RALPH M. HALL, TEXAS
CHAIRMAN

EDDIE BERNICE JOHNSON, TEXAS
RANKING MEMBER

U.S. 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

December 12, 2011

The Honorable Cass R. Sunstein
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Eisenhower Executive Office Building
1650 Pennsylvania Avenue, N.W.
Washington, DC 20403

Dear Administrator Sunstein:

As the Office of Management and Budget reviews the Environmental Protection Agency's (EPA) Mercury and Air Toxics Standards for Utilities (Utility MACT) with an expectation of a finalized rule in the next week, we are concerned that EPA and your office have failed to respond to a variety of specific questions raised by members of the Science, Space, and Technology Committee about this rule over the last several months. Through questions for the record on related hearings and letters to the Administration, Committee members have highlighted a variety of scientific and procedural issues with the Agency's pursuit of unmanageable and costly Utility MACT requirements.

Before the Office of Management and Budget approves any form of the Utility MACT, we expect that the Office of Information and Regulatory Affairs and EPA will provide specific and responsive answers to these questions. More than 30 questions by Committee members have been posed and remain unanswered that are directly relevant to this Administration's consideration of Utility MACT. These questions came from:

- Questions for the record for EPA Assistant Administrator Gina McCarthy following the September 15, 2011 hearing, *Out of Thin Air: EPA's Cross-State Air Pollution Rule*;
- September 22 letter to Gina McCarthy on data transparency from Energy and Environment Subcommittee Chairman Andy Harris;
- November 15 letter to you from Investigations and Oversight Subcommittee Chairman Paul Broun and Energy and Environment Chairman Andy Harris.

For your review and response, enclosed are the relevant questions from these communications. Enclosed also is a November 4th letter sent by nine members of the Committee asking EPA to adhere to its promises on transparency and to respond to past due questions, letters, and requests. As this letter explained, "As the authorizing Committee for scientific activities at EPA, we require such information to examine the scientific foundations of EPA regulations and inform our decision making in regard to the Agency's work and resources."

These questions are particularly important in light of the Court of Appeals for the D.C. Circuit's decision last Friday on EPA's rulemaking for emissions from cement kilns (Portland Cement Association v. EPA). Stating that "EPA has put the cart before the horse, and there is no justification, least of all an agency's own timing choices, for such a cavalier and unscientific attitude," the Court emphasized that "reasoned

decisionmaking is not a dispensable part of the administrative machine that can be blithely discarded even in pursuit of a laudable regulatory goal."

As you know, EPA estimates that the Utility MACT will cost the American economy approximately $11 billion annually; other estimates are far higher. It is incumbent upon you and the Administration to ensure that a costly regulation of this magnitude be based on transparent and robust scientific and economic justifications. Accordingly, we suggest a delay of any formal actions or decisions on Utility MACT until answers to the aforementioned questions are provided. Continued inaction and lack of response from this Administration will compel our Committee to exercise more rigorous oversight.

If you have any questions regarding this request please contact Ms. Tara Rothschild or Mr. Clint Woods with the Subcommittee on Energy and Environment at (202) 225-8844.

Sincerely,

Ralph M. Hall
Chairman
Committee on Science, Space, and Technology

Andy Harris, MD
Chairman
Subcommittee on Energy and Environment

Paul Broun, MD
Chairman
Subcommittee on Investigations and Oversight

Enclosure

Enclosure

Questions for the Record from Chairman Ralph Hall to EPA Assistant Administrator Gina McCarthy following September 15, 2011 hearing, Out of Thin Air: EPA's Cross-State Air Pollution Rule:[1]

7. In the past, you and EPA Administrator Lisa Jackson have claimed that CSAPR and related rules have included an analysis of electric reliability, as well as consultations with FERC. However, when FERC Chairman Jon Wellinghoff testified in front of Congress, he emphasized that their informal assessment "in no way should be used for planning," and that the only relevant assessments are conducted by planning authorities like ERCOT. How has ERCOT's breakdown of the massive reliability concerns – including rotating outages- been included in EPA's CSAPR decision-making?

8. The State of South Carolina has asked the Federal Energy Regulatory Commission to convene a state-federal panel- called a section 209 panel- to resolve specific reliability problems likely to result in that state because of the new EPA power-sector rules. Federal law allows for this type of dialogue in order to order to ensure adequate planning has occurred in advance off ederal policy developments. Are you aware of this? Will EPA delay the implementation of CSAPR and related rules UNTIL this dialogue is complete?

Questions from September 22, 2011 letter from Chairman Andy Harris to EPA Assistant Administrator Gina McCarthy (response requested by October 3, 2011):[2]

I also questioned you about how the number of avoided premature deaths EPA found to justify the CSAPR rule compared with the avoided premature deaths EPA used to justify the ozone reconsideration that was recently pulled back by the White House. Please provide the number of avoided premature deaths attributable to each proposed or finalized Clean Air Act rule issued since January 20, 2009 and a description of the changes from a proposed rule to a finalized rule if the number of avoided premature deaths attributable to the proposed rule changed in the finalized version. Make sure to include the proposed rules since January 20, 2009 that have not yet been finalized. Please distinguish how many of the projected avoided premature deaths result from reductions in each rule's target pollutant and how many resulted from co-benefits from reductions in fine particulate matter. Furthermore, please detail the degree to which each rule contributed to the same avoided premature deaths that would have occurred in the rule's absence.[3]

Lastly, I questioned you about the availability of the data that support the death and injury benefits and you assured me that all such data is publicly available and you were willing to provide it. In light of the pivotal role of this publically-funded research in providing a justification for major EPA regulations, it is imperative that associated data and analysis be open and transparent to allow for sufficient scientific and technical review. Accordingly, in the spirit and letter of Public Law 105-277, Executive Order 13563 (which explicitly states that regulations "must be based on the best available science"), EPA's *Peer*

---

[1] Questions sent October 6, 2011, with a response required by October 20, 2011. As of December 7, 2011, no response has been received by any Member of the Committee.

[2] http://science.house.gov/sites/republicans.science.house.gov/files/9-22-2011%20Harris%20to%20McCarthy.pdf. Response was received on November 30, 2011.

[3] Instead of responding to these questions directly, EPA's response on November 30 (almost two months after the deadline) merely included a "summary table…with links to the Regulatory Impact Analysis (RIA) of all Clean Air Act Rules issued since January 20, 2009."

Review Handbook, and recently-released Scientific Integrity Policy Draft, please provide all original data and analysis for the following studies that were used in EPA analysis:

1. The Cancer Prevention Study I compiled by the American Cancer Society.
2. The Cancer Prevention Study II compiled by the American Cancer Society.
3. The Harvard Six Cities Study.
4. The Nurses' Health Study and Nurses' Health Study II.[4]

Questions from November 15, 2011 letter from Chairman Andy Harris and Chairman Paul Broun to Administrator Cass R. Sunstein (response requested by December 6):[5]

Repeated Double-Counting of Health Benefits

1. Do you believe it is appropriate, accurate, or intellectually defensible to assert economic benefits already claimed in concurrent and prior rulemakings to justify the economics of an individual regulation?

2. How does relying on coincidental $PM_{2.5}$ co-benefits for non- $PM_{2.5}$ rules meet Executive Order (E.O.) 12866's requirement that each "agency shall avoid regulations that are...duplicative with its other regulations"?

3. When the $PM_{2.5}$ benefits are removed from the Utility MACT RIA, EPA is asking the American people to pay $3,600 to $4.36 million for every one dollar of benefit. Absent benefits derived from $PM_{2.5}$ reductions, does OIRA believe that the cost-benefit ratio for achieving the Utility MACT's stated purpose – that is, reducing hazardous air pollutants and not fine particulates – satisfies the E.O. 13563 directive to narrowly tailor regulations such that the benefits justify the cost?

4. In 1999, you stated that "If – as seems clear – the risks prevented by the new ozone regulation are far smaller than the risks that would be prevented by more stringent regulation of particulates, EPA should explain the apparent anomaly in terms of statutorily relevant factors. A chief advantage of this approach is that it should ensure inter-regulation consistency, in such a way as to combat, simultaneously, interest-group power, public torpor, and public over-reaction with respect to certain pollutants." You also stated that "The question is whether EPA can defend apparent interregulation inconsistency in statutorily relevant terms.... If it cannot, it has acted unlawfully."

   How does relying on coincidental $PM_{2.5}$ co-benefits for dozens of non-$PM_{2.5}$ rules achieve inter-regulation consistency as you have defined it?

---

[4] EPA's November 30 response did not provide any of this information. It instead stated that: " In response to the new request in your letter regarding the availability of data and analyses from five epidemiological studies (two American Cancer Society studies, the Harvard Six Cities Study, and two Nurses Health studies), we will take action under 2 CFR 215.36 as soon as possible to provide you with any data and analyses produced with EPA funds to the extent that this information remains available."

[5] Full letter available at: http://science.house.gov/sites/republicans.science.house.gov/files/documents/hearings/Sunstein%20Letter.pdf. Footnotes and other information excluded from this reproduction of questions.

5. The draft OIRA Report to Congress for 2011 discussed revisions to prevent the double-counting of $PM_{2.5}$ benefits, stating that "...to prevent double-counting, the estimates for the $PM_{2.5}$ NAAQS will be adjusted, and estimates associated with the implementing rules promulgated in subsequent years will be used appropriately. The benefit and cost estimates for lead NAAQS and SO2 NAAQS may also be adjusted in future reports to avoid double-counting...."

   a. Why was this language and other references to revising EPA estimates to prevent $PM_{2.5}$ benefit double-counting deleted from the final OIRA Report to Congress?
   b. Please outline all steps that OIRA has taken to prevent the double-counting of $PM_{2.5}$ benefits for individual CAA rules listed in Appendix A.
   c. Please also outline the steps that will be taken by OIRA to prevent EPA from taking credit for already-counted $PM_{2.5}$ benefits in upcoming $PM_{2.5}$ NAAQS from the Agency.

6. For the Utility MACT and CSAPR, please quantify the aggregate costs and benefits without double-counting (i.e. ensure that both benefits and costs are unique).

7. You have also stated in the past that "[a] projection of benefits must depend on a baseline about what would have happened without regulation."

   Please provide a list of all examples for EPA CAA RIAs in which the Agency has clearly removed $PM_{2.5}$ benefits that were already counted in providing a baseline for new rules.

8. As noted above, an accounting change in 2009 allowed EPA to inflate health benefit estimates associated with $PM_{2.5}$ reductions by counting benefits down to the lowest measurable level with no change in the underlying science.

   a. Did OIRA approve this change in benefits calculation?

   b. Has EPA used this same public health benefit assumption in any of the risk analyses regarding its current review of the $PM_{2.5}$ NAAQS? If not, please explain the different treatment of the same air pollutant and why EPA's approach is not the same.

A. Understating Compliance Costs

How is EPA's practice of estimating single-year compliance costs instead of net present value consistent with OMB Circular A-94? Why has OIRA approved RIAs and agency communications that do not use net present value? What steps has OIRA taken to revise EPA's approach to compliance costs?

B. Ignoring Negative Health Impacts of Regulatory Economic Burdens

1. If, as you have stated, "expensive regulation can have adverse effects on life and health," why have none of the EPA CAA RIAs listed in Appendix A included a single dollar of cost associated with the health effects from regulatory expenditures and accompanying economic outcomes?

2. Please provide a list of all health disbenefits identified by EPA in the RIAs for the ozone NAAQS reconsideration, the Utility MACT, or CSAPR.

3. In the context of the Utility MACT, please explain how the estimated $10.9 billion estimate in compliance costs and subsequent increases in electricity rates will not affect the health of a single American.

C. Failing to Analyze and Communicate Uncertainties

1. Why did OMB approve EPA Assistant Administrator Gina McCarthy's September 15, 2011 testimony before the Committee on Science, Space, and Technology in which she stated that CSAPR would avoid "Up to 34,000 premature deaths; 15,000 heart attacks; 400,000 cases of aggravated asthma; 19,000 cases of acute bronchitis; 19,000 hospital and emergency room visits"?

    a. Is this treatment of uncertainty consistent with OMB Circular A-94?
    b. What steps does OMB take to ensure that EPA's characterizations of RIAs are consistent with the guidelines for these analyses?

2. Former OIRA Administrator John Graham wrote in a December 2001 letter to then-EPA Administrator Christine Todd Whitman that "it is clear that we need to understand better which sources of PM in our economy are responsible for the PM-related health effects." Similarly, you have stated that upon finding the need to lower ambient $PM_{2.5}$ levels, "....EPA will have to decide what, exactly, to regulate; and to do this, it will have to decide what fine particulates consist of."

    Does OIRA continue to hold this view about PM speciation? If so, why has OIRA approved several regulations that are being justified from associations based on PM mass alone?

3. The OIRA Report to Congress indicates that "[t]he wide range of benefits estimates for particle control does not capture the full extent of the scientific uncertainty in measuring the health effects associated with exposure to fine particulate matter and its constituent elements." The Report further identifies six key assumptions that demonstrate the significant uncertainty in making these associations in RIAs.

    Please explain how EPA's CAA RIAs incorporate an uncertainty analysis that incorporates these six key assumptions.

4. There were also significant changes made to the section on $PM_{2.5}$ uncertainties between the draft and final OIRA Report to Congress for 2011:

    The draft reported stated that: "Although biological mechanisms for this effect have **not been established definitively** yet, the weight of the available epidemiological evidence supports an **assumption of causality**." (emphasis added)

    In the final report, this passage was changed to: "The weight of available epidemiological evidence supports a **determination of causality**. Biological mechanisms for this effect, while not completely understood, are **supportive of this determination**." (emphasis added)

    Why did OIRA alter this section to reflect more certainty in this association? What was the scientific basis for making this change?

5. EPA has acknowledged that its RIAs assume a causal association between $PM_{2.5}$ exposure and premature mortality and that "[i]f the PM/mortality relationship is not causal, it would lead to a significant overestimation of net benefits."

    a. What steps have been taken by EPA in RIAs to reflect uncertainty in making this assumption of causality?
    b. EPA typically relies on only two studies to extrapolate $PM_{2.5}$ -mortality associations, ignoring a large body of peer-review literature that indicates different results. Is this practice consistent with the President's requirement to develop regulations based on the best available science? In reviewing EPA assertions regarding $PM_{2.5}$ and mortality, does OIRA consider the best available peer-reviewed science? If not, why not? If so, what is this body of science and what does it conclude regarding $PM_{2.5}$ and mortality?
    c. What is the appropriate threshold for an assumption of causality between a pollutant and an individual health outcome?

D. Questionable "Value of a Statistical Life" Assumptions

1. Is EPA's VSL identical to the figure used by other federal agencies? If not, how is it different, and why?

2. As commentators on the CSAPR rule noted: "EPA's estimate for the value of a reduction in the risk of premature mortality was developed in the 1990s based on... literature available circa 1990." You characterized the proposed reconsideration of the 2008 ozone NAAQS as being "based on evidence that is no longer the most current" in violation of E.O. 13563. Is EPA's calculation subject to your interpretation of "evidence that is no longer the most current" in violation of E.O. 13563?

3. EPA's VSL has not been updated or discounted in light of our ongoing economic problems. As you noted in 2003, "[w]illingness to pay is dependent on ability to pay," suggesting that economic issues could substantially diminish EPA's estimated health-based benefits. Has OIRA recommended that EPA or other agencies evaluate VSL in light of economic conditions? If not, why not?

4. You have stated that "it makes a great deal of sense to focus on statistical life-years rather than statistical lives." In spite of the fact that most mortality associated with $PM_{2.5}$ happens in the population over 65 years of age, EPA puts the same value on mortality for all ages. In your view, is this practice appropriate?

A. Lack of Transparency

RIAs for EPA's proposed ozone reconsideration, Utility MACT, CSAPR, and other major CAA rules have relied heavily on two studies to find a correlation between $PM_{2.5}$ and premature death. In turn, these analyses, which were funded by EPA and the National Institute of Environmental Health Scientists, rely exclusively on data sets that are not transparent and not available to other researchers. To be clear, these studies are often the only sources for health effects offered by EPA staff in CAA RIAs, and it is only with the inclusion of these $PM_{2.5}$-related premature death estimates that many of these rules pass a basic cost-benefit test.

1. Is this practice consistent with:
   a. E.O. 13563, which requires that regulations "must be based on the best **available** science"?
   b. The goals of Public Law 105-277, which sought to require that "all data produced under an award will be made available to the public…"?
   c. OMB Circular A-4 on Regulatory Analysis, which states that "[a] good analysis is transparent and your results must be reproducible"?

2. You recently cited the President's approach to data transparency and stated: "In these ways, the President suggested that transparency can serve as a **disinfectant**; provide **data** for citizens to find and use; and ensure that institutions benefit from the **dispersed knowledge** of Americans. Taken as a whole, these points suggest that if regulation is to be empirically informed, it must be in large part because of the knowledge and participation of the American people." (emphasis in original).

   Is EPA's practice of justifying numerous multi-billion dollar regulations on data that is not publicly available consistent with the President's approach to data transparency?

3. EPA has failed to respond to Chairman Harris' September 22 request for data transparency in EPA's benefits analyses. As OIRA oversees E.O. 13563 (which requires that regulations "must be based on the best available science") and the enforcement of OMB guidelines resulting from P.L. 105-277, please provide (or require EPA to provide) all original data and analysis for the following studies that are used to justify EPA's CAA rules:

   a. The Cancer Prevention Study I compiled by the American Cancer Society.
   b. The Cancer Prevention Study II compiled by the American Cancer Society.
   c. The Harvard Six Cities Study.
   d. The Nurses' Health Study and Nurses' Health Study II.

B. Peer Review

As a result of the recently-released report from EPA's Inspector General, "Procedural Review of EPA's Greenhouse Gases Endangerment Finding Data Quality Processes," important questions have been raised about EPA's approach to peer review and its consistency with both OMB's Final Information Quality Bulletin for Peer Review ("OMB Bulletin") and the third edition of EPA's Peer Review Handbook.

1. Do you agree with the IG conclusion that EPA's "review did not meet all OMB requirements for peer review"? If not, why not? If so, what guidance, oversight, and enforcement is OIRA providing EPA with respect to its compliance with OMB peer review requirements?

2. The OMB Bulletin requires that "Each agency shall prepare an annual report that summarizes key decisions made pursuant to this Bulletin." However, EPA has not made public an Annual Peer Review Report since fiscal year 2009. What steps has OIRA taken to ensure timely compliance with the transparency requirements of the OMB Bulletin?

3. The OMB Bulletin "establishes minimum standards for when peer review is required for scientific information" and "covers original data and formal analytic models used by agencies in Regulatory Impact Analyses." The OMB Bulletin also deems scientific assessments associated with regulations that could have a potential impact of more than $500 million in any one year as "highly influential" and thus subject to rigorous peer review requirements. However, the

Administration has refused to categorize the scientific assessments associated with its endangerment finding and $PM_{2.5}$–mortality conclusions—which are directly being used to justify regulations costing into the many billions of dollars—as "influential" or "highly influential." Please explain how this categorization is compliant with the OMB Bulletin, and describe specific OIRA guidance, oversight, and enforcement efforts in support of its peer review requirements.

4. The IG Report highlighted that "EPA's guidance for assessing the quality of externally generated information does not provide procedures or steps for assessing outside data or requirements for documenting such analysis." In light of these concerns about EPA's inability to incorporate externally-generated information, what peer review guidelines has the Agency followed in utilizing these outside assessments of non-peer reviewed data for $PM_{2.5}$-mortality associations?

C. Lessons from the Ozone Reconsideration

1. You urged Administrator Jackson to drop her reconsideration of the 2008 ozone NAAQS because the new standard would be "based on evidence that is no longer the most current" and in violation of E.O. 13563.

   The data underlying $PM_{2.5}$ -premature mortality associations is primarily based on surveys conducted in the 1980s, while several more recent cohort studies go uncited in EPA's RIAs. Why have the Utility MACT and other $PM_{2.5}$ -dependent rules not been held to the same interpretation of E.O. 13563 by OIRA?

RALPH M. HALL, TEXAS
CHAIRMAN

EDDIE BERNICE JOHNSON, TEXAS
RANKING MEMBER

U.S. 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

November 4, 2011

The Honorable Lisa Jackson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator Jackson:

We write today to express our disappointment in the lack of responsiveness by the Environmental Protection Agency (EPA) to Member requests and letters. When President Obama took office in January 2009, he promised that his Administration would be the most transparent in history.

> *"Information maintained by the Federal Government is a national asset. My Administration will take appropriate action, consistent with law and policy, to disclose information rapidly in forms that the public can readily find and use."*[1]

Transparency is necessary in order for Congress to fulfill its oversight responsibilities, therefore requiring Federal agencies to provide requested information as expeditiously as possible is vital. Meaningful and worthwhile oversight requires real cooperation from Federal agencies.

On September 22, 2011 and September 23, 2011, Members of the Science, Space, and Technology Committee sent two letters to Assistant Administrator Gina McCarthy. In the September 22 letter, Energy and Environment Subcommittee Chairman Harris requested the original data sets and analysis for five studies; during a September 15, 2011 hearing, Ms. McCarthy assured the Committee the information was already publicly available and that she would be happy to provide it. Chairman Harris requested the receipt of such information by October 3, 2011. The September 23 letter signed by Chairman Hall and 8 members of the Committee requested information on EPA's development of the Cross-State Air Pollution Rule (CSAPR), including information regarding meetings between EPA and entities affected by CSAPR, information about the cost of electricity to ratepayers, and information regarding the

[1] *Memorandum for the Heads of Executive Departments and Agencies: Transparency and Open Government.* President Barak Obama, January 26, 2009. FR Doc No: E9-1777.

Integrated Planning Model used as the basis for EPA's analysis for CSAPR. This letter requested information to be provided by October 7, 2011.

As the authorizing Committee for scientific activities at EPA, we require such information to examine the scientific foundations of EPA regulations and inform our decision making in regard to the Agency's work and resources. This is especially important when regulations have a direct impact on jobs, as we have seen recently in Texas with the announcement of mine closures.

We trust that you will provide the information requested in the aforementioned letters no later than November 7 and that EPA will be more responsive to the requests of this Committee. If you have any questions regarding this matter please contact Ms. Tara Rothschild or Mr. Clint Woods with the Subcommittee on Energy and Environment at (202) 225-8844.

Sincerely,

Ralph M. Hall
Chairman

Andy Harris
Chairman
Subcommittee on Energy & Environment

Paul C. Broun
Chairman
Subcommittee on Investigations & Oversight

Lamar S. Smith

Randy Neugebauer

Michael T. McCaul

Dana Rohrabacher

Sandy Adams

Dan Benishek