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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

RICHARD M. RUSSELL, MAJORITY STAFF DIRECTOR
MARY FRANCES REPKO, MINORITY STAFF DIRECTOR

October 9, 2018

The Honorable Andrew Wheeler
Acting Administrator
U.S. Environmental Protection Agency
1301 Constitution Ave. NW
Washington, DC 20460

Dear Acting Administrator Wheeler:

We write to urge you to stay firm to your commitment to “restoring the rule of law” at EPA.¹ Former EPA Administrator Scott Pruitt’s reign at EPA included a profound disregard for the mandates of statutory law, as well as attempts to obstruct the public’s ability to hold EPA accountable for fulfilling the laws’ requirements. Under former Administrator Pruitt’s direction, EPA improperly delayed the effective date of rules, delayed its responses to FOIA requests, failed to properly document rule proposals, and ignored administrative procedure.

The courts have also taken note of these deficiencies:

- On July 18, 2018, the 9th Circuit issued an emergency stay of Mr. Pruitt’s July 6, 2018 decision² not to enforce a rule imposing emission limits on certain super-polluting diesel freight trucks (or ‘gliders’). Following the court’s decision, you wisely withdrew Mr. Pruitt’s memo.³
- On August 9, 2018, the 9th Circuit ordered EPA to finalize a ban of the remaining uses of chlorpyrifos within 60 days,⁴ rejecting Mr. Pruitt’s decision to overturn the Obama Administration’s proposed ban. The Court found that EPA was “acting against its own science findings” with “no justification,” and chastised “EPA’s continued failure to respond to the pressing health concerns presented by chlorpyrifos.”⁵
- On August 16, 2018, a federal district court in South Carolina held that EPA had violated the Administrative Procedure Act by failing to provide a meaningful opportunity for

¹ https://www.washingtonpost.com/news/energy-environment/wp/2018/07/06/incoming-epa-chief-this-is-the-right-job-for-me/?utm_term=.c3cbcd390a8d

² https://www.washingtonpost.com/national/health-science/epa-reverses-course-says-it-will-enforce-strict-pollution-limits-for-glider-trucks/2018/07/26/705ff4ee-9144-11e8-8322-b5482bf5e0f5_story.html?utm_term=.1c9f-b066ccad

³ https://www.epa.gov/sites/production/files/2018-07/documents/memo_re_withdrawal_of_conditional_naa_regarding_small_manufacturers_of_glider_vehicles_07-26-2018.pdf

⁴ <https://www.nytimes.com/2018/08/09/us/politics/chlorpyrifos-pesticide-ban-epa-court.html>

⁵ <https://int.nyt.com/data/documenthelper/149-ninth-circuit-opinion-on-pesti/cc426d5eaf5ecfd14272/optimized/full-pdf#page=1> (citations and internal quotations omitted)

public input on its two-year delay of the Clean Water Rule.⁶ The court noted that “an illusory opportunity to comment is no opportunity at all,”⁷ and accordingly enjoined the delay, effectively reinstating the rule’s protections in 26 states.⁸

- On August 17, 2018, the D.C. Circuit found that EPA had made “a mockery” of the law when it delayed until February 2019⁹ the effective date of the Obama Administration’s Risk Management Program (RMP) rule—also known as the “Chemical Disaster Rule”—designed to reduce risks associated with hazardous chemicals.¹⁰ The court rejected EPA’s argument that the agency needed the delay in order to avoid confusion as it determined how to revise the rule: “[T]his ‘confusion,’” the judges wrote, “stems solely from the confusion EPA has caused by the almost two-years’ reconsideration it desires in order to decide what it wants to do. . . . [T]hat is not a basis for delaying protections.”¹¹ Accordingly, on September 21, 2018, the judges struck down the delay and thereby reinstated the Chemical Disaster Rule.¹²
- Federal courts have similarly rejected EPA’s delay of a rule to tighten training requirements for farmworkers applying toxic pesticides because it violated the Administrative Procedure Act;¹³ EPA’s failure to respond to Connecticut’s petition requesting that EPA address pollution from a Pennsylvania power plant;¹⁴ and EPA’s failure to meet its deadline to designate areas that do not meet its new National Ambient Air Quality Standard for ozone.¹⁵
- As of October 1, 2018, citizens have filed nearly 80 lawsuits alleging that the Trump Administration EPA has illegally failed to produce documents under the Freedom of Information Act (FOIA). While most of those cases are still in litigation, courts have ordered EPA to turn over documents in at least 20 cases, and the agency itself has turned over documents in at least 10 more cases under litigation pressure. By contrast, the agency appears to have won only two FOIA cases — on procedural, not substantive, grounds.

There are several examples of pending proposed rules crafted under former Administrator Pruitt’s tenure that are also clearly at risk of being soundly dismissed in court.

For example, earlier this year, EPA invited public comment on its ‘secret science’ proposal,¹⁶ which would limit the scientific information used in rulemaking. This rule, if finalized, could cause the agency to ignore statutory mandates to use the “best available science” when making

⁶ https://www.americanbar.org/content/dam/aba/administrative/environment_energy_resources/resources/wotus/wotus/document_gw_05.authcheckdam.pdf

⁷ https://www.americanbar.org/content/dam/aba/administrative/environment_energy_resources/resources/wotus/wotus/document_gw_05.authcheckdam.pdf

⁸ https://www.americanbar.org/groups/environment_energy_resources/resources/wotus/wotus-rule.html

⁹ <https://www.epa.gov/newsreleases/epa-extends-rmp-effective-date-2019>

¹⁰ <https://newrepublic.com/minutes/144655/arkema-crisis-unfolding-epa-chemical-plant-safety-rule-hold>

¹¹ <https://connmaciel.files.wordpress.com/2018/08/air-alliance-dc-circuit.pdf>

¹² <https://insideepa.com/daily-news/dc-circuit-again-grants-bid-quickly-implement-epa-facility-safety-rule>

¹³ <https://earthjustice.org/sites/default/files/files/cparRuling.pdf>

¹⁴ <https://docs.justia.com/cases/federal/district-courts/connecticut/ctdce/3:2017cv00796/117590/52>

¹⁵ https://www.biologicaldiversity.org/programs/environmental_health/pdfs/72_Order-Summary-Judgment-03-12-2018.pdf

¹⁶ <https://www.epa.gov/newsreleases/epa-administrator-pruitt-proposes-rule-strengthen-science-used-epa-regulations>

rules, such as under the Toxic Substances Control Act¹⁷ and Safe Drinking Water Act,¹⁸ and would also run afoul of the Administrative Procedure Act if important scientific studies are submitted to the rulemaking record and EPA ignores them because its new rule required their exclusion.

The same is true for the recently reformed and bipartisan Toxic Substances Control Act, which tasked EPA with writing ‘framework’ rules for how the agency will evaluate the safety of existing chemicals and included new requirements for how the agency should evaluate the safety of new chemicals. All of these efforts are subject to litigation,¹⁹ in large part because of EPA’s failure to follow the statutory direction Congress gave the agency to evaluate the risk from all uses of a chemical.²⁰ Similarly, the rule exempting super-polluting glider trucks from emissions limits remains pending (despite a federal court’s stay of Mr. Pruitt’s “no action assurance” memo promising that industry that it would not be subject to EPA enforcement, and your subsequent revocation of that memo).²¹

We ask that you return the rule of law at EPA, as you committed to doing in your first address to the agency,²² by withdrawing pending proposed rules or revising final rules and practices that either are unsupported by the best available evidence and expertise, conflict with existing statutory authority, or both.

The failure to quickly correct course will not only unduly and further delay the implementation of vital environmental protections and create an extended period of regulatory uncertainty for industry. In fact, continuing down this unwise path will also cost taxpayers money, since the federal government spends time and money defending these unsound rules in court. We therefore additionally request information about the amount of taxpayer funds that have been expended defending actions taken by former Administrator Pruitt. Please provide the following information by close of business on November 2, 2018:

1. From January 20, 2017 to the present, a list of all deadline lawsuits in which EPA was a party, the amount of government-paid attorney’s fees and costs to the opposing party, and whether EPA settled or litigated the case;
2. From January 20, 2017 to the present, a list of all Freedom of Information Act lawsuits in which EPA was a party, the amount of government-paid attorney’s fees and costs to the opposing party, and whether EPA settled or litigated the case; and
3. From January 20, 2017 to the present, a list of all non-deadline and non-FOIA lawsuits in which EPA was a party, the amount of government-paid attorney’s fees and costs to the opposing party, and whether EPA settled or litigated the case.
4. For each lawsuit identified in your responses to questions 1 and 2, please state whether the lawsuit was subject to EPA’s “Directive Promoting Transparency and Public

¹⁷ 15 U.S.C. 2625(h)

¹⁸ 42 U.S.C. § 300g-1(b)(3)(A)

¹⁹ https://www.edf.org/media/edf-files-lawsuits-defend-reforms-chemical-safety-law?_ga=2.46289198.8299115-46.1534955811-2036426178.1532455459

²⁰ 15 U.S.C. §§ 2602-2603

²¹ <https://www.regulations.gov/document?D=EPA-HQ-OAR-2014-0827-2368>

²² <https://www.washingtonexaminer.com/policy/energy/andrew-wheeler-promises-to-value-epa-staff-as-he-pursues-trumps-deregulatory-agenda>

Participation in Consent Decrees and Settlement Agreements.” If the lawsuit was subject to the Directive, please state whether the parties settled or attempted to settle the matter, and whether non-parties were consulted on any potential settlement.

Thank you very much for your attention to this important matter. If you have any questions or concerns, please ask the appropriate members of your staff to contact Michal Freedhoff, of the Environment and Public Works Committee staff, at 202-224-8832.

Sincerely,


Tom Carper
Ranking Member

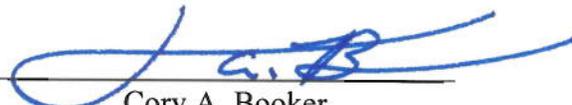

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United States Senator


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United States Senator


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