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December 3, 2013

The Honorable Gina McCarthy
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20004

Dear Administrator McCarthy,

The Environmental Protection Agency's (EPA) regulations must have a sound scientific and technical basis. This principle cannot be compromised. As you yourself stated on November 25, on the occasion of the appointment of a scientific integrity officer, "Science is, and continues, to be the backbone of this agency and the integrity of our science is central to the identity and credibility of our work."[1]

It has come to my attention that EPA's independent science advisors have uncovered serious problems with the science supporting EPA's New Source Performance Standards (NSPS)[2] for power plants.[3] The Agency should not act to unilaterally impose regulations on the American people, particularly when its own advisors have expressed reservations regarding the science on which those regulations are based. The EPA has a responsibility to heed the advice of its advisors calling for independent review.

The magnitude of EPA's proposed power plant regulations cannot be understated. As the first GHG standards for stationary sources under the Clean Air Act, the rule does more than affect power plants. It sets the benchmark for standards affecting all industries and will impact every aspect of our economy. Given the massive effect of this rule on the American economy, the Agency cannot afford to cut-corners. We must have a thorough and independent review before any rules are imposed on the American people.

The Work Group charged with reviewing EPA's major rulemaking actions recently released a memo to the broader Science Advisory Board (SAB or "Board") recommending a review of science underpinning the NSPS proposal. Specifically, the Work Group highlighted

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[1] EPA News Release, "EPA Appoints New Scientific Integrity Official," Nov. 25, 2013, *available at* http://yosemite.epa.gov/opa/admpress.nsf/bd4379a92ceceeac8525735900400c27/d6741453e168fd4385257c2e00650858!OpenDocument.

[2] *See* EPA, "Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Generating Units," September 20, 2013.

[3] Memorandum from SAB Work Group on EPA Planned Actions for SAB Consideration of the Underlying Science to Members of the Chartered SAB and SAB Liaisons, Nov. 12, 2013, *available at* http://yosemite.epa.gov/sab/sabproduct.nsf/18B19D36D88DDA1685257C220067A3EE/$File/SAB+Wk+GRP+Memo+Spring+2013+Reg+Rev+131213.pdf, [hereinafter Work Group Memo].

that the Agency rushed ahead with its NSPS proposal without waiting for the advice of the Work Group and that the underlying science lacked adequate peer review. These discoveries raise serious questions about EPA's proposed rule. The review recommended by these experts is clearly merited.

Under the Clean Air Act, EPA must show that its performance standards are based on technology that has been "adequately demonstrated." In the NSPS proposal, the Agency claims that carbon capture and storage (CCS) technologies for coal-fired power plants meet this requirement. Based on the information provided by EPA, the justification for this CCS based standard relies on two sources of support: three demonstration projects and U.S. Department of Energy National Energy Technology Laboratory (NETL) studies.[4] Both justifications present problems.

First, although none of the projects are operational, EPA points to the expected performance of three coal-fueled electric generating units. Each of these demonstration projects received funding under the Department of Energy's Clean Coal Power Initiative (CCPI). DOE invests in these projects precisely because CCS technology is unproven. Consequently, the Energy Policy Act of 2005 (EPAct) specifically prohibits the Agency from relying on CCPI-funded projects to justify performance standards.[5] This EPAct provision was designed by Congress to safeguard against EPA misusing development programs to justify standards based on unproven technology.

As you may know, EPAct was adopted on a highly bipartisan basis in 2005. The language I reference here had been considered and debated by Congress as far back as 2001. President Obama himself, then a junior Senator from Illinois, voted for EPAct twice—both on floor passage and for the Conference Report. There is no excuse for failure to honor the letter and the spirit of EPAct, particularly as it bears upon the scientific basis and record available to the Agency for its NSPS.

When Administrator McCarthy testified before the Science Committee on November 14, 2013, she was confronted with this apparent conflict between the NSPS proposal and the provisions of EPAct. At that time, Administrator McCarthy avoided the question and provided no explanation of the Agency's interpretation of EPAct provisions.[6] The next day, the Energy and Commerce Committee also raised similar concerns in a letter to the Agency. The EPA has not formally responded to these questions raised by Congress.

Despite the Agency's mysterious silence, some defend EPA's reliance on these CCPI-funded projects by claiming that EPAct only prohibits the Agency from "solely" relying on CCPI-funded projects. According to the Work Group memo, EPA points to "literature" it believes supports the NSPS proposal, particularly studies by the National Energy Technology Laboratory (NETL). Such explanations clearly miss the spirit of the safeguards EPAct sought to provide, but nonetheless make independent review of the studies EPA cites all the more critical.

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[4] The Work Group Memo noted that according to EPA its assumptions about CCS technologies are based on "NETL studies as well as existing [power plants] under construction and in advanced stages of development." *Id.* at 3.

[5] EPAct stipulates that "[n]o technology, or level of emission reduction, solely by reason of the use of the technology, or the achievement of the emission reduction, by 1 or more facilities receiving assistance under this Act, shall be considered to be -- (1) adequately demonstrated for purposes of section [§111]." 42 U.S.C. § 15962(i).

[6] Apparently unaware of the relationship between section 111(b) of the Clean Air Act and EPAct, Administrator McCarthy initially replied that the Agency was regulating under the CAA, not EPAct. Beyond this, the Administrator provided little insight other than noting that "we are hoping with DOE assistance [CCS technologies] will continue to progress."

Second, the Work Group's fact finding efforts revealed that "the scientific and technical basis for carbon storage provisions is new science"[7] meriting further review. When questioned about the NETL studies, EPA claimed that that all studies were peer reviewed. However, efforts to substantiate these claims revealed that EPA was wrong and that peer review was inadequate.[8]

The Work Group's finding is based on communications with EPA and NETL cited in the memo. In these communications, EPA officials took the position that the NETL studies it relied on were "subjected to a significant peer review by industry experts, academia and government research and regulatory agencies. Based on the feedback from these experts, the report was updated both in terms of technical content and revised costs."[9] However, after NETL was consulted the truth came out. Apparently, for the first study, reviewers were only "given several weeks for review and the regulatory agency that provided the review was the EPA."[10] NETL went on to explain that there was no documentation or publically-available description for the peer review process and that two significant updates to this report were not subjected to any peer review. More troubling still, the second major report EPA cited lacked peer review entirely.[11]

The problems highlighted by the Work Group call into question EPA's reliance on these reports in formulating its proposed performance standards. Indeed, it now appears that both of EPA's justifications for its proposal—the CCPI-funded projects and literature – are suspect.

Finally, I want to highlight a broader concern raised by the Work Group. Once regulations are proposed it becomes difficult, if not impossible, to rewind the regulatory process. If not heeded early in the rulemaking process, recommendations from EPA's science advisors become moot if the Agency forges ahead before the scientific review is complete. This is not a new problem. The same concern the Work Group raises was identified two years ago by EPA Senior Leadership.[12]

While I recognize that this has been a reoccurring problem that EPA continues to address, the lack of meaningful progress is unacceptable. The Agency's stubborn insistence on placing its judgment above that of its science advisors raises serious concerns that the EPA's rulemaking is based more on partisan politics than sound science.

Congress specifically put this review process in place to ensure that EPA's standards are grounded in science. Laws are more than mere suggestions. Although EPA lawyers may find

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[7] Work Group Memo at 3.

[8] "EPA staff explained that the NETL studies were all peer reviewed and EPA did not conduct additional peer review(s). However, based on additional information provided to the Work Group from NETL, the peer review appears to be inadequate." *Id.* at 3.

[9] *Id.* at C-27.

[10] *Id.* at C-29.

[11] *Id.* at C-29; p. 3, n. 1.

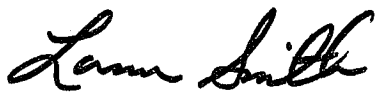
[12] The Environmental Research, Development, and Demonstration Authorization Act of 1978 (ERDDAA) requires EPA to make available to the Science Advisory Board (SAB or "Board") all proposed standards and regulations, together with relevant scientific and technical information on which the proposed action is based. Under this law, the Board then gives the Administrator advice regarding the adequacy of the scientific and technical basis of the proposed actions. However, in response to poor coordination and other failures, EPA Senior Leadership concluded that waiting until the proposal stage to provide information to the SAB was too late in the process for meaningful review. For this very reason, EPA created a new process to ensure that the SAB received planned Agency actions at the pre-proposal stage so that EPA would consider the Board's advice before proposing regulations. The November 12, 2013 memo from the Work Group on EPA Planned Actions for SAB Consideration of the Underlying Science to the Members of the Chartered SAB provides a detailed explanation of this process, its history, and the underlying legal obligations of ERDDAA.

creative ways to skirt the law, the American people hold the Agency to a higher standard. EPA must quickly correct this problem; the time for excuses has passed.

We cannot compromise transparency and accountability in the name of expediency. Americans deserve the truth when it comes to the regulatory process; please don't ignore the advice of the Work Group experts. Your full cooperation will help ensure that we have an honest discussion about the technical feasibility of new mandates.

Thank you again for the thoughtful consideration of these important concerns, and I look forward to your response.

Sincerely,



Rep. Lamar Smith
Chairman
Committee on Science, Space, and Technology

cc: U.S. Environmental Protection Agency Science Advisory Board.
James R. Mihelcic, Chair, Science Advisory Board Work Group on EPA Planned Actions.
Rep. Eddie Bernice Johnson, Ranking Member, Committee on Science, Space, and Technology.