BARBARA BOXER, CALIFORNIA, *CHAIRMAN*

MAX BAUCUS, MONTANA
THOMAS R. CARPER, DELAWARE
FRANK R. LAUTENBERG, NEW JERSEY
BENJAMIN L. CARDIN, MARYLAND
BERNARD SANDERS, VERMONT
SHELDON WHITEHOUSE, RHODE ISLAND
TOM UDALL, NEW MEXICO
JEFF MERKLEY, OREGON
KIRSTEN GILLIBRAND, NEW YORK

DAVID VITTER, LOUISIANA
JAMES M. INHOFE, OKLAHOMA
JOHN BARRASSO, WYOMING
JEFF SESSIONS, ALABAMA
MIKE CRAPO, IDAHO
ROGER WICKER, MISSISSIPPI
JOHN BOOZMAN, ARKANSAS
DEB FISCHER, NEBRASKA

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

United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510–6175

March 28, 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 are writing in light of the announcement by the Institute for Policy Integrity at the New York University School of Law of its intent to initiate litigation as an attempt to force a cap and trade system on the transportation fuels sector. This potential litigation unfortunately illustrates two major concerns involving the Environmental Protection Agency (EPA) as well as ongoing concerns for our country's economic and energy future.

The first concern involves the continued practice of what are commonly referred to as "sue and settle lawsuits." This term refers to a practice where EPA moves to quickly settle certain lawsuits that are brought against the Agency before the public has an opportunity to comment or any affected person has the opportunity to intervene. Often negotiated behind closed doors, "sue and settle lawsuits" exclude the states in their proper role under the Clean Air Act (CAA) and ignore required rulemaking and transparency standards. This process results in a court-ordered timeframe for regulation without input from states and those economically impacted individuals or businesses, and often the circumvention of Congress. Beyond our strong opposition to the practice in general, we raise specific objection to such being applied in this particular case.

The potential negative impact in this case is that it threatens to expand environmental regulation beyond original intent of the law and could have detrimental effects on the livelihoods of our fellow Americans that are not always understood by academia. We note that Section 317 of the CAA states that in promulgating or revising any regulation controlling or prohibiting any fuel or fuel additive under Section 211(c) and any aircraft emission standard under Section 231, the Administrator shall prepare an economic assessment respecting such regulation before publication of notice of proposed rulemaking. Further, Section 321(a) of the CAA makes clear EPA is not to disregard economic impacts. These requirements are routinely ignored by the Agency and setting unrealistic rulemaking deadlines through the "sue and settle" process further prevents consideration of the harm Agency actions may have on American employers, workers, and consumers.

PRINTED ON RECYCLED PAPER

Over the last several decades, the CAA has been quite successful in achieving emissions reductions for the majority of our most severe pollutants. As Congress required in provisions of the CAA, it is imperative that, when determining the benefits of any new action under the Act, an added measure of economic and cost-benefit analysis ensure impacts to our economy are considered. Although trade is not a matter for direct consideration under the Act, we would note that this specific litigation has the potential to set in motion further dependence on Middle Eastern oil and to eschew the use of domestic resources, as well as those from our close ally and trade partner: Canada.

This brings us to our second concern. One of the greatest contributions to society, in that it has done more to equalize the standard of living regardless of income, is the availability of affordable energy. When the price of transportation fuels increases for any reason, it is those with limited resources and fixed incomes whose livelihoods are most impacted by this added financial burden. In recent years, we have consistently heard the term "environmental justice" as a reason for promulgating certain agency actions. We believe there also needs to be a measure of "economic justice" to ensure that Agency actions are not overly regressive and lack consideration for economic harm visited upon the very citizens these environmental laws are intended to protect. Accordingly, we believe it is imperative that the Agency not enter a "sue and settle" agreement either in this particular situation or future litigation, without first providing for the necessary state and stakeholder involvement in the litigation.

It remains incumbent upon the Agency that the economic well-being of our citizenry, including the ability to afford energy, be analyzed and considered in all Agency actions.

Sincerely,

David Vitter
Ranking Member
Environment and Public Works

James Inhofe
Ranking Member
Subcommittee on Oversight

Deb Fischer
United States Senate

Roger Wicker
Ranking Member
Subcommittee on Green Jobs and the New Economy