actions under RCRA are included. EPA's overall poor maintenance of the NOI webpage is unacceptable.

In addition to EPA's incomplete public information about its litigation activities, the Committee is equally concerned by the lack of transparency throughout EPA's rulemaking process, especially at a time of administration transition. A transparent account of ongoing and planned regulatory actions is important not just for the incoming administration, but also for potentially impacted state, local, and tribal officials, job creators, and members of the public. Absent adequate lead-time on EPA regulatory actions, impacted parties are left with uncertainty that can halt capital investments and job growth, displace scarce government resources, and mitigate meaningful environmental benefits. For these reasons, federal agencies are required to submit regulatory agendas of active and anticipated actions to the Office of Management and Budget (OMB) to be published in the semiannual Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda).¹¹

Publication of the semiannual Unified Agenda should be a centerpiece of any administration's efforts to inform the American public about upcoming regulatory activities, particularly during a period of transition. However, the Obama Administration has a record of not treating the Unified Agenda in such high regard. As you may recall, the Obama Administration – in an unprecedented move – failed to issue a Unified Agenda in the spring of 2012 when the President's reelection campaign was in full swing. In fact, only after the president's reelection had been secured did the Obama Administration publish a single Unified Agenda in December 21, 2012. Despite numerous requests from Congress, including this Committee,¹² the Administration has yet to provide a justification for keeping the public in the dark on its regulatory plans during an election year.

Based on a review of recent EPA action as compared to the most recent Unified Agenda, the Committee has reason to believe the Administration once again may be shielding its regulatory plans from the public conveniently during an election year. Although the Obama Administration released the 2016 Spring Unified Agenda for all federal agencies in May, EPA's regulatory agenda is already out-of-date, does not present an accurate projection of upcoming regulatory actions, and in some cases is outright misleading. For example, EPA has made conflicting public statements about its work on the Clean Energy Incentive Program (CEIP) proposed rule regarding implementation of the so-called Clean Power Plan (CPP). Critically, neither the spring nor the fall 2015 editions of the Unified Agenda identified the CEIP as an upcoming rule. Accordingly, it was unexpected when EPA's January 2016 Action Initiation List (AIL), which identifies newly commenced rulemakings on a monthly basis, first listed the

¹¹ http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/UA_About.jsp

¹² <http://www.epw.senate.gov/public/index.cfm/press-releases-republican?ID=682B2ED7-DE0B-5D7C-E1C1-4C1ADB43B59F>

CEIP.¹³ While the AIL indicates EPA commenced work on the CEIP in January, EPA's Regulatory Development and Retrospective Review Tracker (RegDaRRT) website states the Agency actually initiated work on the CEIP on December 24, 2015 – Christmas Eve.¹⁴ As part of the January 2016 AIL, EPA initially indicated it would take “12 months or less” for EPA to complete the CEIP proposal.¹⁵ Notably, EPA's AIL website also appears outdated as it does not list any regulatory actions being initiated since May 2016.¹⁶

The U.S. Supreme Court issued an unprecedented decision to stay implementation of the CPP on February 9, 2016.¹⁷ Despite numerous legal and Congressional questions over EPA's authority to continue work on the CEIP given the stay of the CPP, EPA has continued work on the CEIP proposal, submitting it to OMB on April 26, 2016. However, when the spring 2016 Unified Agenda was released on May 18, 2016,¹⁸ EPA listed the CEIP proposal as a “long-term action” and said its publication date was “to be determined.”¹⁹ According to OMB, a “long-term action” in the Unified Agenda is an action “under development but for which [EPA] does not expect to have regulatory action within the 12 months after publication of this edition of the Unified Agenda.”²⁰ The Unified Agenda was published in the Federal Register on June 9, 2016.²¹ However, EPA's agenda describes “long-term actions” as “rulemakings for which the next scheduled regulatory action is after April 2017.”²²

Despite these statements in the Unified Agenda about no immediate plans to issue the CEIP, OMB concluded review of the CEIP proposal on June 16, 2016. You immediately signed the proposed rule, and a pre-publication version was released on EPA's website that day. It is unclear why EPA would suggest in the Unified Agenda that it had no immediate plans or specific timeframe to issue the proposed CEIP rule, when it now appears EPA's true intention has been to rush to issue a final CEIP rule by the end of this Administration regardless of the Supreme Court's stay of the CPP itself.²³ More importantly, EPA's inconsistent and overall haphazard

¹³ <https://www.regulations.gov/document?D=EPA-HQ-OA-2008-0265-0089>.

¹⁴ <https://yosemite.epa.gov/oepi/rulegate.nsf/byRIN/2060-AS84>.

¹⁵ <https://www.regulations.gov/document?D=EPA-HQ-OA-2008-0265-0089>.

¹⁶ <https://www.epa.gov/laws-regulations/actions-initiated-month>

¹⁷ https://www.supremecourt.gov/orders/courtorders/020916zr3_hf5m.pdf.

¹⁸ The Spring 2016 Unified Agenda was released online on May 18, 2016. <http://www.reginfo.gov/public/>. The Administrator of the OMB's Office of Information and Regulatory Affairs (OIRA) sent a data call for regulatory agendas to agencies on February 19, 2016. At that time, OIRA requested agencies submit their agenda by March 18, 2016. Available at:

https://www.whitehouse.gov/sites/default/files/omb/inforeg/memos/2016/data_call_spring_2016_regulatory_agenda.pdf.

¹⁹ <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201604&RIN=2060-AS84>.

²⁰

http://www.reginfo.gov/public/do/eAgendaHistory?operation=OPERATION_GET_PUBLICATION&showStage=longterm¤tPubId=201604.

²¹ <https://www.federalregister.gov/articles/2016/06/09/2016-12869/introduction-to-the-unified-agenda-of-federal-regulatory-and-deregulatory-actions>

²² <https://www.gpo.gov/fdsys/pkg/FR-2016-06-09/pdf/2016-12921.pdf>.

²³ When EPA first submitted the draft CEIP proposal to OMB for review, the draft initially would have provided a mere 45 days for the public to comment. In the interagency review process, OMB questioned the short public comment period, stating in comments to EPA, “[i]t is unclear why EPA would only provide 45 days for such a complex topic,” and advising a 90-day comment period was preferable. See,

schedule surrounding its work on the CEIP undercuts the transparency and public participation requirements of the federal rulemaking process.

EPA has also made conflicting statements and provided confusing information to the public about its plans for issuing the final Federal Plan for Regulating Greenhouse Gases from Electric Utility Units under the CPP (Model Trading Rules), which EPA also is continuing despite the Supreme Court's stay of the CPP. EPA issued the proposed Model Trading Rules in October 2015. In the spring 2015²⁴ and fall 2015²⁵ editions of the Unified Agenda, EPA indicated that it planned to issue the final Model Trading Rules in August 2016. EPA's spring 2016 Unified Agenda switched the timeframe for issuing the final Model Trading Rules to a "long-term" action and the date for issuing the final rule to "to be determined,"²⁶ meaning the final rule would not be issued before spring 2017. However, EPA's RegDaRRT webpage for the Model Trading Rules was updated on August 15, 2016, to list December 2016 as the projected timeframe for issuing the final rule.²⁷ Even with the new projected date, any plan to issue the final rule during the Obama Administration is inconsistent with how the rule is currently classified in the Unified Agenda.

In both the case of the CEIP and the Model Trading Rules, it is unclear whether the AIL, the RegDaRRT website, or the Unified Agenda information is accurate, and such inconsistencies raise questions about whether EPA is intentionally obfuscating its regulatory plans. Regardless, the facts set forth in this letter raise significant questions regarding EPA's credibility and the utility of the Unified Agenda and other public information about EPA's regulatory plans.

Given the concerns raised in this letter about EPA's lack of transparency surrounding its ongoing litigation and regulatory plans, it is requested that EPA provide the following information no later than close of business on September 21, 2016:

1. A complete list of all Agency actions that are currently underway as part of the Action Development Process, including:
 - a. title of the action;
 - b. tier of the action;
 - c. lead headquarters or regional program office;
 - d. RIN;

<https://www.regulations.gov/document?D=EPA-HQ-OAR-2016-0033-0040>. Notwithstanding OMB's feedback, the proposal that EPA issued and that was published in the Federal Register on June 30, 2016, gave the public only 60 days to provide comments. <https://www.regulations.gov/document?D=EPA-HQ-OAR-2016-0033-0040>. In July 2016, EPA extended the public comment period by four days to September 2, 2016. See, <https://www.regulations.gov/document?D=EPA-HQ-OAR-2016-0033-0068>. In response to complaints that EPA's compressed timeframe has circumvented required consultations with states and tribes, EPA on August 25, 2016, agreed to extend the comment period an additional 60 days to close on November 1, 2016. See, https://www.epa.gov/sites/production/files/2016-08/documents/fr_notice_ceip_comm_peri_ext_8_25_16_w_disclaimer.pdf.

²⁴ <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201504&RIN=2060-AS47>.

²⁵ <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201510&RIN=2060-AS47>.

²⁶ <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201604&RIN=2060-AS47>.

²⁷ <https://yosemite.epa.gov/opei/RuleGate.nsf/byRIN/2060-AS47>

- e. date the action was initiated;
 - f. stage of the action, e.g., status of option selection, proposal, or final action;
 - g. any applicable statutory or judicial deadline for EPA action; and
 - h. whether the action is economically significant or otherwise expected to undergo interagency review pursuant to Executive Order 12866.
2. A complete list of all pending administrative or judicial litigation involving the Agency, including:
 - a. the name of the plaintiff(s) and/or petitioner(s);
 - b. date filed;
 - c. summary of claim(s);
 - d. applicable statute(s);
 - e. applicable regulation(s);
 - f. judicial or administrative body hearing litigation;
 - g. relief being sought by plaintiff(s) and/or petitioner(s); and
 - h. status of settlement negotiations, including mediation or alternative dispute resolution proceedings.
3. A complete list of all petitions to issue, amend, or repeal a rule currently pending before the Agency, including:
 - a. the name of the petitioner;
 - b. date filed;
 - c. summary of petition;
 - d. applicable statute(s); and
 - e. applicable regulation(s).
4. A complete list of all notices of intent (NOI) to file suit received by the Agency since January 1, 2016, including:
 - a. the name of the individual or entity who submitted the NOI;
 - b. date filed;
 - c. summary of NOI;
 - d. applicable statute(s); and
 - e. status of NOI, e.g., whether the Agency has taken the action subject to the NOI, litigation has been filed for failure to act, or the Agency is engaged in settlement discussions or mediation to resolve the NOI or related litigation.
5. A complete list of the delegations of authority that have been issued, amended, or revoked since January 1, 2016.
6. Copies of all mass emails, guidance, briefings, or memoranda distributed to EPA staff concerning planning for the upcoming transition in administrations.

The Honorable Gina McCarthy
September 7, 2016
Page 7 of 7

We look forward to your prompt response. Please have your staff contact Byron Brown or Brittany Bolen of the Environment and Public Works Committee's majority staff at (202) 224-6176 if you have questions about this request.

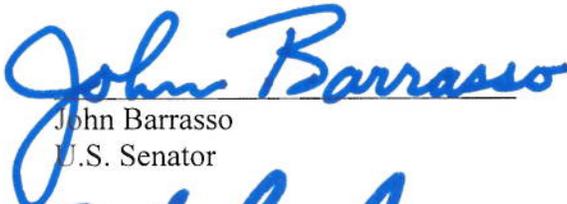
Sincerely,



James M. Inhofe
Chairman



David Vitter
U.S. Senator



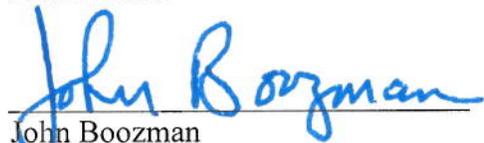
John Barrasso
U.S. Senator



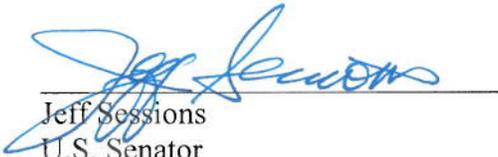
Shelley Moore Capito
U.S. Senator



Mike Crapo
U.S. Senator



John Boozman
U.S. Senator



Jeff Sessions
U.S. Senator



Roger F. Wicker
U.S. Senator



Deb Fischer
U.S. Senator



M. Michael Rounds
U.S. Senator



Dan Sullivan
U.S. Senator