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

RICHARD M. RUSSELL, MAJORITY STAFF DIRECTOR
MARY FRANCES REPKO, MINORITY STAFF DIRECTOR

January 9, 2020

The Honorable Paul Ray
Senior Advisor to the Director for Regulatory Affairs
White House Office of Management and Budget
725 17th Street NW
Washington, DC, 20503

Dear Mr. Ray:

We write to call your attention to several highly problematic rules that the White House Office of Information and Regulatory Affairs (OIRA) is expected to soon work to finalize, or re-propose, in light of the recent highly critical reports about those rules that were written by the Trump Administration Environmental Protection Agency's (EPA's) Science Advisory Board (SAB). Specifically, we request your commitment to ensure that these rules "are based on the best science, the best data, and the best analysis - ...if I'm confirmed,"¹ as you told Senator Carper you would do during your confirmation hearing. The SAB's reports raise significant concerns about pending rules that roll back or undermine the clean cars standards,² Mercury and Air Toxics standards,³ and definition of the Scope of Waters Federally Regulated Under the Clean Water Act,⁴ and limit the use of science in EPA rulemakings.⁵

We continue to expect that you will adequately respond to Senators' previous request (see Attachment 1) that you provide specific information about your involvement in these and other problematic rules that have been proposed or finalized since you began to work at OIRA in May, 2018. However, during your confirmation hearing, you said that you had not been involved on many of these proposed rules because you were not serving as Acting Administrator of OIRA at the time they were proposed. You also repeatedly voiced your commitment to preserving OIRA's traditional role of ensuring that federal agencies use adequate and legal justifications in rules they promulgate. For example, you said that:

¹ <https://plus.cq.com/doc/congressionaltranscripts-5785310?0>

² [https://yosemite.epa.gov/sab/sabproduct.nsf/WebBOARD/3BD8A1AEA4943223852584E1005463DE/\\$File/SAB+SAB+Draft+Review_10_16_19_.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/WebBOARD/3BD8A1AEA4943223852584E1005463DE/$File/SAB+SAB+Draft+Review_10_16_19_.pdf)

³ [https://yosemite.epa.gov/sab/sabproduct.nsf/WebBOARD/D8A22FA3A1E88312852584E100548165/\\$File/MATS+SAB+Draft+Review_10_16_19_.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/WebBOARD/D8A22FA3A1E88312852584E100548165/$File/MATS+SAB+Draft+Review_10_16_19_.pdf)

⁴ [https://yosemite.epa.gov/sab/sabproduct.nsf/WebBOARD/5939AF1252DDADFB852584E10053D472/\\$File/WOTUS+SAB+Draft+Commentary_10_16_19_.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/WebBOARD/5939AF1252DDADFB852584E10053D472/$File/WOTUS+SAB+Draft+Commentary_10_16_19_.pdf)

⁵ [https://yosemite.epa.gov/sab/sabproduct.nsf/WebBOARD/8A4DABC3B78F4106852584E100541A03/\\$File/Science+and+Transparency+Draft+Review_10_16_19_.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/WebBOARD/8A4DABC3B78F4106852584E100541A03/$File/Science+and+Transparency+Draft+Review_10_16_19_.pdf)

“What OIRA does is to ensure that agencies adhere to those--to those standards and also that they include in their rulemakings or in their guidance documents a full, adequate, and robust legal explanation of their action...

...when I was first interviewing for this nomination, the first thing I said to the folks I was interviewing with when they asked me if I had any questions for them, I said, "If I am to--if I'm selected and to go forward with [the OIRA nomination process], I would need to know that I am supported all the way to the top on preserving OIRA's analytic equities--you know, no matter what the circumstances.”⁶

The mission of the EPA SAB, which consists of 44 scientists (all of whom were appointed or re-appointed by the Trump Administration), includes a call to “review the quality and relevance of the scientific and technical information being used by the EPA or proposed as the basis for Agency regulations.”⁷ An examination of the recent reports the SAB issued include findings and recommendations related to EPA’s failures to properly include costs, benefits and other scientific and technical information in its proposed rules. In light of these troubling SAB reports, we request that you specifically commit to ensuring that if you are confirmed as OIRA Administrator, you will not approve the finalization or re-proposal of these rules unless the following excerpted concerns raised by the SAB, as well as additional concerns included in the full SAB reports are fully and appropriately addressed:

1. Science Advisory Board (SAB) Consideration of the Scientific and Technical Basis of the EPA’s Proposed Rule titled The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks

“In conclusion the SAB has determined that the available science summarized in the technical documents reviewed by the SAB has significant weaknesses that should be addressed in the regulatory analysis prepared for the final rule.”

“Together the weaknesses lead to implausible results regarding the overall size of the vehicle fleet, predicting that an increase in vehicle prices due to regulation will cause the fleet to grow substantially when it would usually be expected to shrink... Together with other smaller problems and inconsistencies, the issues are of sufficient magnitude that the estimated net benefits of the proposed revision may be substantially overstated. In fact, the weaknesses are sufficiently important that they could reverse the rankings of the policies being considered. In other words, the augural standards might provide a better outcome for society than the proposed revision.”

“In summary, the SAB is concerned that the 2018 NPRM is taking analytically inconsistent positions on consumer willingness to pay for fuel efficiency gains. We have recommended an evidence-based, practical approach that can resolve the inconsistency and be implemented with the data already available to the agencies.”

“It is also important to remember that the alternatives under consideration are broader than simply retaining the augural standards or adopting the proposed revision. There are many intermediate

⁶ <https://plus.cq.com/doc/congressionaltranscripts-5785310?0>

⁷ <https://yosemite.epa.gov/sab/sabpeople.nsf/WebCommittees/BOARD>

options between the two. Indeed, the voluntary agreement between the State of California and the four global automakers is an intermediate regulatory alternative since it has the practical effect of reducing some of the compliance burdens on manufacturers while retaining some of the advantages of the aural standards.”

2. Science Advisory Board (SAB) Consideration of the Scientific and Technical Basis of EPA’s Proposed Mercury and Air Toxics Standards for Power Plants Residual Risk and Technology Review and Cost Review

“For purposes of this or any future mercury regulation, EPA should instigate a new risk assessment, particularly a net effects risk assessment following the FDA model. It should include all relevant health outcomes for neonates, children and adults.”

“As the vast majority of benefits in this rule are from PM 2.5, the benefits analysis should highlight the fact that co-benefits are from methylmercury reductions and that the primary benefit is related to PM 2.5. If it is decided to include benefits associated with PM 2.5, the evaluation of low level exposures of PM 2.5 should be noted.”

3. Subject: Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act

“The SAB finds that the proposed revised definition of WOTUS (84 FR 4154) (hereafter, the proposed Rule) decreases protection for our Nation’s waters and does not support the objective of restoring and maintaining “the chemical, physical and biological integrity” of these waters.”

“The proposed Rule portrays three Supreme Court decisions as establishing a coherent basis for drawing simple “bright lines” to determine jurisdictional waters for the purpose of the CWA; however, by abandoning a scientific basis to adopt a simplistic, if clear surface water-based definition, this approach neither rests upon science, nor provides long term clarity, as is evidenced by the continuing interpretation and re-interpretation of these decisions over time.”

“In summary, the SAB is disappointed that the EPA and Department of the Army have decided that the CWA and subsequent case law precludes full incorporation of the scientific aspects of EPA’s 2015 Connectivity Report into the proposed Rule.... The departure of the proposed Rule from EPA recognized science threatens to weaken protection of the nation’s waters by disregarding the established connectivity of ground waters and by failing to protect ephemeral streams and wetlands which connect to navigable waters below the surface. These changes are proposed without a fully supportable scientific basis, while potentially introducing substantial new risks to human and environmental health.”

4. Subject: Science Advisory Board (SAB) Consideration of the Scientific and Technical Basis of EPA’s Proposed Rule Titled Strengthening Transparency in Regulatory Science

“The Proposed Rule requires the EPA to clearly identify and make available to the public all studies (or other regulatory science) relied upon when it takes any significant final agency action. This requirement could be cumbersome and impractical if some studies were used in a weight of evidence

consideration but not used to determine specific regulatory endpoints. The lack of criteria for what might satisfy the requirement makes it difficult to understand the implications. The proposed rule should describe in greater detail and clarity how the requirement can be met.”

“The Proposed Rule indicates that there may be exceptions to the requirement to make information available to the public. Case-by-case exceptions may exacerbate concerns about inappropriate exclusion of scientifically important studies. Although it will be difficult to develop criteria for exceptions, the EPA would benefit from a framework and guidance that outline criteria to specify exceptions.”

“There will be costs associated with assessing and disseminating data as required in the Proposed Rule. The agency should consider seeking input from experts in library science, data curation management, and data retention to identify best practices and tools to ensure efficiency and utility of data that are made available.”

“The requirement in the Proposed Rule that “raw data” be made available for public inspection is vague and, as a result, can be interpreted in different ways. Extensive work is required, across a diversity of fields, data types and data of different ages, to understand the implications of adopting different definitions of raw data for the purposes of the Proposed Rule. The SAB notes that historical data sets may be unavailable or may have been discarded if deemed not necessary to maintain. A possible way to address this problem is to apply rule requirements only to information developed after the effective date of a final rule.”

“However, the SAB finds that key considerations that should inform the Proposed Rule have been omitted from the proposal or presented without analysis, and certain key terms and implementation issues have not been adequately defined or described. In addition, the SAB has concerns about the scientific and technical challenges and feasibility of implementing some requirements of the Proposed Rule.”

As is clear from these excerpts, the Trump Administration’s hand-picked science advisors have echoed concerns that we and others have raised about the cost-benefit analysis, scientific evaluations, and legal rationales that underpin the proposed rules you may soon be expected to work to finalize or re-propose. Regrettably, EPA Administrator Wheeler has already dismissed the likelihood that EPA will incorporate the SAB’s input into its clean cars rule, saying on January 6, 2020 that “We’ve pretty much finished up our part of it, and I think DOT’s finishing up their final language in the rulemaking and then it goes to interagency review. But of course we’ve already been involved with most of the agencies and departments so I expect interagency review to go quickly.” Since the EPA Administrator appears inclined to ignore EPA’s own scientific advisors, we therefore request that you commit to ensure that OIRA requires the agency to incorporate the SAB’s findings and recommendations in order to remedy the problems with its proposed rules in a manner consistent with what you said⁸ your OIRA role required:

“What an agency should achieve in cost-benefit analysis is really, really two goals. One is to ensure that the regulation is net beneficial and two its full transparency with the public. And so while it may be enough for the first goal, just to show the benefits of exceed cost, it’s not enough for the second. And so [as] acting administrator, I encouraged agencies--you know, if

⁸ <https://plus.cq.com/doc/congressionaltranscripts-5785310?0>

at all possible to quantify the full range of costs and benefits that are reasonably anticipated from any regulation not just enough to show that benefits exceeded cost... But certainly, the gold standard is quantified the full panoply of benefits- and costs."

Thank you for your consideration of this important request. Please provide your response no later than close of business on January 10, 2020. If you have any questions or concerns, please ask your staff to contact Michal Freedhoff (Michal_freedhoff@epw.senate.gov) or Brian Eiler (Brian_eiler@epw.senate.gov) of the Environment and Public Works Committee staff.

Sincerely,



Thomas R. Carper
Ranking Member



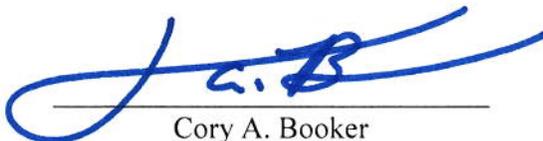
Benjamin L. Cardin
United States Senator



Sheldon Whitehouse
United States Senator



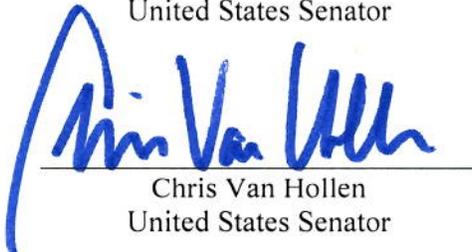
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Edward J. Markey
United States Senator



Chris Van Hollen
United States Senator