

Congress of the United States

House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

2321 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6301

(202) 225-6371
www.science.house.gov

November 23, 2015

The Honorable Eddie Bernice Johnson
Ranking Member
Committee on Science, Space, and Technology
U.S. House of Representatives
Washington, D.C. 20515

Dear Ranking Member Johnson,

On October 23 and November 19, you wrote letters referring to the Committee's issuance of a subpoena compelling documents and communications from the National Oceanic and Atmospheric Administration (NOAA) as a fishing expedition and a waste of time.¹ Further, you encourage obstruction of the Committee's investigation when you support NOAA for being reluctant to waste their time and resources responding to the Committee's request.² Your characterization of the Committee's efforts to obtain data from a government agency under its jurisdiction is inaccurate and misleading.³ There are in fact serious questions for NOAA to answer about its scientific process and how the agency has handled its response to the Committee's investigation.

As the Committee has made clear to NOAA through letters and briefings, the agency has failed to fully explain the conditions surrounding its process and procedures for adjusting upward temperature readings that eliminated the "pause" in global warming. NOAA is also unwilling to provide the Committee with information related to the role of political appointees in the decision to adjust temperature data and widely publicize conclusions based on those adjustments. Providing the Committee with publically available information and two briefings is not an adequate response. Further, it is not your role, nor the role of your staff, to determine what is, or is not responsive to the Committee's investigation when you are actively working to obstruct the Committee's oversight efforts.

¹ Letter from Hon. Eddie Bernice Johnson, Ranking Member, H. Comm. on Science, Space, & Tech., to Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. (Oct. 23, 2015) [hereinafter Letter, Oct. 23, 2015]; Letter from Hon. Eddie Bernice Johnson, Ranking Member, H. Comm. on Science, Space, & Tech., to Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech. (Nov. 19, 2015) [hereinafter Letter, Nov. 19, 2015]; Lisa Rein, *Climate Scientists to be Grilled by Congressional Investigators, But Their E-mails are Still Off-Limits*, WASH. POST, Nov. 16, 2015, available at <https://www.washingtonpost.com/news/federal-eye/wp/2015/11/16/climate-scientists-to-be-grilled-by-congressional-investigators-but-their-e-mails-are-still-off-limits/> (last visited Nov. 23, 2015).

² Letter, Oct. 23, 2015, *supra* note 1. For example: "NOAA, rightfully, has been reluctant to waste their time and resources."

³ *Id.*

Your letters indicate that you are not interested in obtaining answers to important questions and that you are willing to let them go unanswered. Indeed, any time the Committee attempts to conduct oversight, you place your political allegiance to the Administration ahead of the Committee's institutional interests. In fact, your letters regarding the Committee's NOAA investigation are entirely consistent with your posture toward each of the Committee's investigations where you routinely align yourself with agencies and the Administration, undermining the Committee's work. For example, this month the Committee held a hearing entitled "Examining EPA's Predetermined Efforts to Block the Pebble Mine."⁴ You referred to the hearing that focused on EPA's attack on due process as "disheartening."⁵ At the hearing, Members of the Minority even questioned the integrity of President Bill Clinton's former Secretary of Defense William Cohen when he raised critical questions about the EPA.⁶

This Congress, the Committee has sought to conduct oversight of waste, fraud, and abuse, including an instance of federal employees creating illegal post-retirement contracting jobs for themselves that cost taxpayers hundreds of thousands of dollars.⁷ During that hearing, you stated that it was your wish that "this Committee would focus a little less on political theater and a little more on real documented wrongdoing."⁸ Your statement begs the question that if fleecing taxpayers out of hundreds of thousands of dollars is not "real documented wrongdoing," then what is?

Additionally, the Committee has conducted oversight into other matters, such as federal grant recipients paying themselves and family members excessive salaries with what appears to be taxpayer funded federal grants⁹ and even a federal employee manufacturing methamphetamine at a federal laboratory who eventually plead guilty.¹⁰ The Committee also discovered that the EPA intentionally altered videos of the Gold King Mine spill to conceal the

⁴ H. Comm. on Science, Space, & Tech., *Hearing on Examining EPA's Predetermined Efforts to Block the Pebble Mine*, 114th Cong. (Nov. 5, 2015) [hereinafter *Hearing on Pebble Mine*].

⁵ H. Comm. on Science, Space, & Tech., Minority Press Release, *Majority Provides Pebble Mining Company with Public Platform to Criticize EPA* (Nov. 5, 2015), available at <http://democrats.science.house.gov/press-release/majority-provides-pebble-mining-company-public-platform-criticize-epa> (last visited Nov. 23, 2015).

⁶ *Hearing on Pebble Mine*, *supra* note 4, at 42-45.

⁷ H. Comm. on Science, Space, & Tech., *Hearing on Investigating Contract Misconduct at the Nat'l Weather Serv.*, 114th Cong. (Jul. 15, 2015) [hereinafter *Hearing on Investigating Contract Misconduct*]. The former senior government officials at issue invoked their 5th Amendment right when asked to provide details. *See id.* at 21-28; 28-33.

⁸ *Id.* at 9.

⁹ Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech., to Dr. Jagadish Shukla, Pres., Institute of Global Environment & Society (Oct. 1, 2015); Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech., to Mr. Thomas Spiggle, Partner, The Spiggle Law Firm (Oct. 19, 2015).

¹⁰ Letter from Hon. Lamar Smith, Chairman, H. Comm. on Science, Space, & Tech., to Hon. Willie E. May, Director, Nat'l Institute of Standards & Tech. (Sept. 30, 2015); Andrew Blake, *Meth Experiment Gone Bad Blamed for Explosion at NIST Lab; Ex-Guard to Plead Guilty*, WASH. TIMES, Aug. 19, 2015, available at <http://www.washingtontimes.com/news/2015/aug/19/meth-experiment-gone-bad-blamed-explosion-nist-lab/> (last visited Nov. 23, 2015).

lackluster response by EPA officials present during the spill.¹¹ Instead of demanding answers from the EPA, which spilled 3 million gallons of toxic waste water into the Animas River, you referred to the agency as “environmental firefighters.”¹² In this case, the “firefighters” not only caused the fire, but also failed to put it out. After an investigation by the Department of Interior, the agency agreed with the Committee’s conclusion that EPA was negligent,¹³ yet you were silent. Instead of expressing any interest in participating in oversight of NOAA or other agencies under the Committee’s jurisdiction, and ensuring that taxpayers’ hard-earned money is not being abusively misused, you and Members of the Minority obstruct, play defense, and character assassinate anyone who questions the Administration or any federal agency, including a former cabinet-level official in a Democratic Administration.¹⁴

In the NOAA investigation and many others, you effectively act as defense counsel for the Administration. You argue that the Committee should seek fewer documents and ask fewer questions.¹⁵ This blind allegiance to an Administration, even in the face of possible or admitted wrongdoing, does damage to Congress as an institution and to the trust people have in our federal agencies. You have even personally attacked me and my staff. According to a news report regarding the Committee’s NOAA investigation, you said “I have wondered if part of this is motivated by some assertive staff, or it is really him?”¹⁶ Additionally, you reportedly hope “that the recent shakeup in the GOP leadership might provide Smith with a new committee assignment.”¹⁷ You even indicate that I do not believe in science.¹⁸ This type of personal attack makes it clear that you have no interest in being a trusted partner in conducting oversight. Your actions tread closely to eroding the credibility of Members of the House of Representatives.¹⁹

According to your November 19 letter, you write that “I hope you will take this opportunity to provide the Minority with the whistleblower information you possess, so we might better be able to evaluate the veracity of these claims. Until you provide the Minority with this information, I hope you will understand my skepticism regarding the new claims.”²⁰ Unfortunately, you are always skeptical when it comes to conducting oversight of this Administration or any federal agency. Instead of seeking to learn what information the whistleblowers presented to the Committee in a responsible manner, you questioned the veracity

¹¹ Valerie Richardson, *EPA Accused at Hearing of Doctoring Video from Gold King Mine Spill*, WASH. TIMES, Sept. 9, 2015, available at <http://www.washingtontimes.com/news/2015/sep/9/epa-accused-hearing-doctoring-video-mine-spill/?page=all> (last visited Nov. 23, 2015).

¹² H. Comm. on Science, Space, & Tech., *Hearing on Holding the EPA Accountable for Polluting Western Waters*, 114th Cong. (Sept. 9, 2015), at 7.

¹³ U.S. Dep’t of the Interior, Bureau of Reclamation, *Technical Evaluation of the Gold King Mine Incident* (Oct. 2015), available at <https://assets.documentcloud.org/documents/2475483/technical-evaluation-of-the-gold-king-mine.pdf> (last visited Nov. 23, 2015).

¹⁴ *Hearing on Pebble Mine*, *supra* note 4, at 42–45.

¹⁵ See Letter, Oct. 23, 2015, *supra* note 1.

¹⁶ Eric Niler, *Congress’ Chief Climate Denier Lamar Smith & NOAA are at War*, WIRED, Nov. 11, 2015, available at <http://www.wired.com/2015/11/congress-chief-climate-denier-and-noaa-are-at-war/> (last visited Nov. 23, 2015).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ As stated in Clause 1 of Rule XXIII of the Code of Official Conduct, “A Member . . . of the House shall behave at all times in a manner that shall reflect creditably on the House.”

²⁰ Letter, Nov. 19, 2015, *supra* note 1.

of their claims in a public setting by saying “[t]o be frank, this appears to be an after-the-fact attempt to justify a fishing expedition.”²¹ Simultaneously, you are demanding to see information that could be used to personally identify them. Your public statements reflect a complete lack of understanding of whistleblowers’ rights when bringing information to the attention of Congress.

Whistleblowers report information to Congress in a trusted manner with the expectation that their identity will remain confidential. Your irresponsible statements in a public setting is not only harmful to the Committee’s current investigations, but may have a chilling effect on the willingness of federal employees to report waste, fraud, and abuse to the Committee in the future. Additionally, your public statements show that you and your staff are apparently not familiar with the Whistleblower Protection Act, even though it is a key tool for rooting out wrongdoing.²² The Act, which serves as the foundation for delineating rights of whistleblowers, functions as the primary means of informing Members of Congress of misconduct within the Executive Branch. I fear that your reckless and politically charged statements may risk exposing whistleblower identities in an effort to blindly defend the Administration. In the future, rather than risking damage to this institution, if you have questions about whistleblower claims, I suggest the discussion take place in a private setting, not through the media.²³

Additionally, your letters suggest that the oversight goals furthered by the October 13 subpoena are not legitimate because “the issue in question is a scientific research study, not a policy decision by a Federal agency.” This is simply not true. The request for documents and communications between *federal employees* serves the purpose of informing the Committee about the reasoning behind why a certain policy decision was made. As it is true that science informs policy, examining the data underlying policy decisions can be very valuable to informing the Committee’s actions with respect to legislation that may be necessary.

Many of the claims made about the Committee’s investigation in your letters are misleading. For example, you write:

Dr. Karl travelled to Washington, DC on October 19 to provide your staff with a private briefing on his research. You and your staff had the opportunity to ask him any question you desired. You could have confronted Dr. Karl with your whistleblower information. You didn’t. Instead of doing so, you and your staff are wasting taxpayer resources and Dr. Karl’s valuable time.²⁴

²¹ *Id.*

²² 5 U.S.C. § 7211 provides in pertinent part: “The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.”

²³ See H. Comm. on Science, Space, & Tech., Minority Press Release, *Ranking Member Johnson Questions Chairman Smith Again on NOAA Subpoena* (Nov. 19, 2015), available at <http://democrats.science.house.gov/press-release/ranking-member-johnson-questions-chairman-smith-again-noaa-subpoena> (last visited Nov. 23, 2015).

²⁴ Letter, Nov. 19, 2015, *supra* note 1.

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While it is a pleasant surprise for you to finally show concern for taxpayer resources, your characterization is not true. If you and your staff followed the investigation more closely, you would know that the Committee did not disclose the existence of whistleblowers until November 18, 2015, a month after Dr. Karl briefed the Committee. Further, as you should know, it is only with permission from whistleblowers that the Committee can disclose information provided in confidence, a key component of whistleblower protection of which you are apparently unaware. Additionally, you accuse me of making "irresponsible threats to Administrator Sullivan" regarding the Committee's subpoena.²⁵ Rather than proceeding immediately to enforce the subpoena, I have made numerous attempts to obtain the documents through other means, including writing to the Department of Commerce.

Additionally, your characterization that oversight should only be performed if evidence of misconduct, fraud, or abuse of discretion is found is mistaken. This Committee has a duty to "determine whether laws and programs addressing subjects within the jurisdiction of [this] committee are being implemented and carried out in accordance with the intent of Congress and whether they should be continued, curtailed, or eliminated."²⁶ The Rules of the House direct standing committees to conduct oversight on a continuing basis, regardless of whether wrongdoing is suspected. To that end, Congress has a constitutional responsibility to perform oversight, and that oversight may be far-reaching. In *Watkins v. United States*, the Supreme Court ruled that the "power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."²⁷

In the future, rather than immediately subscribing to the views of federal agencies and the Administration without question, it is my hope that you will recognize one of the key reasons why Congress exists—to act as a check on the actions of the Executive Branch. Not only should you, in your capacity as a Member of Congress, be keenly aware of the necessity of Congress to serve as a check on the Executive Branch, but your position as the Ranking Member of a standing committee of the U.S. House of Representatives amplifies your duty even more as one of the leaders of this Committee. Moving forward, I hope that you will further the responsibilities of this institution by conducting meaningful oversight, instead of acting as a blank check for the Administration's agenda.

Sincerely,



Lamar Smith
Chairman

²⁵ *Id.*

²⁶ Rules of the U.S. House of Representatives, Rule X, Clause 2 (b).

²⁷ *Watkins v. United States*, 354 U.S. 178 (1957).