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U.S. Senate Committee on Environment and Public Works: Majority Members September 7th Letter to U.S. Environmental Protection Agency Administrator Regarding Litigation/Rulemaking Petitions

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The Majority Members of the United States Senate Committee on Environment and Public Works ("Committee") sent United States Environmental Protection Agency ("EPA") Administrator Gina McCarthy a September 7th letter regarding commitments the agency is stated to have made regarding improvements in transparency about litigation and rulemaking petitions.

The Committee's letter states that:

Given the impending presidential transition, it is imperative that Congress and the American public have a clear understanding of the ongoing litigation and the regulatory administrative actions that may be underway or planned by the U.S. Environmental Protection Agency. . .

The Committee's concern is stated to be driven by its statement that the referenced information is not publically or readily available. The letter cites the Majority staff's review of EPA's website and publications in expressing concern about prior agency commitments in regards to transparency. It further cites concerns previously raised about the "lack of transparency surrounding EPA's [sue-and settle] agreements with environmental activists groups that were driving much of EPA's regulatory activities".

The Committee cites as an example assurances that EPA is stated to have made regarding posting to its website copies of petitions received since January 1, 2013 to "issue, amend, or repeal an EPA rule per the Administrator Procedure Act or to take specific rulemaking actions for the various environmental laws EPA implements". The possibility the agency may no longer be posting accurate/up-to-date information about the receipt of such rulemaking petitions is raised.

Similar concerns are referenced about Notices of Intent ("NOI") to sue. The Committee opines that such NOIs are often an invitation to enter a "sue-and-settle" agreement that will bind the agency to take regulatory action by a specified date. Interested stakeholders (such as states) are stated to be sometimes unaware of potential settlement negotiations until "a deal has been reached and dates for future actions

were announced”. The letter states that EPA’s NOI webpage shows that more than 100 NOIs have been received since January, 2013 and “many of which have resulted in lawsuits”.

The Committee also references EPA’s recent actions in regards to the Unified Agenda. As an example, it states:

Although the Obama Administration released a 2016 Spring Unified Agenda for all federal agencies in May, EPA’s Regulatory Agenda is already out-of-date, does not present an accurate upcoming regulatory actions and in some cases is outright misleading. For example, EPA has made conflicting public statements about its work on the Clean Energy Initiative Program (“CEIP”) proposed rule regarding implementation of the so-called Clean Power Plan (“CPP”). Critically, neither the Spring nor the Fall 2015 editions of the United Agenda identified the CEIP as an upcoming rule. Accordingly, it was unexpected when EPA’s January 2016 Action Initiation List (“AIL”) which identifies newly commenced rulemaking on a monthly basis first listed the CEIP. While the AIL indicates EPA commenced work on the CEIP in January, EPA’s Regulatory Development and Retrospective Review Tracker (“RegDaRRT”) website states that the Agency actually initiated work on the CEIP on December 24, 2015 – Christmas Eve. As part of the January 2016 AIL, EPA initially indicated it would take “12 months or less” for EPA to complete the CEIP proposal. Notably, EPA’s AIL website also appears outdated as it does not list any regulatory actions being initiated since May 2016.

After addressing additional concerns, the Committee asked EPA to provide certain information September 21st which includes:

- A complete list of all agency actions that are currently underway as part of the Action Development Process. . .
- A complete list of all pending administrative or judicial litigation involving the Agency. . .
- A complete list of all petitions to issue, amend, or repeal a rule currently pending before the Agency, including. . .
- A complete list of all Notices of Intent (“NOI”) to file suit received by the Agency since January 1, 2016. . .
- A complete list of the Delegations of Authority that have been issued, amended, or revoked since January 1, 2016
- Copies of all mass emails, guidance, briefings or memoranda distributed to EPA staff concerning planning for the upcoming transition in administrations

[A copy of the September 7th letter can be downloaded here.](#)