

ONE HUNDRED THIRTEENTH CONGRESS  
**Congress of the United States**  
**House of Representatives**

COMMITTEE ON ENERGY AND COMMERCE

2125 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6115

Majority (202) 225-2927  
Minority (202) 225-3641

July 9, 2014

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

Dear Administrator McCarthy:

This Committee has been investigating the Environmental Protection Agency's (EPA) processes relating to the agency's consideration of carbon capture technologies in developing greenhouse gas emission standards for new power plants. On March 12, 2014, we requested that you provide documents, including communications, relating to the Environmental Protection Agency's (EPA) consideration of carbon capture technologies when developing the proposed rule.<sup>1</sup>

Matters relating to the development of this proposed rule, and EPA's basis for the rule, fall squarely within the power of Congress, and this Committee, to investigate. Rules X and XI of the U.S. House of Representatives delegate to this Committee jurisdiction over and authority to investigate certain matters. In particular, the jurisdiction of this Committee includes not only the EPA's administration of the Clean Air Act, but also the Energy Policy Act of 2005 and the development of Carbon Capture and Sequestration (CCS) technologies by the Department of Energy. Understanding how the Energy Policy Act is being interpreted and applied by the executive branch and EPA's consideration of CCS projects being funded by Congress is necessary to carry out this Committee's legislative and oversight functions.

A May 9, 2014, response to the Committee from your staff states that EPA "is committed to providing the Committee information necessary to satisfy its oversight interests."<sup>2</sup> During a May 20, 2014, meeting between EPA and Committee staff, EPA staff further acknowledged the legitimacy of the Committee's inquiry. EPA staff also stated during that meeting that the agency had collected approximately 7,000 potentially responsive documents and expected to begin reviewing these documents in early June. Now, more than three months after receiving the Committee's request letter, EPA has produced to the Committee only publicly available documents posted on the EPA docket with one exception: a 12-page non-public document

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<sup>1</sup> See Attachment A.

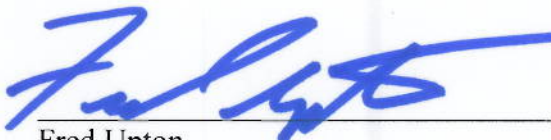
<sup>2</sup> See Attachment B.

“Preliminary Analytic Blueprint” dated April 11, 2011. Even this document was not complete as EPA staff redacted the names of the EPA “Workgroup” members. In a letter dated June 20, 2014, accompanying the production of this document, your staff stated that while EPA believes it has completed collection of responsive documents, it intends to withhold “deliberative” documents from the Committee for an indeterminate period of time, and at least until completion of its current rulemaking.<sup>3</sup> The deliberative process privilege, a common law privilege, has no applicability with respect to Congress and certainly not to EPA’s responses to the Committee’s requests for documents.

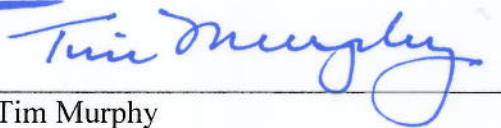
Although Committee staff has met with your staff to discuss the Committee’s requests and the importance of the agency making a timely, good faith demonstration that it will cooperate with the requests, to date, EPA has been wholly unresponsive to the Committee. EPA has not communicated a valid claim of privilege or provided any other valid reason for withholding documents from the Committee. If EPA intends to cooperate voluntarily with the Committee’s requests, we ask that you produce the responsive documents no later than July 23, 2014. To the extent that EPA has decided not to produce responsive documents and requests an accommodation from the Committee, please provide by that date a log of such documents, describing each document EPA is withholding and explaining in full your reasons for seeking an accommodation. Should EPA fail either to produce the documents or provide a suitable log by July 23, 2014, this Committee will seek to compel their production.

Should you have any questions, please contact Karen Christian or Peter Spencer of the Majority Committee staff at (202) 225-2927.

Sincerely,



Fred Upton  
Chairman



Tim Murphy  
Chairman  
Subcommittee on Oversight and Investigations

Attachment

cc: The Honorable Henry A. Waxman, Ranking Member

The Honorable Diana DeGette, Ranking Member  
Subcommittee on Oversight and Investigations

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<sup>3</sup> See Attachment C.

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2125 RAYBURN HOUSE OFFICE BUILDING  
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Majority (202) 225-2927  
Minority (202) 225-3641

March 12, 2014

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

Dear Administrator McCarthy:

We write to notify you that the Committee on Energy and Commerce and its Subcommittee on Oversight and Investigations are investigating the Environmental Protection Agency (EPA) decision-making process relating to the agency's consideration of carbon capture technologies in developing greenhouse gas emissions standards for new power plants.

On September 20, 2013, you signed EPA's re-proposed "Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units" pursuant to section 111 of the Clean Air Act (CAA).<sup>1</sup> Section 111 authorizes EPA to set emissions standards for certain listed stationary sources and pollutants, but EPA may only impose emissions standards that would require the use of technologies that have been "adequately demonstrated." In the proposed rule, EPA makes a number of references to three government-funded carbon capture and sequestration (CCS) power plant projects under the Department of Energy's Clean Coal Power Initiative, including one project under construction and two planned projects. In light of these references, the Committee Chairman and Subcommittee on Energy and Power Chairman, along with other Members, wrote you on November 15, 2013 concerning the statutory limits to the consideration of these projects in EPA's development of emissions standards under section 111.<sup>2</sup>

We continue to have questions about EPA decisions concerning (a) agency consideration of CCS technologies, and the information derived from use of these technologies, at facilities that have been receiving federal funding or tax credits authorized by the Energy Policy Act of 2005; (b) EPA's reliance on these federally supported facilities and technologies for the purpose

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<sup>1</sup> See "Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units," 79 Fed. Reg. 1430 (January 8, 2014); see also "Notice of Data Availability" 79 Fed. Reg. 10750 (Feb. 26, 2014) and "Technical Support Document" dated Jan. 8, 2014.

<sup>2</sup> See Letter from Energy and Commerce Committee to Administrator Gina McCarthy, November 15, 2013.

of proposing emissions performance standards under section 111 of the Clean Air Act; and (c) information from the Department of Energy and other agencies relating to EPA's consideration of these facilities and technologies for the purposes of standard-setting.


At this time, we seek information to evaluate EPA's adherence to statutory obligations and responsibilities, including adherence to the relevant statutory prohibitions relating to the consideration of certain facilities and technologies receiving federal assistance under the Energy Policy Act of 2005. Accordingly, pursuant to Rules X and XI of the U.S. House of Representatives, we ask that you provide responsive documents and written responses to the following requests by March 28, 2014:

1. On December 23, 2010, EPA announced settlement agreements committing EPA to issue New Source Performance Standards (NSPS) to address greenhouse gas emissions from fossil fuel-fired power plants and petroleum refineries.
  - a. Explain when EPA launched its Action Development Process for developing the regulatory proposals that would address these commitments to issue NSPS standards.
  - b. Provide all documents EPA prepared to initiate this regulatory development process, including all preliminary and final Analytic Blueprints and any other planning or guidance documents covering the approach, scope, underlying technical criteria, legal criteria, and review mechanisms EPA would follow for developing these NSPS regulatory proposals and Technical Support Documents.
2. Provide the names and titles of all individuals at EPA responsible for evaluating the application of provisions of the Energy Policy Act of 2005 (EPAAct05) to the agency's pending NSPS proposals for power plants, including EPAAct05 sections 402(i), 421(a), or 1307.
3. Provide all documents in the possession, custody, and control of EPA containing communications between or among EPA officials, employees, or contractors relating to EPAAct05 sections 402(i), 421(a), or 1307, including, but not limited to, letters and email.
4. Provide all documents in the possession, custody, and control of EPA containing communications between or among EPA, the Department of Energy (DOE), the Department of the Treasury, or the Office of Management and Budget relating to EPAAct05 sections 402(i), 421(a), or 1307, including, but not limited to, letters and email.
5. Provide all documents in the possession, custody, and control of EPA relating to EPAAct05 sections 402(i), 421(a), or 1307, including, but not limited to, notes, analyses, reports, and memoranda, and all drafts of such documents.
6. Provide all documents in the possession, custody, and control of EPA containing communications between or among EPA and the Department of Energy (DOE) referring or relating to any facility receiving assistance under DOE's Clean Coal Program, Clean Coal Power Initiative, or any program or funding referenced by EPAAct05 sections 402, 421, or 1307, including, but not limited to, letters and email.

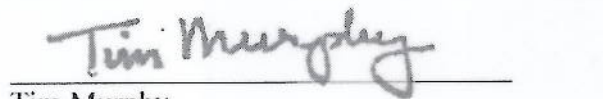
7. Provide all documents in the possession, custody, or control of EPA containing communications between or among EPA and the officials, employees or contractors of any facility receiving assistance under DOE's Clean Coal Program, Clean Coal Power Initiative, or any program or funding related to EPAAct05 sections 402, 421, or 1307, including, but not limited to, letters and email.
8. Provide all documents in the possession, custody, and control of EPA referring or relating to any facility or technology receiving assistance under DOE's Clean Coal Program, Clean Coal Power Initiative, or any program or funding related to EPAAct05 sections 402, 421, or 1307, including, but not limited to, notes, analyses, reports, and memoranda, and all drafts of such documents.

We appreciate your prompt attention to this request. Instructions for responding to the Committee's document requests are included as an attachment to this letter. Should you have any questions, please contact Karen Christian or Peter Spencer of the Majority Committee staff at (202) 225-2927.


Sincerely,




Fred Upton  
Chairman



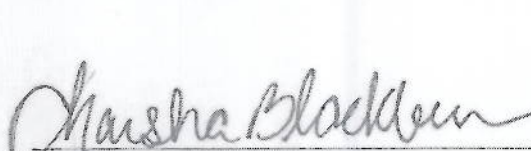
Tim Murphy  
Chairman  
Subcommittee on Oversight and Investigations




Ed Whitfield  
Chairman  
Subcommittee on Energy and Power



Joe Barton  
Chairman Emeritus



Marsha Blackburn  
Vice Chairman



Michael C. Burgess  
Vice Chairman  
Subcommittee on Oversight and Investigations

Letter to the Honorable Gina McCarthy

Page 4

Attachment

cc: The Honorable Henry A. Waxman, Ranking Member

The Honorable Diana DeGette, Ranking Member  
Subcommittee on Oversight and Investigations

The Honorable Bobby Rush, Ranking Member  
Subcommittee on Energy and Power



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

**MAY - 9 2014**

OFFICE OF CONGRESSIONAL AND  
INTERGOVERNMENTAL RELATIONS

The Honorable Fred Upton  
Chairman  
Committee on Energy and Commerce  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your letters of November 15, 2013, and March 12, 2014, to Administrator Gina McCarthy regarding the U.S. Environmental Protection Agency's proposed New Source Performance Standards for emissions of greenhouse gases (GHG) from new fossil fuel-fired power plants ("Carbon Pollution Standards").

Your November 15, 2013, letter requests that the EPA withdraw the proposed Carbon Pollution Standards because, in your view, they conflict with provisions of the Energy Policy Act of 2005. EPA is considering issues relating to the Energy Policy Act of 2005 as part of the rulemaking, which is discussed in more detail in enclosure I. We are also attaching the Notice of Data Availability and the Technical Support Document, which provide additional information responsive to your letter.

Your March 12, 2014, letter requests that the EPA provide documents generated during the development of the Carbon Pollution Standards proposal, including information about evaluating the application of provisions of the Energy Policy Act of 2005. EPA is committed to providing the Committee information necessary to satisfy its oversight interests. Toward that end, we have enclosed documents from EPA's docket that are responsive to several of your requests. The documents are listed in enclosure 2 and are attached to this response.

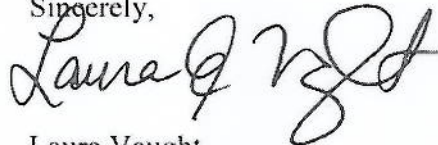
Your March 12th letter also requests internal EPA documents. As you are aware, your request is related to an ongoing regulatory action, a status that raises particular concerns regarding the independence and integrity of ongoing Agency deliberations. The documents you seek are likely to reflect internal advice, recommendations, and analysis by Agency staff and attorneys about the proposed rule. These internal and pre-decisional deliberations are likely to be the subject of additional discussions and analysis among Agency staff and senior policymakers when the comment period on the proposed rule closes and the Agency takes the important step of considering comments from various stakeholders, including comments from Members of Congress, if any. It is critical for Agency policymakers to obtain a broad range of advice and recommendations from Agency staff and to be able to properly execute their statutory obligations under the Clean Air Act and other environmental statutes. Disclosure of pre-decisional information at this stage of the deliberations could raise questions about whether the Agency's decisions are being made or influenced by proceedings in a legislative or public forum rather than through the established administrative process, which is ongoing. In addition, disclosure of such information could compromise the ability of Agency employees to provide candid advice and

recommendations during the Agency's ongoing deliberative processes. It could also chill the candor of future Executive Branch deliberations making the rulemaking process less robust and limiting the Agency's ability to carry out its mission.

Nevertheless, EPA recognizes the importance of the Committee's need to obtain information necessary to perform its legitimate oversight functions, and is committed to working with Congress on such matters. As noted, we are still in the process of gathering and reviewing other documents that may be responsive to the remainder of your requests. After we have processed these documents, we will determine how best to accommodate the Committee's interests in these documents.

Again, thank you for your interest in this important rulemaking. If you have further questions, please contact me, or your staff may contact Tom Dickerson in my office at [dickerson.tom@epa.gov](mailto:dickerson.tom@epa.gov) or (202) 564-3638.

Sincerely,

A handwritten signature in black ink, appearing to read "Laura G. Vaught". The signature is fluid and cursive, with a large initial "L" and "V".

Laura Vaught  
Associate Administrator

Enclosures

cc: The Honorable Henry A. Waxman  
Ranking Member



## **Enclosure 1**

Information in Response to the November 15, 2013, letter from House Energy and Commerce

EPA is considering issues relating to the Energy Policy Act of 2005 as part of the rulemaking process. See Notice of Data Availability, 79 FR 10750 (Feb. 26, 2014). EPA there indicated that the proposal, should EPA ultimately take final action to finalize it, would not violate the cited Energy Policy Act provisions, and solicited public comment on the issue. *Id.* at 10752.

More specifically, EPA proposed that the best system of emission reduction (BSER) for new fossil fuel-fired boilers and integrated gasification combined cycle (IGCC) electric utility generating units (EGUs) is a new efficient unit implementing partial carbon capture and storage (CCS). The EPA based this proposal on a review of existing projects that implement CCS, existing projects that implement various components of CCS, planned CCS projects, and scientific and engineering studies of CCS. The determination relies on a wide range of data, information and experience well beyond that generated by projects receiving financial assistance under Energy Policy Act of 2005 and thus does not depend solely on those projects.

EPA's Notice of Data Availability (NODA) provides the public with additional information on the Energy Policy Act of 2005 and the proposed standards. Through this NODA and an accompanying technical support document (TSD), the EPA clarifies and solicits comment on its proposed views as to the meaning and significance of relevant provisions of the Energy Policy Act of 2005, including how these provisions may affect the rationale for the proposed BSER determination. We have enclosed copies of the NODA and the TSD for your reference. We have also enclosed additional responsive documents, as listed in enclosure 2.

We are committed to ensuring that environmental regulations are developed to facilitate continued maintenance of a reliable, affordable energy portfolio and a diverse mix of fuels in providing the nation's electricity, while also ensuring the protection of public health and the environment. Coal-fired power plants are the largest contributor of U.S. GHG emissions, and climate change poses a serious threat to human health and the environment. The EPA's proposal would ensure that progress toward a cleaner, safer and more modern power sector continues through the deployment of the same types of modern generation technologies and steps that power companies are already using to build the next generation of power plants.

Enclosure 2  
List of Enclosed Responsive Documents

1. EPA-HQ-OAR-2013-0495-0024
2. EPA-HQ-OAR-2013-0495-0045
3. EPA-HQ-OAR-2013-0495-0046
4. EPA-HQ-OAR-2013-0495-0047
5. EPA-HQ-OAR-2013-0495-0048
6. EPA-HQ-OAR-2013-0495-0050
7. EPA-HQ-OAR-2013-0495-0054
8. EPA-HQ-OAR-2013-0495-0055
9. EPA-HQ-OAR-2013-0495-0065
10. EPA-HQ-OAR-2013-0495-0068
11. EPA-HQ-OAR-2013-0495-1872
12. EPA-HQ-OAR-2013-0495-1873



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

JUN 20 2014

OFFICE OF CONGRESSIONAL AND  
INTERGOVERNMENTAL RELATIONS

The Honorable Fred Upton  
Chairman  
Committee on Energy and Commerce  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your letters of November 15, 2013, and March 12, 2014, to U.S. Environmental Protection Agency (EPA) Administrator Gina McCarthy regarding the Agency's proposed New Source Performance Standards for emissions of greenhouse gases from new fossil fuel-fired power plants ("Carbon Pollution Standards").

Climate change poses a serious threat to human health and the environment, and power plants are the largest source of greenhouse gas emissions in the United States. The proposed Carbon Pollution Standards are an essential step toward cutting carbon pollution from new power plants in order to combat climate change and improve public health. The EPA is committed to ensuring that the Carbon Pollution Standards offer flexibility and facilitate the maintenance of a system that provides reliable and affordable energy and continues to utilize a diverse mix of fuels and to deploy modern approaches and technologies that power companies are already using to build the next generation of power plants.

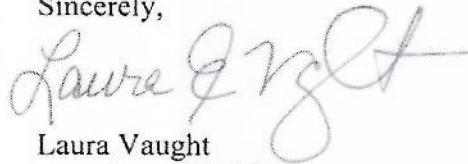
Your March 12, 2014, letter requests that the EPA provide documents generated during the development of the Carbon Pollution Standards proposal. The EPA is committed to providing the Committee information to satisfy its oversight interests. To that end, we provided by enclosure to a previous letter dated May 9 documents from the EPA's docket that were responsive to your request. And, on May 20, EPA staff met with Committee staff to better understand the request and explain the EPA's search and collection process.

As I explained in my letter of May 9, and as staff discussed in the meeting of May 20, your requests seek internal EPA documents related to an ongoing regulatory action. As you know, and as explained more fully in my letter of May 9, the ongoing nature of this action raises particular concerns regarding the confidentiality and independence of Agency deliberations. Disclosure of pre-decisional information at this stage of the deliberations could compromise the Agency's ongoing deliberative processes and impair the Agency's ability to carry out its mission. In addition, the practice of disclosing deliberative documents during a pending action could undermine EPA's effort to ensure all of the Agency's decisions are made without any inappropriate influence or appearance thereof. As such, we expect that many of the documents you seek will need to be produced on a timeline that first allows the deliberative process to reach completion. This is consistent with the Executive Branch's longstanding practice regarding requests for documents during ongoing deliberations.

Nevertheless, EPA appreciates the importance of the Committee's oversight function, and is committed to working with the Committee to provide the information it needs. We have now completed collection of the documents that may be responsive to your requests. We are continuing to process these documents, and at this time we have identified a document that is responsive to part 1.b. of your request. While this document is internal and deliberative, and we have marked it as such, we are providing it in an effort to accommodate the Committee's interests. Please handle this document as confidential, consistent with its internal and deliberative nature.

Again, thank you for your interest in this important rulemaking. If you have further questions, please contact me, or your staff may contact Cheryl Mackay in my office at [mackay.cheryl@epa.gov](mailto:mackay.cheryl@epa.gov) or (202) 564-2023.

Sincerely,

A handwritten signature in cursive script, appearing to read "Laura Vaught".

Laura Vaught  
Associate Administrator

Enclosure

cc: The Honorable Henry A. Waxman  
Ranking Member