

JAMES M. INHOFE, OKLAHOMA, CHAIRMAN

DAVID VITTER, LOUISIANA  
JOHN BARRASSO, WYOMING  
SHELLEY MOORE CAPITO, WEST VIRGINIA  
MIKE CRAPO, IDAHO  
JOHN BOOZMAN, ARKANSAS  
JEFF SESSIONS, ALABAMA  
ROGER WICKER, MISSISSIPPI  
DEB FISCHER, NEBRASKA  
MIKE ROUNDS, SOUTH DAKOTA  
DAN SULLIVAN, ALASKA

BARBARA BOXER, CALIFORNIA  
THOMAS R. CARPER, DELAWARE  
BENJAMIN L. CARDIN, MARYLAND  
BERNARD SANDERS, VERMONT  
SHELDON WHITEHOUSE, RHODE ISLAND  
JEFF MERKLEY, OREGON  
KIRSTEN GILLIBRAND, NEW YORK  
CORY A. BOOKER, NEW JERSEY  
EDWARD J. MARKEY, MASSACHUSETTS

# United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

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

April 14, 2016

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

Dear Administrator McCarthy:

As you know, the Environment and Public Works (EPW) Committee is the principal oversight committee in the U.S. Senate with jurisdiction over the U.S. Environmental Protection Agency (EPA or Agency). The EPW Committee under my leadership has conducted extensive oversight of EPA grants programs, transparency, and scientific integrity.

I write to request documents concerning a 2008-2009 study funded by EPA related to mercury and selenium contamination in fish. The study was the subject of a May 9, 2014, report by the Office of Inspector General (OIG) that found EPA staff violated the Agency's scientific integrity and grants management policies.<sup>1</sup> For several months, EPW Majority staff have made repeated requests by telephone and email for documents about this study. EPA staff have confirmed they have located the documents but have been unwilling to provide them and have given no explanation or justification for this delay other than that the request remains under review.

The science surrounding selenium and mercury contaminated fish implicates significant public policy issues that are pending before EPA today – from the regulation of power plant emissions to federal water quality standards to the diets and health of pregnant women and children. For example, EPA estimated the Mercury Air Toxics rule EPA issued in December 2011 would result in between \$1 million and \$ 6 million in human health benefits by 2016 from reducing mercury contamination of fish from power plant emissions, compared to \$9.6 billion in compliance costs.<sup>2</sup> In another example, EPA is in the process of updating its aquatic life ambient

<sup>1</sup> U.S. Environmental Protection Agency, Office of Inspector General, Report No. 14-P-0247, issued May 9, 2014 (EPA OIG Report); available at: <https://www.epa.gov/sites/production/files/2015-09/documents/20140509-14-p-0247.pdf>.

<sup>2</sup> 77 Fed. Reg. 9304. In contrast, EPA estimated total benefits of between \$33 billion and \$90 billion in non-mercury related benefits. In June 2015, the Supreme Court ruled EPA must consider cost in determining whether it is "appropriate and necessary" to regulate mercury emissions from power plants under section 112(n)(1) of the Clean Air Act. See, *Michigan v. EPA*, 135 S.Ct. 2699. On November 20, 2015, EPA issued a proposed supplemental finding in response to the Supreme Court's decision. 80 FR 75025 (Dec. 1, 2015).

water quality criterion for selenium: EPA released a draft criterion document for external peer review on May 14, 2014, and released a revised draft for public comment on July 17, 2015.<sup>3</sup> On June 11, 2014, the EPA and the Food and Drug Administration also issued a proposed update to their guidance concerning consumption of mercury in fish.<sup>4</sup>

According to the OIG report, EPA paid a contractor more than \$610,000 to conduct the fish contamination study. A draft of the initial report from the study was submitted to EPA in the summer of 2008 and then underwent internal and external peer reviews. Based on comments from the peer reviewers, the contractor prepared separate reports on selenium and mercury contamination and submitted them to the Office of Water (OW) in the fall of 2008. The contractor submitted revised versions of the mercury report in June 2009 and September 2009.

Although these taxpayer-funded reports have remained hidden from the public since 2008, controversy has also surrounded the release of the underlying data on which these reports were based.<sup>5</sup> As described in the OIG report, EPA's Office of Research and Development (ORD) awarded a grant to examine existing fish contamination data and consider potential health impacts from eating selenium contaminated fish compared to consumption of mercury contaminated fish. The grant recipient was aware of the fish contamination study conducted for OW and first requested OW provide the underlying data in September 2011 in order to fulfill the grant's purpose. The OIG found that OW staff ignored the grantee's repeated requests for assistance for several months, before advising the grantee in April 2012 that the fish data would need to be formally requested under the Freedom of Information Act. EPA eventually released the data on May 23, 2012.<sup>6</sup> It is unclear from the OIG report how EPA may have used the various reports and underlying data from the original study.

To date, EPA has failed to release the reports from this study to the public, telling the OIG that "the conclusions could not be supported by the data we had collected."<sup>7</sup> However, according to the OIG report, "OW does not provide any specific evidence that the report is not reliable. Specifically, no statements are made on the weaknesses of the preceding contractor statements regarding fish advisories. The report was peer reviewed, which resulted in changes that the contractor made and the OW accepted. During the [OIG's] review, the OW staff stated they did not know what to do with the data and contractor reports, not that the data and reports were unreliable."<sup>8</sup>

---

<sup>3</sup> 80 Fed. Reg. 44350 (July 27, 2015); available at: <https://www.gpo.gov/fdsys/pkg/FR-2015-07-27/pdf/2015-18348.pdf>. In April 2010, EPA issued its revised final guidance for implementing the 2001 methylmercury water quality criterion; available at: <https://www.epa.gov/wqc/guidance-implementing-january-2001-methylmercury-water-quality-criterion>.

<sup>4</sup> 79 Fed. Reg. 33559 (June 11, 2014); available at: <https://www.gpo.gov/fdsys/pkg/FR-2014-06-11/pdf/2014-13584.pdf>. The EPA OIG has also announced plans to review the EPA's work involving mercury contaminated fish advisories. See, [https://www.epa.gov/sites/production/files/2015-09/documents/newstarts\\_09-9-15\\_mercury.pdf](https://www.epa.gov/sites/production/files/2015-09/documents/newstarts_09-9-15_mercury.pdf).

<sup>5</sup> *Id.* at 7- 8.

<sup>6</sup> This was two months after the final Mercury Air Toxics rule was published in the Federal Register

<sup>7</sup> EPA OIG Report at 21.

<sup>8</sup> *Id.*

The Honorable Gina McCarthy

April 14, 2016

Page 3

The OIG found the lack of timely response and cooperation by EPA staff to be a violation of EPA's scientific integrity policy and grants administration manual. The OIG also questioned whether "withholding this information prevented certain states from having the opportunity to determine whether they needed to revise their advisories on fish the public could safely eat."

I am deeply troubled by EPA's refusal to promptly provide copies of the reports from this study. Given the concerns raised by the OIG report, the considerable amount of taxpayer dollars that were expended, and the many high-profile regulatory and scientific actions involving selenium and mercury contaminated fish that are currently ongoing at the EPA, it is expected that EPA will lift the shroud of secrecy that has surrounded this study and provide these documents without further delay. Accordingly, it is requested that EPA provide complete and unredacted copies of the following documents and information:

- 1) the combined draft report concerning both selenium and mercury contaminated fish provided by the contractor to EPA in July 2008;
- 2) all peer reviewer comments;
- 3) the revised draft selenium contaminated fish report provided by the contractor to EPA in October 2008;
- 4) the revised draft mercury contaminated fish report provided by the contractor to EPA in October 2008;
- 5) the revised draft mercury contaminated fish report provided by the contractor to EPA in June 2009;
- 6) the revised draft mercury contaminated fish report provided by the contractor to EPA in September 2009; and
- 7) a list of all agency actions that rely on or otherwise cite or use the data that are the subject of these reports.

Please provide the requested documents and information no later than April 21, 2016. If you or your staff have questions, please have them contact Byron Brown of the EPA Majority staff at (202) 224-6176.

Sincerely,



---

JAMES M. INHOFE  
Chairman,  
U.S. Senate Committee  
on Environment and Public Works