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# United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

BETTINA POIRIER, *MAJORITY STAFF DIRECTOR*  
ZAK BAIG, *REPUBLICAN STAFF DIRECTOR*

April 16, 2013

The Honorable Gina McCarthy  
Assistant Administrator  
Office of Air and Radiation  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

Dear Assistant Administrator McCarthy:

We appreciate your recognition of the need to improve transparency at the U.S. Environmental Protection Agency (EPA). As you are aware, a number of unanswered questions remain, and while you acknowledged serious problems with EPA's transparency record, acknowledgement does not equal action. Accordingly, we reiterate our request for swift, significant action.

We want to hold you to your word and ensure that EPA will be fully transparent on the science, economics, and negotiations related to EPA decisions and rulemaking. For too long, EPA has failed to deliver on the promises of transparency espoused by President Barack Obama, former Administrator Lisa Jackson, and by you. The days of EPA's claiming substantial benefits from extremely costly regulations and saying "just trust us" must come to an end.

This letter concludes with some historical perspective on the precedent set for the nomination process as it relates to the acquisition of requested information. Our hope is that the commitment to transparency you provided was genuine and that there will be no further need to frustrate the process. Our requests, of which you are already aware, are as follows:

1. **Request:** That the EPA issue new guidance drafted by its Office of General Counsel that clearly outlines: a) standards and procedures to ensure that all official business is conducted solely on official government email accounts; and b) standards and procedures for responding fully, truthfully, and in a timely manner to FOIA requests and Congressional inquiries. The guidance document should also establish training regimes in these areas for all appropriate EPA staff, as well as penalties and procedures for dealing with deviations from the guidance.

**Status:** Your letter of April 8, 2013, committing to roughly 85% of this request, is an important first step. We appreciate recognition that the FOIA process at EPA is broken and that you are taking steps to address significant concerns. Accordingly, we recognize the commitment – assuming it is followed to completion – as a step forward.

2. **Request:** That all private email accounts of Regina McCarthy are exhaustively reviewed, and that all emails regarding official EPA business are produced unredacted to the committee. If no such emails exist, that an affidavit stating that fact by McCarthy be produced for the Committee. In addition, we are asking for transparency on specific documents the Committee has obtained in unredacted form. An outline of specific emails that should have already been made available to the public and Congress was provided to EPA staff.

**Status:** While your response to the Committee that you had searched your personal email accounts and that you only discovered a single instance where a work email was sent or received on your personal account is some acknowledgement, request #2 remains unsatisfied. EPA has still failed to transmit to the Committee specific documents in unredacted form. EPA has been informed of the universe of requested documents verbally and pursuant to a letter sent on April 11, 2013. Accordingly, you have only responded to 25% of this request, which is an insufficient response.

3. **Request:** That underlying data used to promulgate Clean Air Act rules be made public so the public can independently examine cost/benefit and other issues. That the EPA release a full set of data files for the American Cancer Society Study; the Harvard Six Cities Study; HEI/Krewski et al. 2009; Laden et al. 2006; Lepeule 2012; and Jerrett 2009. This request includes the coding of Personal Health Information (PHI).

**Background:** Since 1997, Congress has requested the underlying data for particulate matter studies (PM<sub>2.5</sub>) be made available to Congress and the public. Then-EPA Administrator Carol Browner went back and forth with Members regarding Congressional and public access to the underlying data, citing legitimate scientific inquiry qualifications and confidentiality concerns. In response to the continued reticence by EPA to publicly release data, the Shelby amendment, a rider to the FY1999 Omnibus Appropriations Act (P.L. 105-277), 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.”

A March 4, 2013, letter to the EPA from Ranking Member Vitter and House Science, Space, and Technology Committee Chairman Lamar Smith requested the underlying data from additional long term cohort studies that rely on updates from the Harvard Six Cities Study and the American Cancer Society Study, including: Krewski e. al. (2009); Pope et al. (2002); Pope et al. (2009); Krewski et al. (2000); Laden et. al (2006); and Lepeule et al. (2012). This letter repeated multiple communications from Congress requesting the release of the underlying data which are the basis for nearly all the health and benefit claims from CAA rulemaking in this Administration.

**Status:** While the Agency just recently responded to the March 4, 2013, letter, resending inadequate data already released is not responsive. The Agency admits the data provided are not sufficient to replicate analysis.

4. **Request:** That written assurances be given the Committee that the EPA will conduct cost/benefit analyses as required under various executive orders and as required by the CAA, Section 321(a), specifically through issuance of new guidance mandating “whole economy” modeling on major rules.

**Status:** Wholly unresponsive. While the Agency believes in providing the public with information on the impacts of its regulations, instead of full economy modeling, which captures the regulatory impacts throughout the full economy including the price of energy, the EPA utilizes a model designed to achieve a predetermined outcome: the costlier the regulation, the greater the job increase will be projected.

5. **Request:** That all petitions for rulemaking or the promulgation of guidance received by the Agency, including by the Office of the Administrator and/or by the Office of General Counsel, be tracked, listed, and made publicly available, including copies of the documents, via readily-available links on the Agency’s website. This information is to be regularly updated. That all notices of intent to sue received by the Agency, including by the Office of the Administrator and/or by the Office of General Counsel be tracked, listed, and made publicly available, including copies of the documents, via readily available links on the EPA website. This information is to be regularly updated.

If a citizen’s suit is brought against the Agency alleging that the EPA failed to undertake a nondiscretionary duty, and the Agency determines to undertake settlement negotiations with the plaintiff, then:

- a. The Agency shall issue public notice of its intent to engage in settlement negotiations at least 30 days prior to the commencement of those negotiations; and
- b. The Agency shall include intervenors in any such negotiations.

Further, that the Agency, in fulfilling the requirements of Section 113(g) of the Clean Air Act, shall share all comments received on a consent order or settlement agreement with the presiding judge prior to the Agency’s certifying and agreeing to support any such consent order or settlement agreement

**Status:** Although the EPA has agreed to publish notices of intent to sue, this does not provide adequate opportunity for impacted parties to have a say in settlement negotiations. Accordingly, you have not yet responded adequately to this request.

We also note that during your personal meetings with us as well as during your April 11, 2013, nomination hearing, you made several additional commitments that we expect you will fully satisfy during this process. We appreciate your responsiveness to those requests as well.

In an effort to provide historical perspective on the Committee's dedication to ensuring information requests are properly fulfilled, please review the examples below:

On Agency documents:

During the Bush Administration, Senator Boxer was highly critical of decisions regarding the California Waiver, and conducted vigorous oversight, insisting on receiving all deliberative documents from EPA and refusing to accept any claims short of Executive Privilege. The EPA complied with this request and provided the entire EPW Committee - majority and minority - all of the deliberative documents. We are conducting important oversight of the transparency at the Agency, and we insist upon the same level of compliance shown to Senator Boxer. In responding to the recent FOIA requests of private emails, the EPA claimed deliberative process. Congress does not accept deliberative process and, like Senator Boxer insisted a few years ago, we insist upon receipt of all of the documents.

On data access:

In 2003, some members objected to confirming Governor Leavitt as EPA Administrator, in large part, until EPA conducted detailed modeling on Senator Carper's 4P legislative alternative to air regulations, essentially holding that nomination until the EPA performed detailed, costly analysis. The modeling they requested took weeks and cost taxpayers tens of thousands of dollars. This is in direct contrast to what Republicans are demanding today. We seek documents and information that the Agency already has or should have.

Much of what transpired was outlined in a *Washington Times* article published on October 2, 2003, page a4. The article stated that Leavitt's responses to the written questions were deemed incomplete by some committee members without explaining how. From the article:

The democrats - who have been using the Leavitt nomination to criticize the Bush administration's environmental policies - said in a letter that Mr. Leavitt's answers to their hundreds of written questions are incomplete. The letter did not cite specific examples. [it was signed by all Democrats on the committee]

Mr. Jeffords voiced the democrats' complaint that the bush administration has weakened standards for clean air and water, is not cleaning up hazardous chemical waste sites under the superfund program and "is refusing to give us the answers" about these issues. I consider him a friend...the issues are not related to his qualifications, Mr. Jeffords said of Mr. Leavitt.

We provided this historical context to further outline the Senate EPW Committee's commitment to transparency and records requests in the face of a pending nominee. We further request that a commitment to transparency not otherwise afforded the public over the last four years be the utmost goal.

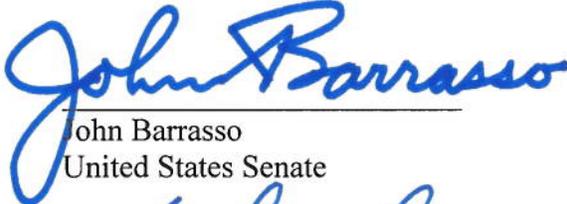
Sincerely,



David Vitter  
Ranking Member  
Environment and Public Works



James Inhofe  
United States Senate



John Barrasso  
United States Senate



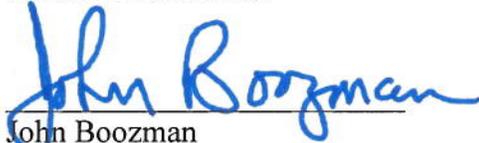
Jeff Sessions  
United States Senate



Mike Crapo  
United States Senate



Roger Wicker  
United States Senate



John Boozman  
United States Senate



Deb Fischer  
United States Senate