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Hearing on Oversight of the Environmental Protection Agency's Interaction with the Science
Advisory Board and S. 543, the Science Advisory Board Reform Act of 2015.

United States Senate
Senate Committee on Environment and Public Works
Subcommittee on Superfund, Waste Management, and Regulatory Oversight

Statement by
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Good morning, Mr. Chairman and other distinguished Members of the Subcommittee. As an attorney with Pacific Legal Foundation, a nonprofit, public interest organization dedicated to the protection of individual liberty, property rights, and a balanced approach to environmental regulation, I wish to thank you for this opportunity to provide my views regarding the manner in which EPA interacts with the Science Advisory Board ("SAB" or the "Board"), and ways in which that interaction may be improved. I have been practicing environmental law for about 40 years, and I have had extensive experience dealing with issues involving EPA's interaction with the Science Advisory Board. I started my legal career as an EPA lawyer and, since then, I have served in private practice, state government, teaching, and public interest. In my opinion, EPA could be using the Board more effectively, efficiently, and wisely. To that end, the Science Advisory Board organic statute, which is part of the Environmental Research, Development, and Demonstration Authorization Act, could be clarified to underscore the Board's important role. S. 543 heads in the right direction.

The Science Advisory Board was established by Congress in the 1970s in response to public criticism that EPA's regulatory proposals under the Clean Air Act and the Clean Water Act lacked technical credibility. See Joe G. Conley, *Conflict of Interest and the EPA's Science Advisory Board*, 86 Tex. L. Rev. 165, 168 (2007). A key element of the SAB's mission is to render advice to EPA "on a wide range of environmental issues and the integrity of EPA research." *Meyerhoff v. United States EPA*, 958 F.2d 1498, 1499 (9th Cir. 1992). The current SAB statute states that the Board's role in EPA rulemaking is to provide "its advice and comments on the adequacy of the scientific and technical basis of regulatory proposals." 42 U.S.C. § 4365(c)(2). The implementing regulations state that the Board's mission is to provide "expert and independent advice to the [EPA] in the scientific and technical issues facing the Agency." 40 C.F.R. § 1.25(c). Thus, the Board is intended to function as a peer review panel of experts to ensure that EPA's regulatory proposals are firmly rooted in sound science.

To implement the purpose of the Board, the statute provides that when “*any* proposed criteria document, standard, limitation, or regulation . . . under *any* authority of the Administrator is provided to any other Federal agency for formal review and comment, [EPA] . . . shall make available to the Board such proposed criteria document, standard, limitation, or regulation, together with relevant scientific and technical information in the possession of the Environmental Protection Agency on which the proposed action is based.” 42 U.S.C. § 4365(c)(1) (emphasis added). Clearly, “*any*” regulatory proposals is intended to mean all regulatory proposals. Moreover, the use of the word “shall” signifies that submittal of regulatory proposals to the SAB is nondiscretionary. *American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1188 (D.C. Cir. 1981). However, under the current statute, the duty is solely upon EPA; the Board itself has no particular duty to respond to a submittal. That is, the Board may decide in its discretion to review the proposal with or without comment, or simply to do nothing. If the Board provides comments on the regulatory proposal, EPA is under no obligation to amend the regulatory proposal in response to those comments, or even to provide any reasons for refusing to do so.

In 2009, when EPA issued its first regulation governing greenhouse gas emissions, it failed to submit the regulatory proposal to EPA. Thus, EPA’s Greenhouse Gas Endangerment Finding under the Clean Air Act, by which EPA found that greenhouse gases pose a danger to human health and welfare, was not submitted for peer review to the Board. *See* 74 Fed. Reg. 66,496 (Dec. 15, 2009). Neither were subsequent regulations promulgated under the Clean Air Act governing greenhouse gas emissions for cars, 75 Fed. Reg. 25,324 (May 7, 2010), and trucks, 76 Fed. Reg. 57,106 (September 15, 2011).

In the aftermath of the greenhouse gas regulations, EPA took the position that it need not submit certain regulatory proposals to EPA unless (1) *another* statute requires EPA to submit a regulatory proposal for “formal review” to a federal agency, and (2) the person seeking to enforce the SAB submittal requirement proves that EPA’s failure to comply with the SAB statute was such that there is a substantial likelihood the regulation would have been significantly changed had SAB been given the opportunity to review it before it was finalized. These EPA positions dilute EPA’s duty to obtain scientific peer review of its regulatory proposals.

It is important to ensure that the SAB statute fulfills its intended purpose of providing scientific credibility to EPA’s regulations. If S. 543 moves forward, the intent of the SAB organic statute could be clarified by explaining that:

- (1) EPA must submit all of its regulatory proposals to the Board for peer review no later than the time it publishes a proposed regulation in the Federal Register for comment by the general public;
- (2) EPA’s failure to timely submit regulatory proposals to the Board is subject to judicial review under the standards set forth in the Administrative Procedure Act;

- (3) The Board must respond to any EPA submittal in writing within 90 days of the date it receives the regulatory proposal from EPA, or by the end of the comment period set forth in the Federal Register in which the regulatory proposal is published, whichever is later;
- (4) Permissible written responses from the Board include (a) commenting on the regulatory proposal and/or making recommendations for changes to the regulatory proposal, or (b) choosing not to comment or recommend changes, and providing reasons why it chose not to do so; and
- (5) EPA must consider the Board's responses and summarize in the preamble to the final rule published in the Federal Register the extent to which the regulatory proposal was changed in response to any comments or recommendations made by the Board, as well as EPA's reasons.

These five suggestions could clarify the SAB submittal requirement to ensure that EPA does not unilaterally refuse to submit any particular regulatory proposal to the Board for peer review. At the same time, it will streamline the SAB review process and make the Board accountable for actually providing peer review.

CONCLUSION

I thank the committee for this opportunity to provide this testimony and hope this analysis will help the committee as it deliberates improvements to the Science Advisory Board organic statute.

Respectfully submitted,
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