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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

August 11, 2015

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

Dear Administrator McCarthy:

The Committee on Science, Space, and Technology appreciates the testimony you presented on July 9, 2015, at a hearing entitled "Examining EPA's Regulatory Overreach." The hearing examined the U.S. Environmental Protection Agency's (EPA) ongoing regulatory agenda. At the hearing, you attempted to address the concerns of Committee Members regarding recent final and proposed rulemakings initiated by the EPA. The Committee has found several instances where your responses to questions posed by Members were false and misleading. Prior to further investigative action by the Committee, we want to invite you to reflect on your testimony and provide further details. Should it be necessary to clarify or amend your testimony, then we request you do so as quickly as possible.

One of the main topics at the July 9 hearing was the transparency of EPA's regulatory agenda. Many of the Members asked questions regarding EPA's use of secret science and the access that Congress and the American people have to the data that justifies the agency's rulemakings. Ensuring that all of the data on which EPA relies for its rulemaking is publically available is an important goal of this Committee.

At the July 9, 2015, hearing, Vice Chairman Frank Lucas (R-OK) asked you whether EPA had made public the data and information used to determine certain standards in the final Waters of the United States (WOTUS) rule issued on May 27, 2015. You had the following exchange with Rep. Lucas:

> Rep. Lucas: In a particular area or two that goes with the Waters of the United States rule, have you made public how the EPA developed the 4,000 feet of high tide line or the ordinary high water mark number in the final rule that was not in the proposed rule? Or for instance, the 1,500 feet within a

> 100-year floodplain number in the final rule? Or all the waters located within 100 feet of an ordinary high water mark identified as navigable? Have those — has that information been made available in what you have provided?
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> Administrator McCarthy: It is available in the docket, and the good thing about attracting a million comments is, it allows us to make changes between proposal and final that are based on better science, better understanding of how the agencies have been managing these programs for years and that's what we relied on, both the knowledge and the expertise of our staff, the information that we received from the public and comments and the science that's available to us.[1]

While the EPA does address the 4,000 foot limit in the Preamble of the Final Rule, it did so only vaguely and without specific reference to any scientific basis for this figure. The Preamble states:

> The agencies reasonably identified the 4,000 foot boundary for these case-specific significant nexus determinations by balancing consideration of the science and the agencies' expertise and experience in making significant nexus determinations with the goal of providing clarity to the public while protecting the environment and public health. The agencies' experience has shown that the vast majority of waters where a significant nexus has been found, and which are therefore important to protect to achieve the goals of the Act, are located within the 4,000 foot boundary.[2]

The Committee understands that EPA refers to the 4,000 foot limit in the Economic Analysis of the Final Rule:

> The agencies have determined that the vast majority of the nation's water features are located within 4,000 feet of a covered tributary, traditional navigable water, interstate water, or territorial sea. We believe, therefore, that very few waters will be located outside 4,000 feet and within a 100-year floodplain.[3]

However, EPA's determination of the 4,000 foot limit does not rely on peer reviewed science nor on publically available Scientific Advisory Board (SAB) determinations. Clearly, EPA's determination relies upon some other analysis that is not public in the docket.

Furthermore, internal memoranda sent by Major General Peabody at the U.S. Army Corps of Engineers (Corps) to Assistant Secretary Jo Ellen Darcy, concur with the notion that

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[1] *Examining EPA's Regulatory Overreach: Hearing Before the H. Comm. on Science, Space, and Technology*, 114th Cong. (2015).
[2] Clean Water Rule: Definition of "Waters of the United States"; Final Rule, 80 Fed. Reg. 37089, June 29, 2015.
[3] U.S. EPA and U.S. Army Corps of Engineers, Economic Analysis of the EPA-Army Clean Water Rule, May 20, 2015.

EPA has not provided any scientific or legal justification for the figures outlined in Mr. Lucas' questioning. In an April 24, 2015, memorandum, the Corps asserts that EPA provided no scientific basis for the 4,000 foot limit listed in the final rule. Moreover, the Corps states very clearly that its belief is that the number is entirely arbitrary. The Corps' memoranda states,

> The arbitrary nature of the 4000-feet cutoff of jurisdiction is demonstrated by the fact that EPA staff engaged in drafting the rule told Corps staff during a conference call in March 2015 that EPA was going to cut off CWA jurisdiction at a distance of 5000 feet from the [ordinary high water mark] of traditional navigable waters, interstate waters, territorial seas, impoundments, or tributaries. Then, three days later, EPA staff changed its position and decided to cut off CWA jurisdiction at the narrower 4000-feet limit from an OHWM. EPA staff has never provided any scientific support or justification for either a 5000-feet or 4000-feet cut-off. Both distances are arbitrary and either limitation would be very difficult to defend in the federal courts when the rule is challenged because neither limitation on CWA jurisdiction is supported by science or field-based evidence.[4]

Additionally, the Army Corps raised concerns for the lack of scientific basis regarding the definition of neighboring all water bodies within 1500 feet of an ordinary high water mark, so long as the water body is located within a 100-year floodplain. The Corps states,

> The 1500-feet limitation is not supported by science or law and this is legally vulnerable. The Corps has advocated the more scientifically and legally defensible distance of 300 feet for declaring by rule that all neighboring water bodies are jurisdictional, based on the Corps experience in implementing the CWA Section 404 program and performing the majority of jurisdictional determinations under the CWA.[5]

Your statement that the information and data requested in Mr. Lucas' question was publically available in the EPA docket was false and misleading. Based on the Corps' memorandum, it is apparent that the figures outlined in EPA's final WOTUS rule were completely arbitrary and not based on any science. These numbers are neither mentioned in the Connectivity Report nor in the SAB documents. In fact, EPA never had any scientific justification for these figures, so it could not provide them in the docket for the public to review nor could it provide them to the Corps, the co-agency charged with promulgating the WOTUS rule. The lack of scientific justification and lack of appropriate collaboration with the Corps on the final rule calls into question the legality of this rule. Moreover, the public never had an opportunity to provide comment on the validity of these distances in the proposed rule as they appeared only in the final rule.

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[4] Memorandum, from Lance Woods, Ass. Chief Counsel, Envt'l Law and Regulatory Programs, U.S. Army Corps of Engineers to Major General John Peabody, Dep. Commanding General for Civil and Emergency Operations, U.S. Army Corps of Engineers, Apr. 24, 2015.

[5] Memorandum, from Lance Woods, Ass. Chief Counsel, Envt'l Law and Regulatory Programs, U.S. Army Corps of Engineers to Major General John Peabody, Dep. Commanding General for Civil and Emergency Operations, U.S. Army Corps of Engineers, Apr. 24, 2015.

Representative Bill Posey (R-FL) raised concerns about the ability of states to regulate background ozone, which would put certain areas into non-attainment under EPA's proposed National Ambient Air Quality Standards (NAAQS) for ozone. You had the following exchange with Rep Posey:

> Rep. Posey: Another Florida Department of Environmental Protection report states, EPA also should consider whether natural background concentrations would preclude compliance with the EPA's proposed standards in certain geographic areas. For example, EPA estimates that 70 to 80 percent of the seasonal mean ozone levels in Florida are attributed to background contributions. And so my question is, how could they comply with the new requirement of 65 to 70 [ppb] if nature gives them 70 to 80 [percent] for a start?
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> Administrator McCarthy: Well, Congressman, let me assure you that states are not held responsible for reducing emissions that are not in their control. The Clean Air Act is very clear about that.[6]

Your unequivocal statement that states would not be held responsible for reducing background ozone contravenes prior statements by the EPA. While the Clean Air Act (CAA) may provide certain exclusions for exceedances of background ozone for exceptional events, international transport, and in rural transport areas, EPA believes that "[i]n no case does the CAA authorize a blanket exclusion from the basic application of an air quality management regime because an area is significantly impacted by background [ozone]."[7] Furthermore, EPA has recognized that the ability of states to gain exclusions for exceedances are "[not] completely burden-free, meaning they all require some level of assessment or demonstration by a state and/or EPA to legally invoke."[8]

Moreover, EPA has stated, "For a prospective standard of 70 ppb, the EPA does not believe that background [ozone] would create significant implementation-related challenges at locations through the U.S. and prevent attainment of NAAQS."[9] This statement and your testimony that the CAA provides instant relief to states for background ozone does not take seriously the concerns raised by many states about regulating background ozone levels.

According to a recent report by the Association of Air Pollution Control Agencies, a majority of states raised concerns to EPA about the achievability of ozone attainment under the

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[6] *Examining EPA's Regulatory Overreach: Hearing Before the H. Comm. on Science, Space, and Technology*, 114th Cong. (2015).
[7] National Ambient Air Quality Standards for Ozone; Proposed Rule, 79 Fed. Reg. 75383, Dec. 17, 2014.
[8] *Id.*
[9] *Id.* at 75382.

proposed rule due to background ozone and the ability of states to obtain relief from attainment under the CAA due to background ozone.[10]

Your statement before the Committee that states would not be held responsible for background ozone is false and misleading. You failed to mention that states with high levels of background ozone seeking relief from achieving attainment are confronted with yet another regulatory regime that is at the discretion of the EPA. Moreover, you failed to assert that EPA believes that background ozone levels would not present an issue for states with an ozone standard set at 70 ppb. Your testimony misleads the states about their obligations under the proposed ozone rule.

With further regard to the EPA's justification for the proposed ozone NAAQS rule, Representative Ralph Abraham (R-LA) asked you to comment on a chart depicting that asthma rates in the United States have increased despite decreasing levels of ozone. You had the following exchange with Rep. Abraham:

> Rep. Abraham: And if you look at the slide, Ms. McCarthy, you see that asthma rates have dramatically increased, and this is despite decreasing ozone. So I guess I would ask for your comment on that.
>
> Administrator McCarthy: Well, I don't think that the scientists at this point are saying that asthma is caused by ozone . . . The issue is that it's exacerbated.

While the Committee agrees with your assertion that asthma is not caused by ozone, your statement does not appear to be consistent with past assertions by EPA. For example, in EPA's 2013 Integrated Science Assessment of Ozone and Related Photochemical Oxidants, one of the conclusions of the report is that "there is likely to be a causal relationship between long-term exposure to [ozone] and respiratory effects [which includes new-onset asthma]."[11]

Non-governmental organizations that support EPA's rule have also latched on to the notion that ozone causes asthma. A press release by the Sierra Club, supporters of the ozone NAAQS rule, continues the false narrative that ozone causes asthma, stating in a quote by Dr. Frank Rosenthal, an Associate Professor of Occupational and Environmental Health Science at Purdue University, "[t]he effect of ozone exposure in both causing asthma and bringing on asthma attack in children, even at relatively low levels, has been well documented."[12]

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[10] Assoc. of Air Pollution Control Agencies, State Environmental Agency Perspective on Background Ozone & Regulatory Relief, June 2015, *available at* http://www.csg.org/aapca_site/documents/AAPCASurvey-StateEnvironmentalAgencyPerspectivesonBackgroundOzoneandRegulatoryRelief-June201.pdf

[11] U.S. EPA, Integrated Science Assessment for Ozone and Related Photochemical Oxidants, Feb. 2013.

[12] Press Release, Sierra Club, *Indiana Doctors Criticize Senate-Adopted Resolution that Condemns New Clean Air Protections,* Apr. 15, 2015, *available at* http://content.sierraclub.org/press-releases/2015/04/indiana-doctors-criticize-senate-adopted-resolution-condemns-new-clean-air.

EPA's doublespeak on whether ozone causes asthma is one of the most troubling aspects of the justification for the proposed ozone NAAQS rule. That the agency responsible for providing accurate and unbiased data on its rulemakings would continue to change its position on the alleged purpose of the ozone NAAQS rule calls into question the necessity for this proposed rule. I urge you to clarify whether EPA's position is that there is no correlation between ozone and new cases of asthma, or retract the statement you made at the hearing as inaccurate. If the latter, and EPA's position is that ozone does in fact cause new cases of asthma, please explain why asthma rates are increasing as ozone is decreasing – which was the original question posed to you by Rep. Abraham.

Subcommittee on Environment Chairman Jim Bridenstine (R-OK) and Representative Randy Hultgren (R-IL) both raised concerns with you regarding transportation conformity penalties for non-compliance with EPA regulations. You had the following exchange with Rep. Bridenstine:

> Rep. Bridenstine: It is true that cities, municipalities, States can lose their Department of Transportation funds if not in compliance with the EPA. That is absolutely true. Do you agree with that?
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> Administrator McCarthy: They can.
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> Rep. Bridenstine: They can. And what that means is that if they can, that means they're being bullied. This is federal bullying and this is exactly what my constituents in the State of Oklahoma are absolutely – they are abhorred by this kind of federal bullying saying that you're going to lose your Department of Transportation funds if you don't comply with what an unelected, you know, government bureaucrat tells you to do. They are abhorred by that. You can argue but they are abhorred by that.
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> Administrator McCarthy: That is not rulemaking. That is in the law and it's never, ever happened.

Your statement was unequivocal that transportation penalties have never been levied for noncompliance with EPA regulations. However, it is not accurate that the sanctions have never happened. According to the Federal Highway Administration, EPA has imposed highway sanctions 13 times in the past 20 years.[13] Although these measures seem to be swiftly dealt with by localities to prevent further detriment, it is clear that EPA has this authority and will not hesitate to use it in order to exact economic pain on the American people.

Additionally, EPA has imposed "conformity lapse" penalties in situations where a local plan has not sufficiently detailed how emissions will be offset with the construction of new

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[13] Federal Highway Administration, U.S. DOT, Clean Air Sanctions, *available at* http://www.fhwa.dot.gov/environment/air_quality/highway_sanctions/sanctionsclock.cfm (last visited Aug. 4, 2015).

roads. The city of Atlanta, Georgia had transportation funds cut off for two years as a result of EPA's conformity lapse penalties in the late 1990's.[14] Enacting EPA's more stringent proposed ozone rule will only result in even more instances of the agency imposing these strict transportation penalties on localities. We urge you to revisit your statements regarding EPA's use of transportation conformity in order to impose its regulatory agenda.

Providing false or misleading testimony to Congress is a serious matter. Witnesses who purposely give false or misleading testimony during a congressional hearing may be subject to criminal liability under Section 1001 of Title 18 of the U.S. Code, which prohibits "knowingly and willfully" making materially false statements to Congress. With that in mind, we write to request that you correct the record and to implore you to be truthful with the American public about matters related to EPA's regulatory agenda going forward.

The Committee on Science, Space, and Technology has jurisdiction over environmental and scientific programs and "shall review and study on a continuing basis laws, programs, and Government activities" as set forth in House Rule X.

If you have any questions about this request, please contact Joseph Brazauskas or Richard Yamada of the Science, Space, and Technology Committee staff at 202-225-6371. Thank you for your attention to this matter.

Sincerely,

Rep. Lamar Smith
Chairman

Rep. Frank Lucas
Vice Chairman

Rep. Randy Hultgren
Member of Congress

Rep. Bill Posey
Member of Congress

Rep. Jim Bridenstine
Chairman
Subcommittee on Environment

Rep. Randy Weber
Chairman
Subcommittee on Energy

[14] James M. Shrouds, *Atlanta 'Conforms' to Clean Air Requirements*, Public Roads, U.S. DOT, Sept. 2000 *available at* https://www.fhwa.dot.gov/publications/publicroads/00septoct/atlanta.cfm.

Rep. Bill Johnson
Member of Congress

Rep. John Moolenaar
Member of Congress

Rep. Steve Knight
Member of Congress

Rep. Bruce Westerman
Member of Congress

Rep. Gary Palmer
Member of Congress

Rep. Barry Loudermilk
Chairman
Subcommittee on Oversight

Rep. Ralph Lee Abraham
Member of Congress

cc: The Honorable Eddie Bernice Johnson, Ranking Minority Member, House Committee on Science, Space and Technology