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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

June 14, 2013

Mr. Avi Garbow
Deputy General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Dear Mr. Garbow:

I write in light of your recent nomination to serve as General Counsel of the Environmental Protection Agency (EPA). If confirmed, you will play an important role in ensuring that EPA holds itself to the highest ethical and transparency standards. Acting Administrator Perciasepe has indicated that the EPA “shares the goal of increased transparency.”¹ The General Counsel is instrumental in determining EPA policy with respect to adherence to fundamental transparency statutes, such as the Freedom of Information Act (FOIA),² and is a key participant, along with the Department of Justice, in the negotiation of agency settlement agreements. Moreover, the General Counsel is EPA’s Chief Ethics Officer, and also advises the Agency with regard to compliance with Executive Orders, including 12866³ and 13563,⁴ as well as statutes such as the Regulatory Flexibility Act⁵ and the Small Business Fairness Act.⁶ Accordingly, I want to articulate my top priorities for the Agency and to seek assurances that you will work with the Environment and Public Works Committee to ensure that, within the purview of the Office of General Counsel, you share these priorities.

The Committee has uncovered multiple instances of mis-management of the Agency’s obligations under the FOIA. These problems range from the apparent bias in assessing applications for fee waivers,⁷ to the unauthorized release of private information of Americans to

¹ Letter from Hon. Bob Perciasepe, Acting Adm’r, U.S. Eenvtl. Prot. Agency, to Hon. David Vitter, Ranking Member, S. Comm. on Env’t & Pub. Works (May 1, 2013).

² See 5 U.S.C. § 552.

³ Exec. Order No. 12866, 58 Fed. Reg. 190 (Oct. 4, 1993), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/EO12866/EO12866_10041993.pdf.

⁴ Exec. Order No. 13563, 74 Fed. Reg. 14, 3824 (Jan. 21, 2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/EO12866/EO13563_01182011.pdf.

⁵ See 5 U.S.C. § 601 *et seq.*

⁶ See 5 U.S.C. § 801 *et seq.*

⁷ Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env’t & Pub. Works, Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov’t Reform, Hon. James Inhofe, Ranking Member, S. Subcomm. on

environmental allies,⁸ to the inappropriate application of FOIA exemptions. As the General Counsel, you will play an instrumental role in improving the Agency's performance on this front. While Acting Administrator Perciasepe committed to following the yet to be issued recommendations of the Inspector General,⁹ implementing these reforms should be a top priority. Thus, I ask for your personal commitment to aid the Committee in its oversight efforts, including obtaining documents already requested by the Committee,¹⁰ and to take all necessary steps to address these defects within the Agency. Additionally, I request your personal commitment to facilitating the FOIA request submitted to EPA by a number of state Attorneys General on August 10, 2012, referenced in a letter sent by myself, Senator Inhofe and Chairman Lankford on May 6, 2013.¹¹

With regard to "sue and settle" agreements, the EPA has entered into nearly 60 settlement agreements with environmental allies, which have led to extraordinarily expensive environmental regulations.¹² The common feature between these agreements is the exclusion of parties who will ultimately bear the brunt of the regulatory mandates. While the EPA has taken a small step towards transparency and agreed to begin posting all notices of "intent to sue" as well as "petitions for rulemaking" on a public website,¹³ this action alone does not cure the inherent unfairness of this practice. Accordingly, I reiterate our request that the Agency allow affected parties to participate in the negotiations before a settlement agreement has been reached, especially under circumstances where they are active litigants in the matter.¹⁴ At this time, there is an opportunity for EPA to demonstrate its commitment to reform this practice by agreeing to the request submitted by 12 trade associations to participate in talks between Earthjustice and EPA related to Earthjustice's petition pending before the Agency threatening to sue the Agency

Oversight, Comm. on Env't & Pub. Works, Hon. Charles E. Grassley, Ranking Member, S. Comm. on the Judiciary, to Hon. Bob Perciasepe, Acting Adm'r, U.S. Env'tl. Prot. Agency (May 17, 2013).

⁸ Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, et al., to Hon. Bob Perciasepe, Acting Adm'r, U.S. Env'tl. Prot. Agency (Apr. 4, 2013).

⁹ *Supra* note 1.

¹⁰ *Supra* note 6.

¹¹ Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, Hon. James Inhofe, Ranking Member, S. Subcomm. on Oversight, Comm. on Env't & Pub. Works, Hon. James Lankford, Chairman, H. Subcomm. on Energy Policy, Health Care & Entitlements, Comm. on Oversight & Gov't Reform, to Hon. Bob Perciasepe, Acting Adm'r, U.S. Env'tl. Prot. Agency (Apr. 29, 2013).

¹² U.S. CHAMBER OF COMMERCE, SUE AND SETTLE: REGULATING BEHIND CLOSED DOORS (2013), *available at* <http://www.uschamber.com/sites/default/files/reports/SUEANDSETTLEREPORT-Final.pdf>.

¹³ Letter from Arvin Ganesan, Assoc. Adm'r, U.S. Env'tl. Prot. Agency, to Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works (Apr. 9, 2013); *see also* letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, to Hon. Bob Perciasepe, Acting Adm'r, U.S. Env'tl. Prot. Agency, Hon. Gina McCarthy, Assistant Adm'r, Office of Air & Radiation, U.S. Env'tl. Prot. Agency (May 16, 2013).

¹⁴ Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, to Hon. Bob Perciasepe, Acting Adm'r, U.S. Env'tl. Prot. Agency, Hon. Gina McCarthy, Assistant Adm'r, Office of Air & Radiation, U.S. Env'tl. Prot. Agency (May 16, 2013) (Active litigants include both parties to litigation as well as intervenors).

to complete its consideration of Ozone NAAQS.¹⁵ As you are aware, compliance with EPA's Ozone National Ambient Air Quality Standards (Ozone NAAQS) could cost up to \$90 billion a year, according to EPA's own estimations. Moreover, the impact of these standards would be felt nation-wide. Accordingly, I request you commit to ensuring that these parties have a seat at the table in any negotiations related to either the Earthjustice petition, or any related petition submitted in the future.

In addition, the Committee has identified several examples of EPA employees failing to adhere to EPA's Standards of Ethical Conduct during your tenure in the Office of the General Counsel. In the first instance, it appears that former Regional Administrator Al Armendariz and Associate Regional Administrator Layla Mansuri were inappropriately involved in decisions related to the Las Brisas Energy Center, despite their advocacy against the facility before their employment at EPA.¹⁶ Additionally, the Committee is concerned that Michelle DePass, Assistant Administrator for the Office of International and Tribal Affairs, violated the clear terms of her ethics pledge when she continued to work at the Ford Foundation after she was confirmed to her position at EPA.¹⁷ These and other potential violations are very serious matters that compromise the integrity of the Agency. I hope that as the Agency's Chief Ethics Officer you will work with the Committee to reconcile these ethical issues and to ensure that similar problems do not occur in the future. As a preliminary matter, I request that EPA publish on a public website all ethics filings of senior officials within both EPA headquarters and regional offices.

Finally, the Committee has exposed failures in EPA's cost-benefit analysis of major rules that diverge from the required regulatory analysis prescribed by federal statutes and Executive Orders. In particular, E.O. 12866, as reinforced by E.O. 13563, instructs federal agencies to determine the costs and benefits of rules to ensure that it imposes "the least burden on society, including individuals, businesses of differing sizes, and other entities."¹⁸ However, I understand that EPA's current regulatory analysis fails to take into account a regulation's full costs on the economy.¹⁹ This type of analysis undermines the mandates of the Executive Orders, and results

¹⁵ Letter from Nat'l Assoc. of Manufacturers ET AL., to Hon. Bob Perciasepe, Acting Adm'r, Env'tl. Prot. Agency (May 13, 2013).

¹⁶ Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, Hon. James Inhofe, U.S. Senator, Hon. Roger Wicker, U.S. Senator, Hon. Jeff Sessions, U.S. Senator, Hon. John Boozman, U.S. Senator, Hon. John Cornyn, U.S. Senator, to Hon. Gina McCarthy, Assistant Adm'r, Office of Air & Radiation, U.S. Env'tl. Prot. Agency (Mar. 12, 2013).

¹⁷ Letter from Hon. David Vitter, Ranking Member, S. Comm. on Env't & Pub. Works, Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to Hon. Michelle DePass, Asst. Adm'r, Office of Int'l & Tribal Affairs, U.S. Env'tl. Prot. Agency (May 15, 2013).

¹⁸ *Supra* note 3.

¹⁹ Press Release, S. Comm. on Env't. & Pub. Works, Republican Staff, Eye on the EPA: Transparency Request #4, Snapshot Approach on Economic Analysis Doesn't Work (Apr. 25, 2013), *available at* http://www.epw.senate.gov/public/index.cfm?FuseAction=Minority.Blogs&ContentRecord_id=4310ac51-ef70-4c02-03ea-cbf64c1486c2&Region_id=&Issue_id=

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in a significant gap in understanding the full impact that regulations will have across the economy. As General Counsel, you will have the authority to amend EPA's regulatory analysis and bring it into compliance with E.O. 12866 and E.O. 13563.²⁰ Through the Regulatory Issues Practice Group within the Cross-Cutting Issues Law Office, you are tasked with managing the office that counsels EPA officials on legal compliance with all administrative matters relating to the development of rules and guidance.²¹ Given this responsibility, I ask that you reexamine the weaknesses the Committee has identified in EPA's regulatory analysis and commit to applying a cost-benefit analysis that fully considers the impact of major rules across the economy.

These are just some of the key issues that you will be facing if confirmed to serve as EPA's General Counsel. Accordingly, it is imperative that I have your full commitment to work with me on these matters so that we can work together to restore trust in the Agency. I look forward to meeting with you and key members of my staff as this process moves forward.

Sincerely,



David Vitter
Ranking Member
Senate Committee on Environment
and Public Works

²⁰ ENVTL. PROT. AGENCY, *About the Office of General Counsel (OGC)* <http://www2.epa.gov/aboutepa/about-office-general-counsel-ogc> (last accessed Jun. 13, 2013).

²¹ *Id.*