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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

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July 20, 2016

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

Dear Administrator McCarthy:

I write to comment on the list of candidates nominated to serve on the U.S. Environmental Protection Agency's (EPA or Agency) chartered Clean Air Scientific Advisory Committee (CASAC). The CASAC is a seven-member member Federal Advisory Committee (FAC) tasked with providing the EPA independent scientific advice related to the national ambient air quality standards (NAAQS). As you know, I have long expressed concerns over the composition of previously appointed CASAC panels, but I am hopeful you will use this opportunity to appoint an expert that will bring much needed balance and integrity to CASAC.

Pursuant to Section 109(d)(2) of the Clean Air Act, the chartered CASAC must be composed of at least "one person representing State air pollution control agencies."¹ On April 6, 2016, EPA published a notice in the Federal Register requesting nominations for candidates to fill this statutorily required state-affiliated position.² Nominations were due by May 6, 2016. On June 20, 2016, EPA posted a list of seven candidates who were nominated on its website and announced the Agency would accept public comments on those candidates until July 20, 2016.³ Among the seven candidates, the EPA Science Advisory Board (SAB) staff office will make a recommendation to you, as the EPA Administrator, who will then appoint a member to the chartered CASAC for a three-year term beginning in October 2016.⁴

This is a critical position on CASAC that warrants robust review of the candidates' qualifications both individually and within the context of the other six members of CASAC to ensure balance of the panel. EPA should consider the historical composition of the chartered CASAC as well as those serving in this specific state-affiliated position on CASAC, and how one of the nominees may fill a void on the panel. With these factors in mind, I want to highlight several issues related to the lack of geographic diversity and fresh perspectives on the chartered CASAC that EPA

¹ 42 U.S.C. § 7409(d)(2).

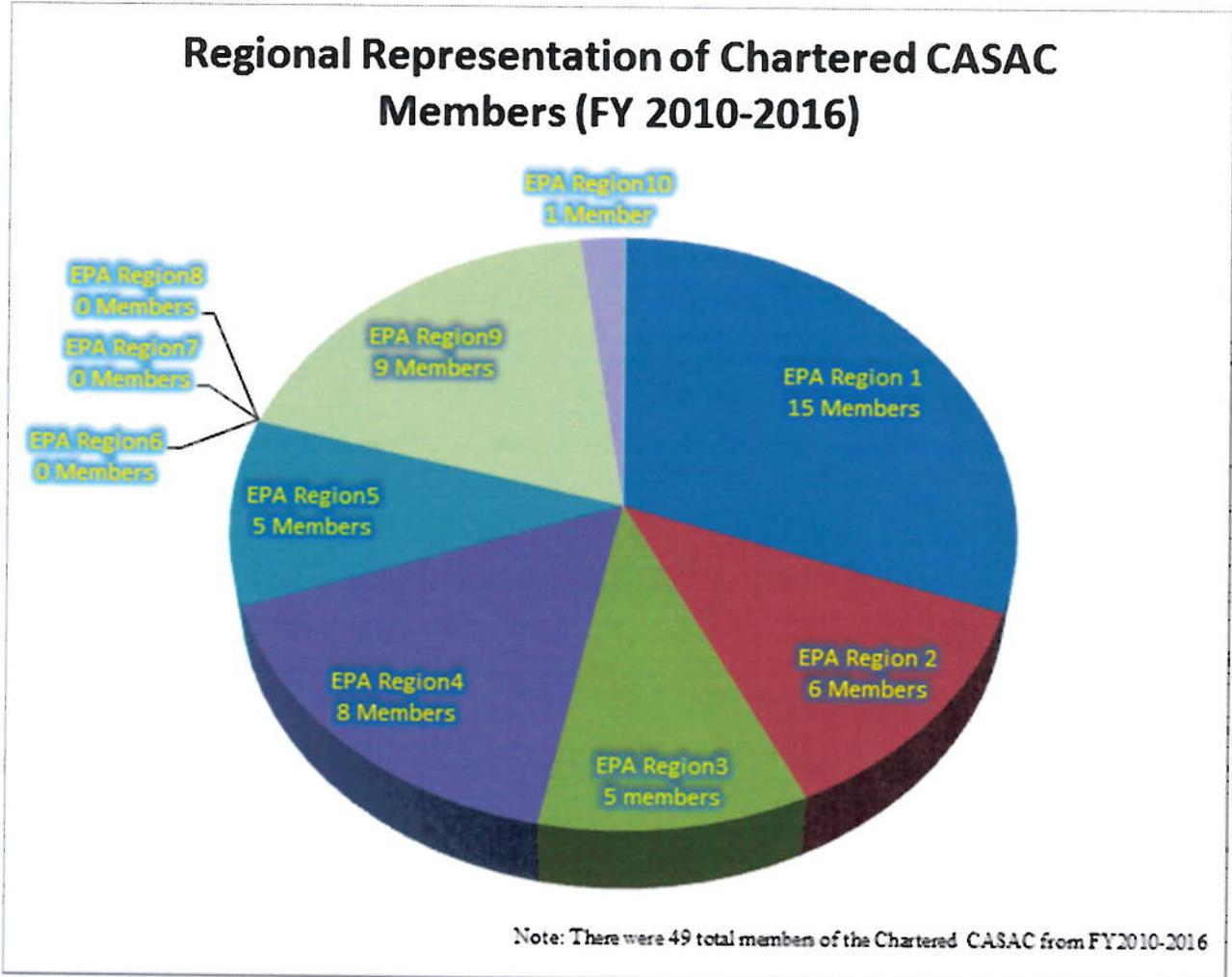
² U.S. Evtl. Prot. Agency, Notice, Request for Nominations of Candidates to the EPA's Clean Air Scientific Advisory Committee (CASAC) and the EPA Science Advisory Board (SAB), 81 Fed. Reg. 19967, Apr. 6, 2016, available at <https://www.gpo.gov/fdsys/pkg/FR-2016-04-06/pdf/2016-07918.pdf>.

³ [https://yosemite.epa.gov/sab/sabproduct.nsf/LookupWebProjectsCurrentCASAC/3CDA169D2187C6C885257F85006D3AF1/\\$File/List%20of%20Candidates-CASAC.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/LookupWebProjectsCurrentCASAC/3CDA169D2187C6C885257F85006D3AF1/$File/List%20of%20Candidates-CASAC.pdf)

⁴ "Appointments are anticipated to be filled by the start of Fiscal Year 2017 (October 2016). . . Members are appointed by the EPA Administrator for a three-year term and serve as Special Government Employees who provide independent expert advice to the agency." 81 Fed. Reg. 19967.

SAB staff office should take into account when evaluating the nominees. While not providing an endorsement of any of the candidates, I note in this letter my concerns with two of the nominees under consideration for the chartered CASAC.

In the first instance, EPA's record for ensuring geographic diversity on its advisory panels has been lacking under the Obama Administration. As for the current seven-member chartered CASAC; there are no members from EPA Regions 2, 4, 6, 7, or 8. In fact, over the course of this Administration, EPA has not appointed a single person from EPA Regions 6, 7, or 8 to serve on the chartered CASAC. These regions include 15 states, which represent 30 percent of the country; yet represent zero percent of the chartered CASAC during the last six years. As I have stated before, these regions cover vast parts of the country that are among the most impacted by the NAAQS, so qualified experts from these areas would have particularly unique experience with air quality issues that CASAC has not benefited from in recent years. Meanwhile, the coastal EPA Regions 1 and 9 have been overrepresented on the panel. The following chart illustrates the geographic representation of the members appointed to the chartered CASAC by this Administration:



Source: FACA Database, Clean Air Scientific Advisory Committee: http://facadatabase.gov/rpt/_message.asp

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This seeming geographic bias on the chartered CASAC cannot be ignored. It is also important to note that with respect to this specific state-based position on CASAC, there has been no meaningful geographic diversity at all. In last 20 years, there have been only four individuals filling this position on the chartered CASAC, two of which were from EPA Region 1 and the others were from Regions 2 and 5. Indeed, the last time this position was vacant there were six candidates nominated, with many from the west coast and northeast.⁵ This was disappointing in light of the overrepresentation of those areas on the panel. This time there is a more diverse group of nominees from EPA Regions 4, 5, 6, and 8. As such, there is no reason for EPA to overlook well-qualified candidates from these areas that would clearly balance the panel with respect to geographic diversity.

As you are aware, the chartered CASAC is a federal advisory committee (FAC), subject to the Federal Advisory Committee Act (FACA) of 1972, which provides uniform procedures for the establishment, operation, administration, and duration of FACs.⁶ FACA regulations require membership on FACs be balanced and provide several factors for agencies to consider in reaching balance, including the geographic impact of the FAC's recommendations.⁷ EPA's FAC Management Handbook also states that the Designated Federal Office (DFO), who is charged with ensuring compliance with FACA and its implementing regulations, should compose FACs with a balance of views, which includes geographic considerations.⁸ EPA's CASAC Membership Balance Plan, updated in April 2015, specifically added "geographic location may be considered" as the only other factor to consider the balance of the chartered CASAC.⁹

These requirements must be considered when evaluating the nomination of Bart Croes of the California Air Resources Board (CARB), who would not provide geographic diversity to the panel. In fact, there has been one member from California on the chartered CASAC since the beginning of the Administration. For one of 50 states to constantly have a member on a seven-member panel does not suggest EPA has meaningfully considered geographic representation on CASAC. Even more, the current chartered CASAC already includes a member from California, Ron Wyzga, who was just reappointed in October 2015 to serve a term ending in 2018. Therefore, if EPA appointed Mr. Croes to CASAC, for the next two years, 30 percent of the

⁵U.S. Env't. Prot. Agency, Invitation for Public Comment on the List of Candidates for the Environmental Protection Agency's Clean Air Scientific Advisory Committee, May 21, 2013, *available at* [https://yosemite.epa.gov/sab/sabproduct.nsf/WebAll/CASACFY13AMD/\\$File/CASAC_Nominee_Biosketches_05-22-13_corrected.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/WebAll/CASACFY13AMD/$File/CASAC_Nominee_Biosketches_05-22-13_corrected.pdf).

⁶ 5 U.S.C. App. 2 § 2.

⁷ GSA Final Rule on Federal Advisory Committee Management, 41 CFR Parts 101-6 and 102-3.

⁸ ENVTL. PROT. AGENCY, EPA'S NEW FEDERAL ADVISORY COMM. MGMT HANDBOOK, Oct. 9, 2013, *available at* <http://nepis.epa.gov/Exe/ZyNET.exe/901W0000.TXT?ZyActionD=ZyDocument&Client=EPA&Index=2000+Thru+2005&Docs=&Query=&Time=&EndTime=&SearchMethod=1&TocRestrict=n&Toc=&TocEntry=&QField=&QFieldYear=&QFieldMonth=&QFieldDay=&IntQFieldOp=0&ExtQFieldOp=0&XmlQuery=&File=D%3A%5Czyfiles%5CIndex%20Data%5C00thru05%5CTxt%5C00000012%5C901W0000.txt&User=ANONYMOUS&Password=anonymous&SortMethod=h%7C-&MaximumDocuments=1&FuzzyDegree=0&ImageQuality=r75g8/r75g8/x150y150g16/i425&Display=p%7Cf&De fSeekPage=x&SearchBack=ZyActionL&Back=ZyActionS&BackDesc=Results%20page&MaximumPages=1&ZyEntry=1&SeekPage=x&ZyPURL#> (hereinafter EPA FAC Handbook).

⁹ CASAC Membership Balance Plan, April 15, 2015, *available at* <http://facadatabase.gov/committee/charters.aspx?cid=634&aid=51>.

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panel would be from one state, which is wholly unacceptable. Such an appointment would be counter to EPA policy and would suggest the Agency does not take geographic diversity seriously given the high caliber of other candidates from regions not currently represented, as well as regions that have not been represented on the chartered CASAC for many years.

In addition, EPA must take into account concerns over the lack of fresh perspectives on the chartered CASAC when assessing the balance of the panel. For instance, the current chartered CASAC includes four of seven members that previously served on the chartered CASAC. As you are aware, EPA's Peer Review Handbook advises the Agency to select new members "to obtain fresh perspectives and reinforce the reality and perception of independence from the Agency."¹⁰ EPA's FAC Handbook dictates that members of the chartered CASAC can serve only six years "in order to provide fresh perspectives to the committee."¹¹

I applaud EPA's commitment to this term limit on the chartered CASAC since 2010.¹² However, as a practical matter, the six-year tenure policy does not necessarily ensure a balanced panel with respect to fresh perspectives per FACA. Indeed, since the Clean Air Act requires CASAC to review the NAAQS every five years, there could be instances where CASAC members review and vote on the standard for the same criteria pollutant that they had previously reviewed, especially when members do not serve in consecutive three-year terms. EPA now has an opportunity to fill this opening in a manner that addresses this past concern and is consistent with EPA's Peer Review and FAC Handbooks.

Specifically, EPA must consider these factors when evaluating Dr. Donna Kenski of the Lake Michigan Air Directors Consortium, who was nominated to serve on CASAC. Dr. Kenski has already served on the chartered CASAC for a three-year term from 2008 to 2010. During this time, Dr. Kenski reviewed and provided advice on each of the six criteria pollutants. Critically, as a member of the chartered CASAC, she was a voting member authorized to make recommendations to the Administrator on the NAAQS, which is distinct from members of CASAC subcommittees who do not directly advise the Administrator. Accordingly, if she were appointed again to serve another three-year term, she would review and make recommendations on a number of the same criteria pollutants. This scenario is exactly what I cautioned against in 2011, when I requested a review of CASAC membership by the EPA Office of Inspector General (OIG).¹³ In addition to not providing a fresh perspective, when an individual is tasked with reviewing the same standard, it also calls into question the impartiality of the member as they would essentially be reviewing their past work in advising on the last standard. In the interest of

¹⁰ ENVTL. PROT. AGENCY, SCIENCE & TECH. POLICY COUNCIL, PEER REVIEW HANDBOOK, 4th Ed. (Oct. 2015), http://www2.epa.gov/sites/production/files/2015-09/documents/final_epa_peer_review_handbook-4th_ed_091415_dummy_link.pdf.

¹¹ EPA FAC Handbook, *supra* note 8.

¹² OFFICE OF INSPECTOR GEN., U.S. ENVTL. PROT. AGENCY, REPORT NO. 13-P-0387 EPA CAN BETTER DOCUMENT RESOLUTION OF ETHICS AND PARTIALITY CONCERNS IN MANAGING CLEAN AIR FEDERAL ADVISORY COMMITTEES (Sept. 11, 2013), at 21-22, *available at* <http://www2.epa.gov/sites/production/files/2015-09/documents/20130911-13-p-0387.pdf>.

¹³ Letter from Hon. James M. Inhofe, Ranking Member, S. Comm. on Env't & Public Works, to Hon. Arthur A. Elkins, Jr., Inspector Gen., U.S. Env't. Prot. Agency (Aug. 4, 2011), *available at* http://www.epw.senate.gov/public/_cache/files/d55fa42f-7c41-456e-893f-2963eb26e07e/lettertoelkins080411.pdf.

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showing a good faith effort to ensure fresh perspectives and balance on the panel, I urge you to choose among the other expert candidates whom have not served on the chartered CASAC.

Moreover, during Dr. Kenski's previous term on the chartered CASAC, there was significant controversy generated by members of the committee, who did not act impartially and overstepped the statutory authority delegated to CASAC. Specifically, Dr. Kenski joined members of the chartered CASAC in a letter to then-EPA Administrator Stephen Johnson that challenged the ozone NAAQS in 2008, which did not conform to the range advised by CASAC.¹⁴ In the correspondence Dr. Kenski signed, CASAC members ridiculed then-Administrator Johnson and muddled the lines of science and policy decision-making that were clearly outside the bounds of CASAC's statutory charge. As you are aware, the Clean Air Act does not require the EPA Administrator to follow CASAC's recommendation. This interaction between CASAC and EPA was then subject to numerous Congressional investigations and oversight, which casts a shadow over Dr. Kenski's previous experience on CASAC. Given that there are other highly qualified individuals nominated to serve on the chartered CASAC that have not previously served and have not been subject to such controversy, I see no reason to appoint someone who has raised this significant concern.

Thank you for your attention to this matter. If you have any questions with this request, please contact the Committee on Environment and Public Works at (202) 224-6176.

Sincerely,



James M. Inhofe

Chairman

Committee on Environment and Public Works

cc: Aaron Yeow, Designated Federal Officer, Clean Air Scientific Advisory Committee

¹⁴ Letter from Dr. Rogene Henderson, Chair, Clean Air Scientific Advisory Comm. et al., to Hon. Stephen Johnson, Adm'r, U.S. Env'tl. Prot. Agency, Apr. 7, 2008, *available at* [https://yosemite.epa.gov/sab/sabproduct.nsf/4AF8764324331288852574250069E494/\\$File/EPA-CASAC-08-009-unsigned.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/4AF8764324331288852574250069E494/$File/EPA-CASAC-08-009-unsigned.pdf).