Response: The EPA is fully committed to an open and transparent peer review process on the TCE draft risk assessment and has scheduled three public meetings with the peer reviewers to facilitate this engagement. The EPA also actively sought written public comment on the draft TCE risk assessment and the charge to the panel through a Federal Register Notice. Based on the comments received, we subsequently revised the charge to be responsive to the commenters. All the public comments have been, and will continue to be, provided for consideration by the panel. The transparent and open public meeting aspect of the TCE peer review meetings provides opportunities for observers to listen to the panel deliberations and for the public to provide comments at each meeting.

Vitter 32. In addition, EPA has not answered direct questions regarding whether or not these assessments will be refined before being used to inform regulatory determinations.

Vitter 32a. Can you tell me the agencies plans regarding these assessments?

Vitter 32b. Will further refinements be made before they are used to inform regulatory actions?

Vitter 32c. Why hasn't your office taken steps to clarify how these assessments are used?

Response to 32 a-c: From the beginning of the EPA's efforts to identify chemicals for assessment, the agency has continually stated that the assessments are being developed to determine if risk management actions are needed to address potential risks. In the EPA's 2011 Discussion Guide that stakeholders were provided for engagement on the effort, the EPA's Goal of Prioritization stated that "EPA intends to identify priority chemicals for review and possible risk management under TSCA." When the EPA made public the list of TSCA Work Plan chemicals, we publicly indicated that if an assessment indicates a potential risk of concern, the EPA will evaluate and pursue appropriate risk reduction actions, as warranted. If an assessment indicates negligible risk, the EPA will conclude its current work on the chemical being assessed. This information has consistently been on our TSCA Work Plan website and is in the presentations we routinely make on the Work Plan effort.

Vitter 33. The transparency and openness we would like to see from your office appears to be missing.

What steps will you take to improve your relationships and communications with stakeholders?

Response: The EPA is fully committed to stakeholder and public engagement on this important work. For example, from the earliest stage of the EPA's efforts to identify chemicals for assessment, the EPA has engaged stakeholders and the public. Stakeholders were consulted on the criteria and methodology for identifying chemicals for inclusion on our TSCA existing chemicals work plan and stakeholder comments were seriously considered in developing and implementing the work plan, which was announced in March 2012. The EPA has and will continue to fully engage the public on the chemical specific draft risk assessments during the public comment and peer review process.

Senator Fischer

Endangered Species Act Consultations for Pesticides

Fischer 1. Given that over the 40 year history of the Endangered Species Act, EPA and the Fish and Wildlife Services and National Marine Fisheries Services have not successfully completed a consultation that resulted in a label change, do you believe it appropriate EPA try to solve this deficiency on a selective product-by-product basis that relies on spatial (geographic) bans of product us or significant non-wind-directional buffers that have the long-term potential to decrease land value, arable land available for production, global competitiveness, and production of row crops themselves?

Response: The EPA, working with the US Fish and Wildlife Service and the National Marine Fisheries Service ("the Services"), as well as with the USDA, is establishing a systematic approach to evaluate the potential effects of pesticides on threatened and endangered species. The government's approach will employ the advice from the National Academy of Sciences' 2013 report to ensure that decisions about needed protections are scientifically sound. The government will also ensure that there is robust public participation throughout its review and decision-making process.

Fischer 2. Do you intend to follow this same approach that takes significant U.S. cropland out of production to address this lack of consultation process for every product that goes through registration or re-registration?

Response: As indicated above, the EPA, in consultation with the Services and the USDA, is advancing new scientific methods and ensuring that a more robust public participation process is available to stakeholders. This approach should produce narrowly tailored measures that achieve protection goals and minimize impacts on agriculture and other pesticide users.

Fischer 3. Have you evaluated the impact on U.S. agricultural production and our economy of such an approach?

Response: The EPA, in partnership with the Services and the USDA, is ensuring that the government uses the best available scientific information on agricultural production systems so that practical and reasonable protections for threatened and endangered species can be implemented, if needed.

Senator Fischer with Senator Crapo

Endangered Species Act Consultations for Pesticides

Fischer/Crapo 4. On April 30, a Committee on the National Research Council of the National Academy of Sciences (NAS) made detailed recommendations concerning revisions to the process by which EPA and the Fish and the Wildlife Service or the National Marine Fisheries Service assess risk during the consultation under the Endangered Species Act (ESA) for specific pesticide registration actions taken by EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The Administration requested this review in March 2011 "to review scientific and technical issues that have arisen as our departments and agencies seek to meet their respective responsibilities under ESA and FIFRA."

Do you believe that the NAS review has achieved its mission?

Response: Yes.

Fischer/Crapo 5. Do you believe that there is more work to be done? Are there other outstanding issues that must be resolved at the intersection of ESA and FIFRA? Do other scientific, technical and policy questions remain?

Response: Yes, more work remains to be done. The EPA, the Services, and the USDA are developing an action plan to implement the advice of the NAS. Establishing a new, shared scientific methodology for assessing the impacts of pesticides on protected species is the first step toward creating an efficient and effective system for meeting the requirements of both the FIFRA and the ESA.

Fischer/Crapo 6. Given the complexities involved, could the development of a response to the NAS report be improved with a public stakeholder process that brings together all parties to work-through those outstanding and unresolved inter-agency policies and procedures?

Response: The EPA, the Services, and the USDA anticipate engaging stakeholders as part of the process of implementing the new risk assessment methodologies. The agencies have already announced and begun to implement new opportunities for stakeholder participation on reviews and decisions involving individual pesticides.

Fischer/Crapo 7. We believe that there is an opportunity here to address years of regulatory frustration and to do so in a way that provides regulatory certainty to all parties. The Administration's letter to the National Academy of Sciences described this issue as "scientifically complex and of high importance." We would like your assurance that you will do your part to pursue and implement a comprehensive process for addressing these scientifically complex and important issues.

Fischer/Crapo 7a. Has the Administration formulated its official response to the NAS report-a "roadmap" if you will-now that the report has been public since April?

Fischer/Crapo 7b. When might that plan become public?

Response to 7 a-b: The EPA, the Services, and the USDA are working diligently to implement the recommendations in the NAS report. We anticipate that we can begin sharing our plans with the public in the fall of 2013.

Questions for the Record
July 23, 2013 Hearing on the Nomination of Avi Garbow
to be General Counsel for the U.S. Environmental Protection Agency
Committee on Environment and Public Works
United State Senate

Senator Boxer

Boxer 1. Mr. Garbow, you spent several years in private practice working for the law firm WilmerHale.

Boxer 1a. Would you say that this law firm works on behalf of clients from industry?

Response: Yes

Boxer 1b. What did you take away from your experience working at WilmerHale in terms of better understanding businesses' perspective on issues?

Response: My legal work representing clients in private practice significantly enhanced my professional growth, and provided me with valuable perspectives on many issues facing small and large businesses. In particular, I saw firsthand the efforts undertaken by many clients to comply with applicable laws, or to address instances of noncompliance, including the financial and human resource implications that attend to legal obligations. During the course of my representation of business clients, I was exposed to many facets of their enterprises, and gained valuable insight into the competing interests and demands often present in multidimensional companies.

Boxer 2. Mr. Garbow, can you describe the factors that you will use to determine whether to advise your client to settle a law suit that is filed by industry or environmental groups against the EPA?

Response: The factors that I would use, if confirmed, to determine whether to advise a client to settle a claim or matter – whether filed by industry or an environmental group – are based upon a case by case assessment of the relevant facts, the legal claims at issue, and an evaluation of the risks associated with the litigation. Such advice would only be rendered after full consultation with lawyers in the Department of Justice assigned to that particular matter.

Boxer 2a. Can you also please describe considerations that arise when EPA is sued over missing mandatory deadlines to issue rules, and whether courts order timelines for Agency action in such cases?

Response: When the EPA is sued for failure to timely adhere to a statutorily mandated duty to act, the agency's legal defenses are generally significantly limited if the agency did in fact miss the statutory deadline. The absence of a legal defense to a claim, or the limited nature of the available defenses, is an important factor when considering the merits of likely litigation outcomes in a lawsuit. In cases in which an agency is found by a court to have violated a statutorily mandated duty, and missed a deadline for action, courts regularly order the agency to expeditiously come into compliance in accordance with a timetable set by the court.

Vitter 2e. What are EPA's criteria for identifying a conflict-of-interest?

Vitter 2f. After a conflict-of-interest was identified, how was Dr. Armendariz screened from working on covered projects?

Vitter 2g. Why was Layla Mansuri, an attorney, permitted to work on the Las Brisas permit in light of her previous advocacy against the project prior to her employment at EPA?

Response to Vitter 2a-g: If confirmed, I will support the EPA's Designated Agency Ethics Official (DAEO) in the full and effective execution of his or her duties. I also hold myself and all those who work for me to the highest ethical standards. I commit to work with my colleagues to be responsive to the committee's requests on this and other matters.

Vitter 2h. Can you commit to me that as General Counsel you will implement a policy that will prohibit an appointee from working on a project that they were actively involved in prior to their service at EPA?

Response: If confirmed as General Gounsel, I will commit to working with the agency's DAEO to ensure that any appointee complies with applicable recusal obligations. Pursuant to Designation by the EPA Administrator and 5 CFR § 2638.203, the DAEO is responsible for managing the agency's ethics program.

Vitter 3. On May 15, 2013, I sent a letter to Assistant Administrator Michelle DePass inquiring about her compliance with her ethics pledge. In her pledge, she promised to resign her position as Program Officer with the Ford Foundation upon confirmation. Ms. DePass was confirmed on May 12, 2009, however, she was employed at the Ford Foundation until July 23, 2009.

Why was Ms. DePass permitted to continue as an employee at the Ford Foundation AFTER her confirmation and contrary to her pledge?

Response: I did not participate in any discussions regarding the specific date on which Ms. DePass would commence federal employment. I do understand that she left her work at the Ford Foundation before becoming a federal employee.

Vitter 4. The Committee has identified several examples of EPA employees failing to adhere to EPA's Standards of Ethical Conduct. In the first instance, it appears that former Regional Administrator Al Amendariz and Associate Regional Administrator Layla Mansuri (an attorney) were inappropriately involved in decisions related to the Las Brisas Energy Center, despite their paid advocacy against the facility before their employment at EPA. Additionally, the Committee is concerned that Michelle DePass, Assistant Administrator for the Office of International and Tribal Affairs, violated the clear terms of her ethics pledge when she continued to work at the Ford Foundation after she was confirmed to her position at EPA. These and other potential violations are very serious matters that compromise the integrity of the Agency.

Vitter 4a. As the Agency's Chief Ethics Officer, will you commit to working with the Committee to eliminate these types of ethical lapses?

Response: The General Counsel is not the agency's Chief Ethics Officer; the agency's DAEO serves in that capacity. Nonetheless, if confirmed, I will hold myself and my staff to the highest ethical standards and I commit to working with the agency's DAEO to ensure that all the EPA employees uphold ethics standards and meet their ethics responsibilities.

Vitter 4b. In addition, will you commit to publishing on a public website all ethics filings of senior officials within both EPA headquarters and regional offices?

Response: I do not believe the General Counsel would have authority to make such a commitment. I am aware that under the STOCK Act an e-filing system is under development for the OGE Form 278 (Executive Branch Personnel Public Financial Disclosure Report). I also know that OGE Form 278s, which are required of certain senior headquarters and regional employees, are available to the public upon request.

Vitter 5. While Dr. Armendariz has resigned his position from EPA, Layla Mansuri and Chrissy Mann are still employed by Region 6. Both of these individuals represented entities opposed to the construction and permitting of the LBEC.

Vitter 5a. Has EPA identified conflict-of-interest for either Ms. Mansuri or Ms. Mann?

Vitter 5b. Please list all topics in which EPA has identified a conflict-of-interest.

Vitter 5c. Has either Ms. Mansuri or Ms. Mann worked on any matter related to the LBEC?

Vitter 5d. Has either Ms. Mansuri or Ms. Mann worked on the development of the NSPS rule for greenhouse gases for new power plants Electric Generating Units?

Response to 5a-d: These are specific questions concerning the ethics obligations of individuals, and of which I have no specific knowledge. The EPA's DAEO is the most appropriate person to address these questions.

Topic: FOIA

Vitter 6. According to documents obtained by the Committees, EPA readily granted FOIA fee waivers for environmental allies, effectively subsidizing them, while denying fee waivers and making the FOIA process more difficult for states and conservative groups. Most recently, 12 states have joined in litigation against the EPA to force the Agency to turn over documents relating to sue and settle agreements. So far EPA has steadfastly denied the states very detailed requests.

Vitter 6a. Why has EPA unilaterally denied Fee Waiver Requests to states and local entities?

Response: The EPA does not unilaterally deny fee waiver requests from states and local entities. The EPA evaluates all fee waiver requests on a case by case, request by request basis using the six factors contained in our regulations, located at 40 C.F.R. § 2.107(l)(2) & (3).

Vitter 6b. Does EPA take the position that states will never be able to demonstrate that they have met the criteria to obtain a fee waiver?

Response: No, the EPA does not take that position. The EPA evaluates all fee waiver requests on a case by case, request by request basis using the six factors contained in our regulations, located at 40 C.F.R. § 2.107(l)(2) &(3).

Vitter 6c. Stated another way, can you envision a scenario wherein EPA grants a state's Fee Waiver request?

Response: Yes, I can envision a scenario wherein a state or local entity qualifies for a fee waiver under agency regulations. The EPA evaluates all fee waiver requests on a case by case, request by request basis using the six factors contained in our regulations, located at 40 C.F.R. § 2.107(l)(2) & (3).

Vitter 6d. If EPA can envision a scenario where a state can obtain a fee waiver, please explain why Oklahoma and 11 other states have failed to satisfy that criteria.

Response: The specific Freedom of Information Act (FOIA) request you reference is now in litigation. OGC determined on administrative appeal that it was an improper FOIA request because it failed to meet the legal standard under FOIA and agency regulations to reasonably describe the records sought. A final determination with respect to the merits of the states' fee waiver request was never reached, because it was determined that the request was improper, and so the fee waiver request was moot. A copy of this determination is attached.

The EPA has made multiple efforts to communicate with the states about what information is needed in order to reasonably identify the records they are seeking, and also to provide general feedback on their fee waiver request in order to assist them in resubmitting a request. Should the states choose to resubmit a request that reasonably identifies the records they are seeking, EPA will fairly evaluate any renewed fee waiver request using the six factors, at that time.

Vitter 7. Myself, along with Senator Inhofe and Chairman Issa sent EPA a letter on May 17, 2013, reiterating the request made by the states. We have yet to receive a response from EPA.

When can we expect to receive EPA's response to this letter?
Response: The EPA responded to your May 17, 2013 letter regarding the EPA's processing of fee waiver requests on June 28, 2013. A copy of this response is attached.

I believe your question refers to the April 29, 2013 letter that you, Senator Inhofe, and Congressman Lankford sent to the EPA. As indicated above, the states' similar requests were unable to be processed by the agency because they did not reasonably describe the records being sought. Although your request for documents is not required to conform with the agency's FOIA regulations, the same practical difficulties with identifying the records do apply.

Vitter 8. It is my understanding that Congress – as a coequal branch of government – does not need to request a fee waiver to obtain documents from the executive branch.

Vitter 8a. Do you agree with this statement?

Response: I agree that a request for records from the Speaker of the House, President of the Senate, or members of Congress in his or her capacity as the chair of a congressional committee or subcommittee concerning matters within their jurisdiction is not processed pursuant to the FOIA requirements and regulations, including applicable processing fees.

Vitter 8b. If so, there should not have been a delay – certainly a delay this long – for EPA to begin processing our request. Why has EPA delayed in its response to the May 17, 2013 letter?

Response: The EPA responded to your May 17, 2013 letter regarding the EPA's processing of fee waiver requests on June 28, 2013. A copy of this response is attached.

If your question refers to the April 29, 2013 letter that you, Senator Inhofe, and Congressman Lankford sent to the EPA, any delay in responding to the April 29 request in no way relates to a request for fees. Although your request for documents is not required to conform with the agency's FOIA regulations, the same practical difficulties with identifying the records do apply. Your request, which calls back to the states' even broader September 2012 request, amounts to a request for every document (whether internal or external to the EPA) that relates in any way to communication with any organization with an environmental or natural resource interest, on any of no less than three major environmental statutes that the agency implements, from every single one of the agency's twenty one offices.

Vitter 8c. Will you commit to doing all that is within your power to expedite a response to this request?

Response: If confirmed, I am happy to further discuss this request in order to better understand the information you are seeking and enable the Agency to effectively search for relevant documents.

Vitter 9. During your confirmation hearing I asked you about an EPA email that discussed a standard protocol for responding to FOIA requests. In this email an EPA attorney, Geoffrey Wilcox, instructed that one of the first steps is to alert the requestor that they needed to narrow the request because it is overbroad, and secondarily that it will probably cost more than the amount they agreed to pay. I asked you if such a "standard protocol was appropriate?" You replied that it was not. Moreover, I requested that you follow up on what actions, if any, the Agency had taken to correct this behavior and you committed to do so for the record.

Accordingly, I request that you provide me with an update on any corrective action EPA has taken to address this matter.

Response: As I said at the hearing, I did not know the specific circumstances or context of the email excerpt you read to me. I have since looked into the matter.

At the hearing, I understood the email excerpt to be a general statement of the EPA protocols for responding to all FOIA requests. I have since learned that the email was sent in the context of agency staff responding to two specific, extremely large and overbroad FOIA requests, one of which indicated a willingness to pay only $500 in costs to cover the FOIA request.

The approach described in the email was for responding to "such FOIA requests" (i.e., overbroad FOIA requests with limited commitment to pay fees) and appears to be consistent with the

EPA's FOIA regulations. In responding to broad requests, the EPA's FOIA regulations require employees to communicate with the requester to alert them to the estimated cost to fulfill the request (40 C.F.R. section 2.102(d) and section 2.107(e)), and to advise the requester that the agency will wait for further instructions before proceeding with the request (40 C.F.R. section 107(e)). The EPA is also required to communicate with the requester to provide an opportunity for them to narrow or modify their large request when it results in the need for the agency to request an extension of time to respond. 40 C.F.R. 2.104(d). The EPA's regulations for implementation of FOIA are consistent with the statutory requirements of FOIA itself, and with the Department of Justice's guidance to all agencies for implementation of FOIA. Under these circumstances, I am not aware that any corrective action was deemed appropriate or necessary.

The EPA is working towards establishing national FOIA procedures to further ensure that requests are processed consistently, and according to these and other procedural requirements contained in our regulations. Furthermore, as I referenced during my testimony at the hearing, I understand that the agency intends to provide additional training on FOIA to its workforce by the end of the calendar year.

Vitter 10. In May, I sent a joint letter with Chairman Issa asking EPA to provide our offices with "All FOIA fee waiver requests submitted to EPA between January 21, 2009 and May 16, 2013." This production should include all requests for an appeal. All response letters from EPA to requestors for FOIA fee waivers sent between January 21, 2009, and December 31, 2012, including all responses to an appeal. All EPA materials used to train FOIA officers on processing requests for FOIA fee waivers. I am still waiting for a response.

Vitter 10a. Can you provide a reason as to why EPA has not yet provided this information to the Committees? What is that reason?

Response: I am not familiar with the current status of the agency's response to this request. I will look into the status of this inquiry and help to ensure the agency is responding to this inquiry.

Vitter 10b. Isn't it true that these records, by their nature, do not contain any deliberative or other privileged material as they are correspondence between the Agency and an outside entity?
Response: Response letters from the EPA to a FOIA requestor will not contain any deliberative material. In general, correspondence between the Agency and an outside entity may contain material subject to a personal privacy exemption or the confidential business exemption.

Vitter 10c. Will you commit to me to do all that you can to expedite responding to this request back at the Agency?

Response: I will commit to look into to the status of this response and help to ensure that the agency is responding to this inquiry.

Vitter 11. The Committee has uncovered multiple instances of mis-management of the Agency's obligations under the FOIA. These problems range from the apparent bias in assessing applications for fee waivers, to the unauthorized release of private information of Americans to environmental allies, to the inappropriate application of FOIA exemptions. As the General Counsel, you will play an instrumental role in improving the Agency's performance on this front.

While Acting Administrator Perciasepe committed to following the yet to be issued recommendations of the Inspector General, implementing these reforms should be a top priority.

Will you commit to aid the Committee in its oversight efforts, and to take all necessary steps to address these defects within the Agency?

Response: If confirmed as General Counsel, I will commit to continue my office's role in providing sound legal counsel to the Agency on responding to oversight requests, and fulfilling its obligations under the FOIA, and I look forward to playing a key role in ensuring that any improvements to EPA's processes recommended by the Inspector General are, as needed, implemented quickly and effectively.

Vitter 12. The office of General Counsel is responsible for the Agency's compliance with internal guidelines as well as transparency statutes, such as the Federal Records Act, and the Freedom of Information Act. On March 18, 2013, I sent a letter along with Chairman Issa to Region 9 Administrator Jared Blumenfeld asking him to certify that he had not used his personal email to conduct Agency business. As you are aware, EPA policy explicitly prohibits such activities as it interferes with the Agency's record keeping capabilities. To date, I have not received a response from Mr. Blumenfeld, or from the Agency, answering the very simple question. EPA's response sent on April9, 2013, fails to respond the actual question posed.

Vitter 12a. Accordingly, what actions have you or the office of General Counsel taken to ensure that Mr. Blumenfeld was and is not using his personal email address to conduct Agency business?

Response: The Office of General Counsel contacted Mr. Blumenfeld soon after a federal district court complaint was filed in May suggesting that the Region 9 Administrator had used his personal email account to conduct agency business. At that time, Mr. Blumenfeld was counseled on his obligations under the Federal Records Act, the Freedom of Information Act and the EPA records policy in regard to email use for official agency business and federal records preservation.

Vitter 12b. Has the Office of General Counsel conducted any sort of investigation to determine whether or not Mr. Blumenfeld did in fact use his personal email to conduct Agency business?

Response: The Office of General Counsel is currently working with the EPA's Office of Regional Counsel in Region 9 to respond to a FOIA request that asked for all emails concerning official Agency business transmitted to and from Mr. Blumenfeld's personal email account since November 2009. The EPA has been processing this records request under the FOIA and the EPA regulations, while keeping the requester informed, as required by the FOIA, in regard to the progress being made toward the agency's response.

Vitter 12c. If the Agency did in fact learn that Mr. Blumenfeld had been using his personal email account to conduct Agency business, what corrective actions were taken?

Response: As noted above, the Office of General Counsel has recently been working with Mr. Blumenfeld with respect to his obligations under the agency's email use and federal records preservation policies and is presently engaged in responding to a FOIA request that relates to that

issue. The Office of General Counsel will continue to work with other EPA offices, such as the Office of Environmental Information, to ensure that all agency personnel are actively complying with federal statutes and agency policies relating to email use and official agency business.

Topic: Sue and Settle

Vitter 13. According to a recent survey, since 1993, 98 percent of EPA regulations (196 out of 200) pursuant to three core Clean Air Act programs (NAAQS, NESI-IAP, and NSPS) were promulgated late, by an average of 5.68 years (or 2,072 days) after their respective statutorily defined deadlines. If EPA is out of compliance with all its deadlines, then clearly the Agency has limited resources relative to their statutory responsibilities. Establishing a deadline, therefore, also establishes EPA's priorities. In at least two instances, EPA and environmentalist organizations have litigated to either limit or prevent intervention by state or local officials in settlement discussions.

Given that the Congress expressly stipulated that environmental policymaking by EPA be performed in cooperation with the States, is it appropriate for the Agency to establish its priorities with environmentalist organizations in settlement negotiations that exclude the input of local officials and representatives?

Response: Agency priorities are set by the EPA Administrator, in consultation with senior agency leadership; agency priorities are not established by nongovernmental entities through settlement agreements. As appropriate, the Administrator and agency leadership regularly seek and receive the input of states, tribes, and local officials and representatives in the course of implementing environmental laws and programs.

Vitter 14. OGC lawyers, together with attorneys in the U.S. Department of Justice's Environment and Natural Resources Division, represent the Agency in court. DOJ rules stipulate that, "It is hereby established as the policy of the Department of Justice to consent to a proposed judgment in an action to enjoin discharges of pollutants into the environment only after or on condition that an opportunity is afforded persons (natural or corporate) who are not named as parties to the action to comment on the proposed judgment prior to its entry by the court." Neither EPA nor the Department of Justice allow for public notice and comment of consent decrees or settlement agreements pursuant to the litigation alleging EPA failed to meet non-discretionary duties under the CWA. Rather, DOJ publishes in Federal Register only notice of settlement agreements/consent decrees engendered by enforcement actions.

Would EPA OGC commit to implementing the policy of its partners at the DOJ, and agree to allow for public notice and comment for CWA settlement agreement and consent decrees pursuant to deadline suits, in addition to enforcement actions?

Response: If confirmed, I commit to examining, in consultation with the Department of Justice, the EPA's Office of Water, and other affected entities, the advantages and disadvantages of instituting a policy that may allow for public notice and comment for certain draft settlement agreements and consent decrees in matters where the EPA is alleged to have violated a nondiscretionary duty under the Clean Water Act.

Topic: Human Resources

Vitter 15. Has EPA ever conducted training for use of the People Plus time tracking software?

Response: The issues of time and attendance are managed through the Office of the Chief Financial Officer and not within the purview of the Office of General Counsel, so I am not in a position to provide detail on this specific question. I understand that new employees and new supervisors are instructed on their timekeeping responsibilities through the offices for which they work.

Vitter 16. Is the Agency currently implementing new time and attendance policies? Please identify what these new policies are.

Response: The issues of time and attendance are managed through the Office of the Chief financial Officer and not within the purview of the Office of General Counsel, so I am not in a position to provide detail on this specific question. I understand that the EPA is revising its time and attendance policy to include additional responsibilities for timekeepers and approving officials, as well as system design changes and internal control improvements.

Vitter 17. Please outline EPA's policy on how to manage an underperforming employee.

Response: While management of personnel in the Office of General Counsel (OGC) falls primarily to OGC's Principal Deputy General Counsel, I am a strong believer in the value of regular feedback and open communication between office management and staff. In general, I understand that specific performance management requirements are governed by governmentwide regulations, as well as the requirements of any applicable collective bargaining agreements.

Topic: Chemical Safety Board (CSB)

Vitter 18. Congress established the Chemical Safety Board as a non-regulatory, independent investigatory body yet recently EPA has been attempting to subpoena CSB witness statements and records.

Vitter 18a. Under what legal authority has EPA determined it has access to the CSB's investigatory records?

Response: The EPA has a range of legal authorities that it may invoke to have access to the CSB's investigatory records. Clean Air Act section 112(r)(6)(Q), 42 USC 741(r)(6)(Q), provides that "any records, reports or information obtained by the Board shall be available to the Administrator, the Secretary of Labor, the Congress, and the public." An exception is provided for confidential business information and trade secrets. That exception does not apply to officers, employees, and authorized representatives of the United States when carrying out duties under the Clean Air Act or in any proceeding under the Clean Air Act. Additionally, the EPA has investigative authority under Clean Air Act section 114, 42 USC 7414, to gather information in support of the EPA's activities under the Clean Air Act. Clean Air Act section 307(a), 42 USC 7607(a), provides administrative subpoena authority. With respect to the subpoena authority of the United States through a grand jury proceeding, that authority is vested in the Department of Justice through a court supervised process.

Vitter 18b. Does EPA believe it should follow the Memorandum of Understanding between the Agency and the CSB?

Response: Yes.

Topic: Fuel Economy

Vitter 19. What is your opinion on the application of EPCA to EPA's GHG authority and fact that Mass vs. EPA may have found authority to regulate but did not require it?

Response: In the Massachusetts case, the Supreme Court made it clear that the fact "that DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. The EPA has been charged with protecting the public's 'health' and 'welfare,' 42 U.S.C. §7521(a)(1), a statutory obligation wholly independent of the DOT's mandate to promote energy efficiency. See Energy Policy and Conservation Act, § 2(5), 89 Stat. 874, 42 U.S.C. § 6201(5)." 549 U.S. 497, 532 (2007). The Supreme Court also made it clear that "[i]f EPA makes a finding of endangerment, the Clean Air Act requires the Agency to regulate emissions of the deleterious pollutant from new motor vehicles." 549 U.S. at 533.

Vitter 20. When does EPA intend to issue a response to the Alliance/Global ZEV waiver petition for reconsideration filed in March of this year?

Response: Although I understand that the EPA, and in particular the Office of Air and Radiation, has been actively working with the petitioners and other stakeholders on the issues raised in the petition, I have not been involved in the details of those discussions.

Vitter 21. Will the mid-term review be completed before the President leaves office?

Response: In October, 2012, the EPA adopted greenhouse gas (GHG) standards for light-duty motor vehicles covering model years 2017 through 2025. Given the long time frame at issue in implementing the standards for model years 2022–2025, the EPA will conduct a comprehensive mid-term evaluation and agency decision making process for the GHG standards for those model years. The evaluation will determine whether the model year 2022-2025 GHG standards are appropriate under section 202(a) of the Clean Air Act. Under the regulations adopted in that rulemaking, the EPA would be legally bound to make a final decision, by April 1, 2018, on whether the model year 2022–2025 GHG standards are appropriate under section 202(a), in light of the record then before the agency. If, based on the evaluation, the EPA decides that the GHG standards are appropriate under section 202(a), then the EPA will announce that final decision and the basis for the EPA's decision. Where the EPA decides that the standards are not appropriate, the EPA will initiate a rulemaking to adopt standards that are appropriate under section 202(a), which could result in standards that are either less or more stringent. The date on which the mid-term review will conclude thus depends on the substantive decision made by April 1, 2018. Further discussion of the mid-term review can be found at 77 Fed. Reg. 6264, 62784-5 (October 15, 2012).

Topic: CWA

Vitter 22. Do you agree that the CWA does not regulate the flow of water?

Response: In the CWA, the Congress stated its objective to restore and maintain the chemical, physical, and biological integrity of the nation's waters and provided the EPA and the states with an assortment of legal authorities. The decision how the EPA or a state will use these authorities to address a given issue involves very careful consideration of the facts unique to the situation. I commit to work with the EPA's Office of Water and our Regional Offices to ensure that the EPA's use of these authorities is consistent with the words and objectives of Clean Water Act.

Vitter 23. Do you agree that EPA can require permits under Section 402 of the CWA only for discharges of pollutants from a point source to a "water of the United States"?

Response: I agree that Section 402 of the Clean Water Act requires a permit for discharges of any pollutant or combination of pollutants. As defined in Section 502 of the Clean Water Act, this includes discharges to "waters of the United States" from point sources, as well as discharges to waters of the contiguous zone or the ocean from any point source other than a vessel or floating craft.

Vitter 24. Can you assure me that EPA will not attempt to regulate water as a surrogate for a pollutant, in violation of the Eastern District of Virginia's recent decision in VA Dept. of Transportation v. EPA (holding that EPA may not regulate stormwater as a surrogate for a pollutant)?

Response: The EPA did not appeal the decision of the District Court for the Eastern District of Virginia in *VA Dept. of Transportation* v. *EPA*. The EPA is continuing to analyze that decision as it works with states to develop options for establishing total maximum daily loads (TMDLs) under the Clean Water Act to address water quality impairments caused by urban stormwater. While it is not the General Counsel's role to be the final decision maker on agency policy and programs, I look forward to working with the Agency's leadership to ensure that such TMDL efforts are consistent with the Clean Water Act.

Senator Inhofe

Inhofe 1. As EPA's General Counsel, would you commit to EPA posting on its website copies of all complaints filed against EPA as a result of notices of intent to sue?

Response: Many documents filed in the EPA's defensive environmental cases are already available on the Office of General Counsel (OGC) website.[1] In addition, notices of intent to sue the EPA are available.[2] Neither of these sites routinely makes available complaints filed against the EPA. I agree this information might be of value to interested stakeholders, and, if confirmed, commit to work with OGC lawyers and technical staff to explore options for making complaints more readily available to the public.

Inhofe 2. As EPA's General Counsel, would you commit to EPA posting on its website copies of any proposed consent decrees 30 days before submitting them to a court of law?

Response: If confirmed, I commit to examining, in consultation with the Department of Justice, the EPA leadership, and other affected entities, the advantages and disadvantages of posting all proposed consent decrees before submitting them to a court.

Inhofe 3. Out of all the rules for which EPA has deadlines, how many of them have been met? And, how many of those deadlines have been missed?

Response: My understanding is that neither the Office of General Counsel, nor the agency more broadly, maintains an inventory of all the rules that the EPA has issued that is linked to statutory deadlines, nor do we maintain an inventory of all statutory deadlines.

Inhofe 4. Do you believe that under the Federal Advisory Committee Act (FACA) (5 U.S.C. Appendix) EPA's Science Advisory Board (SAB) is authorized and obliged to respond to congressional inquiries from relevant committees of substantive jurisdiction about its activities?

Response: I have not worked directly with the specific authorities contained in the Federal Advisory Committee Act (FACA) (5 U.S.C. Appendix) and how they apply to the EPA's Science Advisory Board (SAB). If confirmed as the EPA General Counsel, I commit to review the FACA, including any authorities and obligations it may contain with regard to the SAB interactions with relevant congressional committees, and work with the OGC staff and the SAB to ensure the SAB complies with appropriate authorities when responding to any congressional requests pending before it.

Inhofe 5. Can you commit to this Committee that, as EPA General Counsel, you will review all pending requests for information from Congress to EPA's Science Advisory Board (SAB) and will clearly communicate to the members of the SAB that it is appropriate and obligatory that they respond to such inquiries in a timely manner?

Response: If confirmed, I commit to review any congressional requests presently pending before the SAB and to work with the OGC staff and the SAB to ensure the SAB complies with

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[1] http://www.epa.gov/ogc/documents.htm

[2] http://epa.gov/ogc/noi.html

appropriate authorities when responding.

Inhofe 6. Continuing Job Losses Analysis (321 (a)): Since 1977, section 321 (a) of the Clean Air Act has required "the Administrator to conduct continuing evaluations of potential loss or shifts of employment which may result from the administration or enforcement of the provision of [the Clean Air Act] and applicable implementation plans, including where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such administration or enforcement." EPA has never conducted a section 321 (a) study to consider the impact of Clean Air Act programs on jobs and shifts in employment. The §321 requirement is different than the requirement from Executive Order 12866 that EPA consider in a Regulatory Impact Analysis (RIA) what impact a single proposed rule will likely have on jobs. For §321, EPA has to consider the impact that existing Clean Air Act requirements – taken as a whole – have had on job losses and shifts in employment throughout our economy. RIAs, by contrast, only consider the potential future employment impact that a single proposed rule will have. Therefore, EPA's preparation of RIAs for new rules docs not satisfy §321(a).

Inhofe 6a. Has EPA ever conducted a study or evaluation under section 321 of the Clean Air Act? If so, when and, as EPA's General Counsel, would you commit to EPA posting on its websites, copies of those studies and/or evaluations?

Response: The EPA has found no records that contain studies or evaluations under section 321 of the Clean Air Act since passage of the 1977 Amendments, when the Congress enacted section 321.

Inhofe 6b. As EPA's General Counsel, would you commit to complying with section 321 of the Clean Air Act and ensuring that EPA evaluates on a continuing basis how air quality regulations, taken as a whole, affect jobs and shifts in employment?

Response: CAA section 321 authorizes the Administrator to investigate, report and make recommendations regarding employer or employee allegations that requirements under the Clean Air Act will adversely affect employment. In keeping with congressional intent, the EPA has not interpreted this provision to require the EPA to conduct employment investigations in taking regulatory actions. Section 321 was instead intended to protect employees in individual companies by providing a mechanism for the EPA to investigate allegations that specific requirements, including enforcement actions, as applied to those individual companies, would result in layoffs. The EPA has found no records indicating that any administration since 1977 has interpreted section 321 to require job impacts analysis for rulemaking actions. The EPA does perform detailed RIAs for each major rule it issues, including cost benefit analysis, various types of economic impacts analysis, and analysis of any significant small business impacts. Since 2009, the EPA has focused increased attention on consideration and (where data and methods permit) assessment of potential employment effects as part of the routine RIAs conducted for each major rule.

Inhofe 7. Sue and Settle: "Sue and settle" occurs when an agency intentionally relinquishes its statutory discretion by accepting lawsuits from outside groups which effectively dictate the priorities and duties of the agency through legally-binding, court-approved settlements negotiated behind closed doors - with no participation by other affected parties or the public. As a result of the "Sue and Settle" process, the agency intentionally transforms itself from an

independent actor that has discretion to perform its duties in a manner best serving the public interest, into an actor subservient to the binding terms of settlement agreements, including using its congressionally- appropriated funds to achieve the demands of specific outside groups. This process also allows agencies to avoid the normal protections built into the rulemaking process- review by OMB and other agencies, reviews under Executive Orders, and review by other stakeholders - at the critical moment when the agency's new obligations are created. For the past four years, EPA has actively engaged in settlements with environmental advocacy groups that result in new commitments to write rules on specified timetables and to undertake other new activities.

Inhofe 7a. Would you support efforts to improve the transparency of this process and allow affected parties, including states and industry, to participate in the process, including settlement negotiations, to ensure that all interests are represented?

Response: I am absolutely committed to supporting appropriate efforts to improve transparency in EPA decision making processes. If confirmed, I intend to have an open door policy for stakeholders to discuss legal issues of concern to help ensure that our legal analysis is guided by the fullest consideration of relevant information.

Inhofe 7b. As EPA's General Counsel, what would you do to ensure that the agency does not agree to deadlines through settlements that do not provide sufficient time for EPA to meet its obligations under the Administrative Procedure Act, the Regulatory Flexibility Act, the Small Business Regulatory Enforcement Fairness Act, OMB Circular A-4, and other requirements that apply to EPA?

Response: If confirmed, I will counsel the agency to provide sufficient time in any schedule set by settlement agreement to ensure the time periods allocated for any particular agency action are sufficient to fulfill all legal requirements.

Inhofe 7c. In a recent denial of several environmental groups' petition for a rulemaking under the Clean Air Act, Acting Administrator Robert Perciasepe stated that, "[e]ven under the best circumstances, the EPA cannot undertake simultaneously all actions related to clearly determined priorities as well as those requested by the public, and so the agency must afford precedence to certain actions while deferring others.... The EPA must prioritize its undertakings to efficiently use its remaining resources."

Inhofe 7c (i). How do you prioritize the rulemakings that EPA decides to pursue?

Response: Agency priorities are set by the Administrator, in consultation with senior agency leadership.

Inhofe 7c (ii). Would you agree that the new commitments that EPA agrees to in "sue and settle" agreements with environmental groups, including timetables for rulemakings, have an impact on EPA's priorities as to the rulemakings that it undertakes?

Response: The agency does not commit in any settlement to any action that is not otherwise authorized by law. The agency thoughtfully and deliberately develops priorities for each of its program areas. Where a statute establishes mandatory duties for agency action, and the agency

has missed a mandated deadline, the initiation of legal proceedings against the agency, and any resolution of those claims, can have an impact on the allocation of resources.

Inhofe 7c (iii). Would you agree that the new commitments that EPA agrees to in "sue and settle" agreements with environmental groups, including timetables for rulemakings, have an impact on EPA's budget?
Response: The agency does not commit in any settlement to any action that is not otherwise authorized by law. The allocation of resources within the EPA's appropriated budget can be affected by legal proceedings against the agency, or the resolution of those claims, where the agency has missed a mandatory statutory deadline.

Inhofe 8. Cooperative Federalism is also a major concern of mine, especially as it is related to the Clean Air Act.

Inhofe 8a. Will you commit to working to improve the "cooperative" nature of "cooperative federalism" so that the EPA works with states instead of against them?

Response: Yes, I commit to work with states, and will seek opportunities to improve areas of cooperation with states that are within the purview of the Office of General Counsel. I agree that an effective working relationship between the EPA and state governments is important to Clean Air Act (CAA) implementation.

Inhofe 8b. Will you commit to approving Federal Implementation Plans only after the EPA has exhausted all of its resources to remedy a State Implementation Plan?

Response: The CAA gives both states and the EPA authorities and responsibilities to provide clean air and protect public health. The EPA has a mandatory duty under the CAA to promulgate a Federal Implementation Plan (FIP) in certain circumstances that are required by law when a state does not meet its State Implementation Plan (SIP) obligations under the CAA. In general, the EPA strives to avoid situations in which a FIP is necessary. The EPA's strong preference is for states to develop and submit their own SIPs that meet the CAA requirements, and the EPA works with states to help them to develop approvable SIPs in order to avoid a FIP in the first instance, or to replace a FIP with an approvable SIP as soon as possible. If confirmed, my role as General Counsel would be to ensure that the relevant agency decision makers are advised of the CAA legal obligations and authority related to FIPs and SIPs, which I commit to do.

Senator Fischer

Numeric Effluent Limits

Fischer 1. Is EPA planning to propose regulation of municipal separate storm sewer flow amounts and numeric effluent limits for pollutants? If so, what is EPA's statutory authority to consider regulating such flows and numeric effluent limits for pollutants?

Response: While it is not the General Counsel's role to be the final decision maker on agency policy and programs, if confirmed I look forward to working with the agency's leadership to fully consider these issues. My understanding is that the EPA is considering revisions to its stormwater rules that may include performance standards for stormwater discharges that could require sites to incorporate sustainable stormwater controls as the sites are developed and redeveloped – the time when it is most cost effective to do so.

The authority for any such proposed rule is section 402(p)(6) of the Clean Water Act, 33. U.S.C. § 1342(p)(6), which provides that:

> "[T]he Administrator, in consultation with State and local officials, shall issue regulations (based on the results of the studies conducted under paragraph (5) which designates stormwater discharges, other than those described in paragraph 2 [discharges already regulated] to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (b) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate. "

Consent Decrees

Fischer 2. Section 402 of the Clean Water Act authorizes and directs the issuance of NPDES permits for discharges to the nation's waters. Such permits act as shields against EPA and state enforcement and citizen lawsuits so long as the permittee remains in compliance with its permit. In light of this, what is EPA's authority for requiring civil consent decrees in lieu of, or in addition to, NPDES permits for publicly treatment facilities, combined sewer overflows, and municipal separate storm sewer systems? Further, what is the authority for EPA insisting on civil consent decrees to implement green infrastructure by local governments?

Response: While it is not the General Counsel's role to be the final decision maker on agency policy and programs, if confirmed I look forward to working with the agency's leadership to fully consider these issues.

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

JUN 28 2013

OFFICE OF THE
ADMINISTRATOR

The Honorable David Vitter
Ranking Member
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Senator Vitter:

Thank you for your letter of May 17, 2013, regarding the Environmental Protection Agency's Freedom of Information Act (FOIA) fee waiver process. I appreciate the opportunity to respond to these issues.

First, and let me be clear, it is not the practice of the EPA to deny or grant fee waivers to any group or individual based on ideology. The EPA follows the established FOIA regulations which provide several factors in determining when a fee waiver can be granted. These regulations can be found at 40 C.F.R. § 2.107. We have also provided an enclosure to this letter for information regarding these factors. In addition, the EPA's regulations governing the FOIA process, including the fee waiver process, can be found on the EPA's website at http://www.epa.gov/foia/.

FOIA requires all federal agencies to promulgate regulations for the collection of fees associated with responding to FOIA requests. The EPA's fee regulations are consistent with the guidance provided by the Department of Justice in its "Freedom of Information Act Guide." Under the EPA FOIA regulations, the agency charges a fee to process any FOIA request, unless the fee is waived or under a *de minimis* level. This fee relates to the direct costs the agency incurs when searching for, duplicating, and retrieving the requested records. These direct costs may include a portion of the salary of the employee performing the work and the cost of operating duplication equipment.

Upon receipt of a fee waiver request containing insufficient information, the EPA's FOIA Office may send a letter to the requestor seeking information on the factors on which a decision is made. These factors will help the FOIA Office to determine whether the requestor has adequately demonstrated that the request meets the standard for a waiver of fees. Fee waiver decisions are made on a case-by-case basis, because, as stated above, the EPA is not permitted to grant fee waivers to requestors on a class basis. Fee waiver decisions are also made on a request-by-request basis: the fact that a requester received a fee waiver for one request does not mean

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that requester will receive a fee waiver for the next request. If an initial request for a fee waiver is denied, a requester can submit an administrative appeal to the agency, and seek a review of the initial decision within 30 days of the denial by sending a letter of appeal to the agency via email or through FOIA Online. These appeals are then independently reviewed by staff in the Office of General Counsel, who issue a decision on the appeal.

After receiving your letter, we reviewed the requests for fee waivers that the agency received, and determined that the agency acted appropriately. However, it is important to note that the EPA has taken the additional step of asking the agency's Inspector General to also review relevant information and policies.

In the time period of January 1, 2012 – April 26, 2013, the EPA received 892 requests for fee waivers. Of those 892 requests, 535 were denied (approximately 60 percent) and 357 were granted (approximately 40 percent). The majority of those denied were attributed to not meeting the requirements as laid out in factors two and three, which are outlined in the enclosure. It is important to note, that for the 535 FOIA requests where a fee waiver request was denied, the EPA only collected fees for 37 of those requests. Generally, this was due to the fact that these requests ultimately did not exceed the $14.00 *de minimis* cost threshold to process FOIA requests. In addition, we have determined that the median fee paid for the FOIA fees collected during this time period was $70.85.

With respect to Competitive Enterprise Institute (CEI), during the above-referenced time period, CEI submitted 16 fee waiver requests. Of those requests, 10 (or 64 percent) were granted, either initially or on appeal. The other six requests were denied because they did not meet the requirements laid out in factors two and three. Nevertheless, for the five CEI fee waiver requests the EPA denied, CEI did not have to pay for these FOIA requests because they did not exceed the $14.00 threshold to process FOIA requests.

Again, thank you again for your letter. The EPA remains committed to conducting its activities with the highest legal and ethical standards and in the public interest. If you have any questions, please feel free to contact me or your staff may contact Arvin Ganesan, the EPA's Associate Administrator or Congressional and Intergovernmental Relations at (202) 564-4741.

Sincerely,

Bob Perciasepe

Bob Perciasepe
Acting Administrator

Enclosure

cc: The Honorable Barbara Boxer
Chairman

Factors EPA Considers in FOIA Fee Waiver Determinations

The six factors that determine whether or not a fee waiver is granted or denied are as follows:

- Factor One: The subject of a request: Whether the subject of the requested records concerns, "the operations or activities of the government." The subject of the requested records must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote.

- Factor Two: The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be "likely to contribute" to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or substantially identical form, would not be as likely to contribute to such understanding when nothing new would be added to the public's understanding.

- Factor Three: The contribution of an understanding of the subject by the public is likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding". The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requestor. A requestor's expertise in the subject area and ability and intention to effectively convey information to the public will be considered. It will be presumed that a representative of the news media will satisfy this consideration.

- Factor Four: The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced significantly by the disclosure. The FOIA Office will not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is "important" enough to be made public.

- Factor Five: The existence and magnitude of a commercial interest: Whether the requestor has a commercial interest that would be furthered by the requested disclosure. The FOIA Office will consider any commercial interest of the requestor or of any person on whose behalf the requestor may be acting, that would be furthered by the requested

disclosure. Requestors will be given the opportunity in the administrative process to provide explanatory information regarding this consideration.

- Factor Six: The primary interest in disclosure: Whether any identified commercial interest of the requestor is sufficiently large, in comparison with the public interest in disclosure that disclosure is "primarily in the commercial interest of the requestor". A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. The FOIA Office ordinarily will presume that when a news media requestor has satisfied the public interest standard, the public interest will be the interest primarily served by the disclosure to that requestor. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

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

AVI, LITTER 6 ATTACH

IAY 3 1 2013

OFFICE OF
GENERAL COUNSEL

Mr. P. Clayton Eubanks
Deputy Solicitor General
Office of Oklahoma Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105

Re: Freedom of Information Act Appeal No. EPA-HQ-2013-004583 (Request No. EPA-HQ-2013-003886)

Dear Mr. Eubanks:

I am responding to your March 15, 2013 fee waiver appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. You appealed the February 22, 2013 decision of Larry Gottesman of the U.S. Environmental Protection Agency ("EPA" or "Agency") to deny your request for a fee waiver ("initial fee waiver denial"). You seek a waiver of all fees associated with your FOIA request for documents related to consideration, proposal, or discussion of three subjects related to the Clean Air Act ("CAA") with non-governmental organizations whose purpose may include environmental or natural resource advocacy and policy. You requested a waiver of all fees associated with processing your request, and stated you were willing to pay $5.00 (five dollars) in the event your fee waiver was denied.

On February 22, 2013, Mr. Gottesman, the EPA's National FOIA Officer, denied your request for a fee waiver finding that you had failed to express specific intent to disseminate the information to the general public, thus failing to demonstrate that your request is likely to contribute to public understanding of a reasonably broad audience of persons interested in the subject matter.

I have carefully considered your request for a fee waiver, EPA's initial fee waiver denial, and your appeal. For the reasons set forth below, I have concluded that you do not have a proper request pending before the Agency, and therefore your appeal of the denial of a waiver of fees is moot.

Analysis

In reviewing your February 6, 2013 FOIA request in order to process your fee waiver appeal, this office has determined that your initial request fails to adequately describe the records sought, as required by the FOIA and by EPA's regulations. 5 U.S.C. § 552(a)(3); 40 C.F.R. § 2.102(c). You seek records "which discuss or in any way relate to" any "consideration, proposal,

or discussion with" "Interested Organizations" or any "Other Organizations" on three broad topics related to the Clean Air Act. Request at 1. At least one category of your request (records described in paragraph (a)(i)) is almost identical to a request that was previously denied by EPA as improper on September 14, 2012. While you have tailored the subject matter of the next two categories of records you are seeking ((a)(ii) and (a)(iii)) by focusing only on Regional Haze State Implementation Plans ("SIPs"), you have not provided enough information to permit an employee reasonably familiar with the subject matter to identify the records you are seeking. This is because despite reducing the provided list of "Interested Organizations" from eighty to seventeen, you are still requesting documents related to any communication between EPA and "Other Organizations" which you broadly define as "any other non-governmental organization, including citizen organizations whose purpose or interest may include environmental or natural resource advocacy and policy." Request at 1. This qualifying statement about requesting records from "Other Organizations" effectively re-incorporates the sixty-three excluded organization from the list in your original request, as well as numerous other unnamed organizations, and would require EPA staff to also search for and determine the organizational mission of any 3rd party that may have had a communication with the Agency on topics under the CAA. Broad, sweeping requests lacking specificity are not sufficient. American Fed. of Gov't Employees v. Dep't of Commerce, 632 F.Supp. 1272, 1277 (D.D.C.1986). Additionally, requests for documents which "refer or relate to" a subject are routinely "subject to criticism as overbroad since life, like law, is 'a seamless web,' and all documents 'relate' to all others in some remote fashion." Massachusetts v. Dep't of Health & Human Servs., 727 F.Supp. 35, 36 n.2 (D.Mass 1989).

Additionally, paragraph (b) of your request is nearly identical to the request previously denied by EPA as an improper request on September 14, 2012. Instead of requesting "all documents" that in any way relate to the three broad categories of your request from every single headquarters and regional EPA office, you have requested records from sixteen different offices instead of twenty-one. Request at 2-3. You are requesting all documents sent or received by staff in sixteen EPA offices on three general subjects, for a period of almost four and a half years. Such "all documents" requests have been found by courts to be improper. *See*, Dale v. IRS, 238 F.Supp 2d 99, 104 (D.D.C. 2002); Mason v. Callaway, 554 F.2d 129, 131 (4th Cir.1977). By way of comparison, a recent District of Columbia decision found that a similar request that amounted to a request for all internal emails of 25 individuals over a two year period failed to reasonably describe the records sought, and was unreasonably burdensome. Hainey v. U.S. Dep't of Interior, No. 11-1725 (2013 WL 659090 (D.D.C.)). The court found that the burden of amassing this volume of information, in addition to the time needed to review the records, conflicted with settled case law that "an agency need not honor a [FOIA] request that requires 'an unreasonably burdensome search'" and that "FOIA was not intended to reduce government agencies to full-time investigators on behalf of requestors." Id. At *8-9 (internal citations omitted).

For the reasons stated above, I have determined that your request does not reasonably identify the records you are seeking. Because this is your second attempt at submitting a properly formulated request, I will take this opportunity to indicate how your request might be modified to reasonably identify the records you are seeking. In order to reasonably identify the records you are seeking, you should identify the records with particular specificity. EPA regulations state that "whenever possible you should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter" and also that "[t]he more specific you are about the records or type of records you want, the more likely EPA will be able to identify and locate records responsive to your request." 40 C.F.R. § 2.103(c). Often this is accomplished by providing key words which employees may use to easily search for and determine if there are responsive records. For example, should you limit your request to records communicating with any *specifically identified* organization AND referencing settlement relating to the three subject areas you identify, your request would enable EPA staff familiar with the subject area to search for and locate any responsive records.

Because I have determined that you do not have a proper request pending before the Agency, your appeal of EPA's initial denial of a fee waiver for your request is moot, and I am closing your appeal file. Although I need not address the merits of your fee waiver request and appeal at this time, I have included the following discussion in order to assist you in submitting any properly formulated request for records and a waiver of fees.

Fee Waiver Discussion

The statutory standard for evaluating fee waiver requests is whether "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government; and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

EPA's regulations at 40 C.F.R. § 2.107(l)(2) and (3) establish the same standard. EPA must consider four conditions to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns the operations or activities of the Federal government; (2) whether the disclosure is likely to contribute to an understanding of government operations or activities; (3) whether the disclosure is likely to contribute to public understanding of a reasonably broad audience of persons interested in the subject matter; and (4) whether the disclosure is likely to contribute significantly to public understanding of government operations or activities. 40 C.F.R. § 2.107(l)(2). EPA must consider two conditions to determine whether a request is primarily in the commercial interest of the requester: (1) whether the requester has a commercial interest that would be furthered by the requested documents; and (2) whether any such commercial interest outweighs the public interest in disclosure. 40 C.F.R. § 2.107(l)(3).

Finally, the Agency considers fee waiver requests on a case-by-case basis. Judicial Watch, Inc. v. DOJ, 185 F. Supp. 2d 54, 60 (D.D.C. 2002). Whether a requester may have

received a fee waiver in the past is not relevant for a subsequent request.

Public Interest Prong of the Fee Waiver Test

A requester seeking a fee waiver bears the burden of showing that the disclosure of the responsive documents is in the public interest and is not primarily in the requester's commercial interest. See Judicial Watch, Inc., 185 F. Supp. 2d at 60; Larson v. CIA, 843 F. 2d 1481, 1483 (D.C. Cir. 1988). Conclusory statements or mere allegations that the disclosure of the requested documents will serve the public interest are not sufficient to meet the burden. See McClellan Ecological Seepage Situation, 835 F.2d at 1285; Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1312 (D.C. Cir. 2003). The requester must therefore explain with reasonable specificity how disclosure of the requested information is in the public interest by demonstrating how such disclosure is likely to contribute significantly to public understanding of government operations or activities. Larson, 843 F.2d at 1483. Furthermore, if the circumstances surrounding this request (e.g., the content of the request, the type of requester, the purpose for which the request is made, the requester's ability to disseminate the information to the public) clarify the point of the request, the requester must set forth these circumstances. See Larson, 843 F.2d at 1483.

Elements 2 and 4

I will discuss the second and fourth factors of the public interest prong at the same time. The second factor to consider is the informative value of the documents to be disclosed. 40 C.F.R. § 2.107(l)(2)(ii). The requested documents must be "meaningfully informative about government operations or activities in order to be 'likely to contribute' to an increased public understanding of those operations or activities." 40 C.F.R. § 2.107(l)(2)(ii). The disclosure of information already in the public domain would have no informative value since it would not add to the public's understanding of government. Id. The fourth factor to consider is how the disclosure of the requested records is likely to contribute "significantly" to public understanding of government operations or activities. 40 C.F.R. § 2.107(l)(2)(iv). Disclosure of the information should significantly enhance the public's understanding of the subject in question as compared to the level of public understanding prior to disclosure. Id.

In support of your request, you generally state that "[t]he requested documents are sought in order to more clearly illuminate the operations and activities of EPA. As such, release of the requested documents will significantly contribute to public understanding and oversight of the EPA's operations, particularly regarding the quality of the EPA's activities and the efficacy of both Congressional directives and EPA policies and regulations relating to the Requesting States." Request at 4. You also state that "disclosure 'is likely to contribute' to an understanding of government operations or activities'" and "disclosure is likely to contribute 'significantly' to public understanding of government operations and activities" (repeating the regulatory

standard). Request at 5. These general statements are typically insufficient to support a waiver of fees . Judicial Watch Inc. v. DOJ, 185 F.Supp 2d 54, 61-62 (D.D.C. 2002). You also state that "the public currently has no access to the requested Subject information," however information about the Clean Air Act, Regional Haze, and the public comment process around negotiated settlements is available on the Agency's program website[1] as well as on the websites of the Regional Planning Organizations' and States' sites. Request at 8; Appeal at 7.

Your less generalized statements in support of factors two and four also fail to demonstrate that your request satisfies the standard established by these elements. You state that your request seeks "information that will result in understanding EPA's interactions with non-governmental advocacy groups and how those interactions influence how EPA sets policy that affects the public interest," that will help "understand and make public EPA's decision-making process in negotiating and entering into litigation settlements," and will educate the public on "the importance of cooperative federalism and why the States should continue to have the lead role in implementing federal environmental programs." Request at 7; Appeal at 3. As compared to the broad categories of your request, there is no clear nexus between the records requested and the areas of education identified above. For example, your request is in no way limited to communications with non-governmental organizations, or to discussions about cooperative federalism. Numerous records you have requested will not shed any light on these subjects, and you have not explained how all of the requested records will meaningfully inform the public about these stated topics.

Element 3

Additionally, the requester seeking a fee waiver must also demonstrate that the disclosure of the requested documents will likely contribute to the public understanding, *i.e.*, the understanding of "a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester." 40 C.F.R. § 107(l)(2)(iii). The requester's expertise in the subject area and his or her "ability and intention to effectively convey information to the public will be considered." Id. A requester must express a specific intent to publish or disseminate the requested information, and identify a specific increase in public understanding that would result from such dissemination. Judicial Watch, Inc.v. DOJ, 122 F. Supp. 2d 5, 10 (D.D.C. 2000). A requester who does not provide specific information regarding a method of disseminating requested information will not meet the third factor, even if the requester has the ability to disseminate information. Judicial Watch, Inc. V. DOJ, 122 F. Supp. 2d 13, 18-19 (D.D.C. 2000).

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[1] *See, e.g.* http://www.epa.gov/airquality/visibility/program.html; http://www.epa.gov/airquality/visibility/actions.html.

You state that the "Requesting States" will compile and summarize the requested records into a report that will be distributed to the general public, the media, and Congress. Appeal at 6. You also state that the report will be available state libraries and web sites. Id. These general statements do not provide enough information to demonstrate a tangible or cognizable plan to disseminate the information. See, Van Fripp v. Parks, 2000 U.S. Dist. LEXIS 20158, *20 (D.D.C. Mar. 16, 2000) ("Obtaining placement in a library is, at best, a passive method of distribution that does not discharge the plaintiff's affirmative burden to disseminate information."). While it is possible that a report written using information obtained from the Agency could be informative, these general statements about passive methods of distribution, especially when unaccompanied by details about the authorship of a report by the staff of thirteen different state governments or about the intended audience, fails to demonstrate a specific intent to publish or disseminate the requested information.

This discussion above is being provided to you in order to assist you in understanding the Agency's obligations to evaluate fee waiver requests using the standards contained in EPA's regulations and the FOIA. Should you choose to submit a new request, please feel free to contact the Agency's FOIA Office for information about what you may provide in order to submit a proper request, and to provide the information necessary for the Agency to evaluate a request for a fee waiver.

Conclusion

This letter constitutes EPA's final determination on this matter. Pursuant to 5 U.S.C. 552(a)(4)(B), you may obtain judicial review of this determination by filing a complaint in the United States District Court for the district in which you reside or have your principal place of business, or the district in which the records are situated, or in the District of Columbia. As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) within the National Archives and Records Administration was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD, 20740-6001; e-mail, ogis@nara.gov; telephone, 301-837-1996 or 1-877-684-6448; and facsimile, 301-837-0348.

Please call Lynn Kelly at 202-564-3266 if you have any questions regarding this determination.

Sincerely,

Kevin M. Miller
Assistant General Counsel
General Law Office

cc: HQ FOI Office

AL 14-000-4144

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United States Senate

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

January 7, 2014

Victoria B. Wassmer
Assistant Administrator for Finance and Management
Federal Aviation Administration
800 Independence Ave., SW
Washington, DC 20591

Dear Assistant Administrator Wassmer:

Thank you for appearing before the Committee on Environment and Public Works on December 17, 2013, at the hearing entitled, "Hearing on the Nominations of Rhea Sun Suh to be Assistant Secretary for Fish and Wildlife and Parks of the U.S. Department of the Interior, Victoria Baecher Wassmer to be Chief Financial Officer of the U.S. Environmental Protection Agency (EPA), Roy K.J. Williams to be Assistant Secretary of Commerce for Economic Development of the U.S. Department of Commerce, and Thomas A. Burke to be Assistant Administrator for Research and Development of the EPA." We appreciate your testimony and we know that your input will prove valuable as we continue our work on this important topic.

Enclosed are questions for you that have been submitted by Senators Boxer and Vitter for the hearing record. Please submit your answers to these questions by COB January 17, 2014, to the attention of Mara Stark-Alcalá, Senate Committee on Environment and Public Works, 410 Dirksen Senate Office Building, Washington, DC 20510. In addition, please provide the Committee with a copy of your answers via electronic mail to Mara_Stark-Alcala@epw.senate.gov. To facilitate the publication of the record, please reproduce the questions with your responses.

Again, thank you for your assistance. Please contact David Napoliello of the Majority Staff at (202) 224-8832, or Bryan Zumwalt of the Minority Staff at (202) 224-6176 with any questions you may have. We look forward to reviewing your answers.

Sincerely,

Barbara Boxer
Chairman

David Vitter
Ranking Member

PRINTED ON RECYCLED PAPER

Environment and Public Works Committee Nominations Hearing
December 17, 2013
Follow-Up Questions for Written Submission

Questions for Wassmer

Questions from:

Senator Barbara Boxer

1. Ms. Wassmer, can you describe how your background and experiences at the FAA and earlier at OMB have prepared you to be the Chief Financial Officer at EPA?

2. Ms. Wassmer, can you describe how, with your background and experiences working for the FAA, OMB, and with the Office of the Vice President's Millennium Challenge, you will provide a fresh perspective and how you will work to change, as appropriate, EPA's financial management systems?

3. Ms. Wassmer, one of the roles of the Chief Financial Officer is to oversee EPA's goal setting process. Can you explain how you would ensure that EPA is working every day to enhance safeguards for pregnant women, children, and other vulnerable populations?

4. Ms. Wassmer, can you describe what in your background best prepares you to be EPA's Chief Financial Officer?

5. Ms. Wassmer, one of the EPA Chief Financial Officer's responsibilities is to be the agency audit follow-up official responsible for agency-wide audit resolution and ensuring action officials implement corrective actions in response to OIG recommendations. Do you agree that, if confirmed, you will work with agency officials to ensure that appropriate actions are taken to implement corrective actions in response to OIG recommendations?

Senator David Vitter

1. Are you familiar with the criminal case against John C. Beale? As you should know, Beale was a career civil servant that bilked the agency for millions in unearned bonus pay, unauthorized travel, and by simply being paid for work he did not do. As the chief financial officer for the agency, it will in large part be your responsibility to develop and implement new systems to protect against this sort of fraud in the future. Please share with the Committee the steps you will take in your first 100 days to reform the agency and prevent future fraudulent acts.

2. In the case of John Beale, it appears that he could not have been able to accomplish his fraud against the American taxpayer without the assistance, either knowing or unknowing, or other EPA staff. For example, the Committee has learned that Robert Brenner was often the one who approved Beale's requests for bonuses and that Beth Craig approved his travel. Have you had the opportunity to review the facts of this case? Do you concur with my assessment that others at the agency participated, perhaps unknowingly, in Beale's fraud? What do you plan to do in your position as CFO to ensure that EPA employees are not bilking the taxpayers out of millions?

3. In the case of John Beale – did you know that he was still on pay roll AFTER his manager – Gina McCarthy – believed he had retired from the agency? How can something like that happen? Do you agree with me that such a disconnect is unacceptable?

4. Are you aware of the fact that the EPA Inspector General has identified "Workforce Planning" as a serious management and performance challenge for the agency? Are you aware of the fact that according to the EPAIG, EPA currently does not identify the essential functions of staff based on data? Do you agree with me that a failure to identify essential agency functions based on data is a serious failing? Wouldn't the Harvard School of Public Policy frown on such a shabby state of affairs?

5. Are you aware of the fact that despite prodding from GAO and the IG, EPA has not developed analytical methods or collected data to measure its workload and the corresponding workforce levels necessary to carry out that workload? How do you intend to remedy that?

6. Are you aware that when the EPW Committee asked EPA how much money the agency spent to conduct the watershed assessment of the Bristol Bay Watershed in Alaska, EPA admitted to my staff that they had no way of calculating the amount of in house resources dedicated to the effort? Do you find such a state of affairs acceptable? If not, will you commit to me today that as the CFO you will develop a process that will require the agency to know how much taxpayer dollars are being spent on agency activities?

7. As you may know, there have been 3 OIG reports on EPA justification for workforce level with the first being released on December 20, 2010, the second on September 14, 2011 and the last on August 30, 2013. Over the span of 3 years these reports have come to the conclusion that EPA is not meeting the requirements set by Title 5 CFR Part 250.202 the *Human Capital Assessment and Accountability Framework*, which states that workforce planning systems include a workforce analysis process that identifies the size and characteristics of the workforce needed to meet organizational goals. Contrary to this requirement EPA has not conducted the necessary workload analysis to determine the correct number of FTEs needed to specifically carry out the most essential parts of its mission. EPA has not done so for 20 years and still does not do so as of 2013. If confirmed as EPA's next CFO, will you commit to implementing a system can accurately model the workforce needs of the agency.

BARBARA BOXER, CALIFORNIA, CHAIRMAN

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United States Senate

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

January 7, 2014

Thomas A. Burke, PhD, MPH
Associate Dean for Public Health Practice and Training
The Johns Hopkins Bloomberg School of Public Health
624 North Broadway, Hampton House Rm. 429
Baltimore, MD 21205

Dear Dr. Burke:

Thank you for appearing before the Committee on Environment and Public Works on December 17, 2013, at the hearing entitled, "Hearing on the Nominations of Rhea Sun Suh to be Assistant Secretary for Fish and Wildlife and Parks of the U.S. Department of the Interior, Victoria Baecher Wassmer to be Chief Financial Officer of the U.S. Environmental Protection Agency (EPA), Roy K.J. Williams to be Assistant Secretary of Commerce for Economic Development of the U.S. Department of Commerce, and Thomas A. Burke to be Assistant Administrator for Research and Development of the EPA." We appreciate your testimony and we know that your input will prove valuable as we continue our work on this important topic.

Enclosed are questions for you that have been submitted by Senators Boxer, Vitter, and Inhofe for the hearing record. Please submit your answers to these questions by COB January 17, 2014, to the attention of Mara Stark-Alcalá, Senate Committee on Environment and Public Works, 410 Dirksen Senate Office Building, Washington, DC 20510. In addition, please provide the Committee with a copy of your answers via electronic mail to Mara_Stark-Alcala@epw.senate.gov. To facilitate the publication of the record, please reproduce the questions with your responses.

Again, thank you for your assistance. Please contact David Napoliello of the Majority Staff at (202) 224-8832, or Bryan Zumwalt of the Minority Staff at (202) 224-6176 with any questions you may have. We look forward to reviewing your answers.

Sincerely,

Barbara Boxer
Chairman

David Vitter
Ranking Member

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Environment and Public Works Committee Nominations Hearing
December 17, 2013
Follow-Up Questions for Written Submission

Questions for Burke

Questions from:

Senator Barbara Boxer

1. Dr. Burke, do you agree that the Environmental Protection Agency (EPA) should use the current, best available science when making decisions on how to best protect human health and the environment, including implementing the recommendations of the National Academy of Sciences (NAS)?

2. Dr. Burke, can you describe how your experiences on numerous NAS Committees and EPA science advisory councils, including the EPA Science Advisory Board, have prepared you to lead scientific research and development at EPA?

Senator David Vitter

1. During the December 17, 2013, nominations hearing you committed to making data and information that underlies scientific studies used to justify EPA rulemakings available to the public. However, when it comes to most regulations under the Clean Air Act, the EPA has a practice of withholding underlying data, making it impossible for Congress and the public to fully understand the scientific underpinnings of major federal regulations. How will you reconcile EPA's current practice of withholding underlying data? How will you ensure that EPA's scientific work is objective and reproducible?

2. Do you believe it is a conflict of interest for a researcher to receive funding from the EPA to conduct research, and then sit on exclusive panels for the agency making decisions based on the very same research?

3. Isn't it correct that you and at least one of your close colleagues, Dr. Jonathan Samet, have received millions of dollars in research grants from the agency? If so,how many EPA research grants have you received? Please describe the scope of the research, which person and office at EPA authorized the grant, and the amount of the grant.

4. EPA research grants are supposed to be awarded in an unbiased and merit-based fashion. However, concerned have been raised that EPA summarily awards the same applicants the limited number of grants. Moreover, Dr. Burke, along with several of his colleagues at the Johns Hopkins University have received numerous EPA research grants. To ensure a competitive and neutral grant process, will you commit to acting without bias or favoritism in distributing EPA research grants?

5. In recent years, the EPA Inspector General (IG) and the Government Accountability Office (GAO) reported instances where EPA grants have been awarded with no public notice, competition, or accountability. Will you commit to adopting all of the IG and GAO's recommendations regarding EPA's grant programs?

6. Francesca Grifo, former senior scientist and director at the Union of Concerned Scientists was recently appointed to serve as EPA's Scientific Integrity Officer within the Office of Research and Development. If confirmed, how do you intend to work with the Scientific Integrity Officer?

7. Are you familiar with Francesca Grifo, EPA's recently appointed Scientific Integrity Officer? Do you believe there is any reason to be concerned that Dr. Grifo's work at the Union of Concerned Scientists may affect her ability to carry out the responsibilities of the Scientific Integrity Officer?

8. In promulgating National Ambient Air Quality Standards (NAAQS), EPA has repeatedly relied on studies that are based on individual cohort data collected in the early 1980s. In 2004, NAS cautioned against relying solely on these studies because of the potential problems given that "cohorts were established decades ago, and some critical data items, including residence history, smoking rates, dietary factors, and other potential confounding and modifying factors, have not been updated." Do you agree with the NAS's caution against using studies that rely so heavily on outdated cohorts? Will you commit to reviewing this issue and reporting back to the Committee with specific guidance on how you intend to use such studies in setting standards and assessing risk?

9. In the Office of Management and Budget's 2013 report on benefits and costs of federal regulations, over 80 percent of the claimed monetized benefits of all federal regulations were based on PM2.5 reductions. However, the report listed six major uncertainties, including a core uncertainty that PM2.5 may not cause the increased risk of mortality at lower concentrations.

   a. Do you agree that these uncertainties are significant within the context of cost-benefit analysis?

   b. Do you believe that EPA should address these uncertainties by developing integrated quantitative uncertainty analyses?

   c. Will you commit to conducting this type of uncertainty analysis in the upcoming ozone NAAQS review?

10. OMB Circular A-4 requires key uncertainties to be disclosed and quantified to the extent possible to inform decision makers and the public about the effects and uncertainties of alternative regulatory actions. However, EPA has a practice of excluding and failing to quantify key uncertainties in the cost-benefit analysis of rulemakings. Will you commit to following all OMB circulars and guidelines? How will you ensure that key uncertainties are included and quantified in the cost-benefit analysis of EPA rulemakings?

11. In FY2013, ORD received approximately $725 million in new appropriations and had $150 in unobligated balances. Yet, no one knows exactly how these funds are used or whether they are being used most efficiently to produce beneficial gains. In effect, EPA has no way of evaluating the environmental "bang for the buck" for each ORD research program. Will you commit to providing Congress an accounting on the costs and potential and actual beneficial gains of each ORD research program? If confirmed, how will you allocate spending in the Office of Research and Development?

12. The psychologist Brian Nosek and colleagues recently wrote: "Publishing norms emphasize novel, positive results. As such, disciplinary incentives encourage design, analysis, and reporting decisions that elicit positive results and ignore negative results." Therefore, it seems that there is less of an emphasis on replication of findings to ensure scientific integrity than developing novel findings.

   a. Do you believe that there is publication bias that leads to greater publication rates of studies reporting positive results compared to studies showing no relationship?

   b. Considering the likelihood of a possible publication bias by journals and a possible bias toward funding positive results by federal agencies, how do you recommend EPA consider this bias in weighing positive and negative studies?

13. The scientific integrity of EPA's hallmark IRIS program has been questioned by Congress as well as the National Academy of Sciences (NAS). While Dr. Ken Olden is working to bring new leadership to the program, there is much more work that needs to be done.

   a. Can you commit to ensuring that all draft and final assessments released by the IRIS program are consistent with the recommendations of the NAS Formaldehyde committee which recommended changes for all IRIS assessments, not just formaldehyde?

b. Science has advanced significantly over the last 25 years. Will you ensure that as part of the improvements in the IRIS program, the Agency will move away from outdated default assumptions and instead always start with an evaluation of the data and use modern knowledge of mode of action -- how chemicals cause toxicity -- instead of defaults?

c. Do you agree that standard protocols should be developed to enable all studies to be independently judged based on their quality, strength, and relevance regardless of the author affiliation or funding source? If so, will you make development of these standard approaches a priority?

d. To further improve the IRIS Program, can you commit to revising the way hazard values are presented to the public to ensure that critical science policy choices are transparently presented and not comingled with scientific assumptions?

14. While health protection is often seen as the responsibility of EPA risk managers, when it comes to scientific assessments, the job of a risk assessor or toxicologist should be to produce assessments that are predictive of risks.

    a. Do you agree that the role of the IRIS program is to identify values that are predictive of the potential health risks rather than those that provide the most conservative (lowest) value?

    b. Will you support an approach to chemical assessment that results in hazard values that are predictive of actual health risk?

15. It is my understanding that internally the IRIS program no longer relies on definitions that are still publicly used (for example, the definition of the RfD and the meaning of confidence values in IRIS), yet EPA has never used any formal stakeholder or public or peer review process to implement these changes. Instead EPA seems to be relying on a 2002 review received from EPA's Risk Assessment Forum Technical Panel, and staff appear to pick and choose which suggestions they will follow and which they will not implement.

    a. Will you commit to engaging stakeholders before changes to critical definitions and methodologies in the NAAQS and IRIS program are made?

16. Currently, when developing hazard values for exogenous exposures the IRIS Program does not consider natural environmental levels of chemicals, e.g., exposure to minerals from geologic formation, exposure to off-gassing from foliage, or levels naturally produced by the human body as part of its metabolic processes.

    a. Do you agree that chemicals associated with the body's natural metabolic processes should be addressed specifically and separately in the development of a hazard value?

    b. What is your position about addressing natural environmental chemical levels as distinct from background man-made emission?

    c. Do you agree that IRIS hazard values should be able to pass a reality check and accommodate levels associated with existing natural exposures that are not known to be associated with any adverse effects at these low exposure levels?

17. There is a pressing need for priority setting when it comes to chemical evaluations within ORD and throughout EPA.

Will you ensure coordination with other EPA program offices?

18. A 2011 GAO report recommended that EPA needed a more coordinated approach to managing its laboratories. In 2013 a National Academies (NAS) panel began reviewing EPA's laboratory capabilities. If the NAS study and EPA's own review substantiates that unnecessary and costly redundancy do indeed exist, do you commit to expeditiously undertake appropriate actions to consolidate or close labs, and reduce redundant staff?

    a. Can you commit to developing a plan to undertake research in order to build the datasets necessary to establish scientific confidence for regulatory use of a tiered, risk-based approach for using high-throughput/high-content screening assays for safety evaluations (looking to approaches already developed such as the from the Hamner Institute)?

19. Industry and federal research efforts have invested millions to better understand how chemicals interact with biological systems at human exposure levels in order to ensure development of human health risk assessment prediction models that are as accurate and science-based as possible. However, IRIS has a long track record of dismissing these types of scientific biologically-based models and asserting that such approaches cannot prove the defaults are not warranted. Demanding that science proves a negative is an anti-scientific policy and indicates a deep seated prejudice against use of mode of action knowledge to replace defaults.

    a. Why shouldn't EPA use the most up to date knowledge on mode of action and dose response at environmentally relevant exposures in lieu of outdated default approaches for hazard identification and dose response throughout the Agency, including in the IRIS Program?

    b. Many scientists have criticized IRIS for its current framework and suggested using a weight of evidence framework. Thus, a litmus test for an improved IRIS will be adoption and use of a weight of evidence framework that incorporates all of the relevant and reliable data and knowledge of hypothesized modes of action, so that there is a clear and objective presentation of the extent to which existing data and knowledge do, or do not, support each hypothesis, including the default. Assuming you support such an approach, can you provide us with a timeline for when we might see such an approach adopted within IRIS?

20. In developing chemical assessments, such as those in IRIS, there is a blending of science, policy and science policy assumptions and choices throughout the evaluations.

    a. Do you agree that IRIS assessments should explicitly acknowledge and transparently convey the science and assumptions around the science (i.e., handling uncertainty) inherent in IRIS assessments?

21. In the 2009 NAS committee you chaired issued a report recommending there should be one unified approach for dose- response modeling. Unfortunately, such an approach may not always consider the millions of dollars of research that have been invested to explore the mechanisms of action of individual chemicals. Significant activities, coordinated by the Alliance for Risk Assessment, have been undertaken since 2009 to broaden the understanding of dose-response and to link different approaches to conducting dose response to problem formulation. This has resulting in more than 30 published case studies, illustrating qualitative categorization, quantitative screening and in-depth assessments.

a. Can you commit to developing a clearly articulated prioritization process for high priority IRIS assessments that benefits from, and is responsive to, engagement from all stakeholders? Will you ensure coordination with other EPA program offices?

a. Do you support linking dose response to problem formulation such that the complexity of the dose response approach is "fit for purpose" and reflects the range of decision options and likely regulatory impacts?

b. Do you believe that any approach implemented needs to put chemical specific information and test data ahead of standardize approaches?

c. Will you support an approach the puts chemical specific information and test data ahead of standardized approaches in the IRIS program?

22. In the past you have suggested, in an NAS report you chaired, that information on nonchemical stressors should be incorporated into assessments and EPA should put further research dollars into evaluating the interactions between chemical and nonchemical stressors.

    a. Considering the struggles ORD is having simply evaluating chemical stressors in the IRIS program, do you believe that ORD has the staff, with requisite qualifications and financial capacity, to also take on evaluations of nonchemical stressors?

    b. Shouldn't ORD first convince Congress, NAS, and all other stakeholders that they can appropriately evaluate chemical stressors before broadening their scope?

23. As noted in "Science and Decisions: Advancing Risk Assessment" (NRC, 2009) "... formal consideration of numerous simultaneous chemical, physical, and psychosocial exposures with evaluation of background disease processes and other dimensions of vulnerability could quickly become analytically intractable if the standard risk-assessment paradigm is followed, both because of the computational burden and because of the likelihood that important exposure and dose-response data will be missing. That points toward the need for simplification of risk-assessment tools in the spirit of iterative risk assessment..."

    a. Since the NAS 2009 report there have been significant advances in the development and application of tiered, iterative tools for cumulative risk assessment, including development by the World Health Organization of a formal framework for risk assessment of combined exposure to multiple chemicals. Do you support use of this WHO framework? If not, why not?

24. Currently the staff in the IRIS Program are the sole arbiters of determining whether and to what extent draft IRIS assessments should be revised to reflect input from peer reviewers and the public. EPA's own Scientific Advisory Board has recommended the use of a "monitor" or "editor."

    a. Can you commit to ensuring that a 3rd party, independent of the IRIS Program, is tasked with ensuring that EPA staff have sufficiently considered and responded to peer reviewer and public input before assessments and other documents are finalized?

25. In previous comments on IRIS reform, you said that EPA's IRIS program is in "crisis" and is in need of reform while further stating "the sleeping giant is that EPA science is on the rocks ... if you fail, you become irrelevant, and that is kind of a crisis." Further, you admonished, "You can't fail this time."

In response to a question you said, "We owe it to the American public, we owe it to the scientific community. . . to have risk assessments based in sound science. It would be better to do it right than destroy the credibility of the process."

The NAS report on formaldehyde was critical of the process as well as the underlying science that EPA used in its draft assessment. Your October 2011 testimony emphasized not only the importance of the process but, more importantly, the scientific conclusions or scientific content of the IRIS assessments.

a. Given the significance of this risk assessment to the scientific process and for restoring the public confidence in EPA's science, it is imperative that you commit to having the NAS relook at the next iteration of the formaldehyde IRIS assessment. Can I have your assurance that this peer review will take place?

26. EPA, at the urging of stakeholders, will convene a scientific workshop on formaldehyde in the first half of 2014. Three key issues have been identified for discussion. I am concerned that this workshop will be similar to typical EPA science workshops of the past where the agency solicits input from a variety of stakeholders, irrespective of their qualifications, listens politely and without comment and provides no resolution or feedback. Quite frankly, that is a waste of time and resources. I want to see difference in interpretation of the data, particularly from the epidemiological studies, narrowed. It is my hope that a robust dialog will help accomplish that. EPA staff should be engaged participants in the dialog, not mute listeners and I suggest EPA engage a professional facilitator and have the proceedings of the workshop published. Will you commit to be personally involved in the development and conduct of this workshop and ensure that the right scientists with the relevant subject matter expertise are at the table?

27. The EPA workshop is timely, important at both the scientific and policy levels, and deals with scientific challenges of the highest order. How will you assure EPA integrates high quality information to help inform regulatory decisions for formaldehyde that presents complex challenges? How will EPA conduct a thorough, state-of-the-art WOE evaluation of the entire database?

28. If you are confirmed, what commitment will you make to ensure EPA's scientific content and scientific conclusions are sound in light of the series of significant scientific shortcomings that the NAS Formaldehyde report identifies and the subsequent recommendations put forward?

29. As you know, Congress directed EPA to contract with the NAS to review the cancer and non-cancer IRIS assessments of inorganic arsenic. It is our understanding that a senior scientist in the IRIS program stated publically in a meeting that any recommendations from the NAS would be unlikely to change the agency's views on the arsenic IRIS assessment. If confirmed, are you prepared to effect organizational and staffing changes to ensure that scientific integrity characterized by objectivity, transparency and scientific rigor is restored?

30. What are your views on how best to use systematic review as a tool to identify and review the body of scientific literature pertinent to a risk assessment of a chemical or substance? It is our understanding that the systematic review method developed by Dr. Birnbaum at the NTP and planned to be used by EPA IRIS automatically codes studies in the literature funded by industry as biased. That would mean that industry studies would not be given the same weight as other studies possibly funded by other organizations. How do you view this practice? How can you justify automatically ascribing bias to studies from or funded by industry, ignoring their scientific merit? Couldn't this distort the science by leaving out reliable and sound scientific studies?

a. Others have pointed to different sources of bias, such as publication bias, which creates incentives, including increased likelihood of funding, toward studies that report positive associations; what are your views on this and similar concerns and how do you plan to take these kinds of bias into account?

31. The recent NAS interim report on inorganic arsenic states, "EPA proposes to use linear low-dose extrapolation as the default for cancer and non-cancer effects." This is in contrast with the EPA cancer guidelines, which supports the use of mode-of-action to determine the shape of the dose-effect relationship. It is also in contrast with general mechanistic understanding of non-cancer dose-response relationships. What are your views on linear versus non-linear approaches to risk assessment? Do you think EPA should pursue the establishment of a threshold at low exposures if the data support such association?

32. As an epidemiologist, please describe how you think the body of epidemiology on a specific substance should be reviewed. For instance, many observers, including the NAS, have criticized EPA for giving too much weight to epidemiological studies of large populations exposed to inorganic arsenic, such as the Taiwan data, just because of the large number of subjects, while giving little credence to studies from the US that observe smaller populations, although the lifestyles, including nutrition, of the large populations are totally different from US lifestyle. Meta-analysis studies have been conducted of US populations that address the smaller number of study subjects, but EPA has ignored those studies. These meta-analyses provide evidence that the dose-response relationship used by NRC 2001 from Taiwan is not consistent with findings from the US, and is higher than what would be derived from studies of US populations. What is your view on the use of meta-analyses as a way to integrate information from smaller studies and to provide a reality check on EPA risk calculations?

33. Studies from places like Bangladesh and Taiwan involve populations with very different nutritional statuses than is found in the US. The NAS Interim Report notes the importance of taking account of these differences in applying these study findings to the US (at p.59). How would you extrapolate from those studies to make the data relevant to the US?

34. How do you view the intersection between epidemiology and toxicology? Many critics believe EPA has been overly reliant on epidemiology and deemphasized mechanistic research that provides guidance for dose-response calculations. Some EPA critics suggest that a reluctance to identify modes of action is a deliberate approach by EPA to allow it to use epidemiological data to validate their modeling.

    a. What steps can you take to correct this bias, whether real or perceived?

    b. Science commentators have noted a concern about "normative science," which is defined as "information that is developed, presented or interpreted based on an assumed, usually unstated, preference for a particular policy choice." [Lackey, Robert T. Normative Science. *Terra Magazine*, Oregon State University, Volume 8, Issue 2 (2013).] What steps will you take to ensure that EPA's science assessments on your watch do not include this kind of normative science?

    c. Another type of concern has been identified: "EPA's use of assumptions that it claims are 'public health protective,' which err on the side of overstating risk when data are lacking.... Such inflated risk estimates can lead to overly stringent regulations and can scramble agency

priorities because the degree of precaution differs across chemicals."[1] How do you intend to guard against this problem? What are your views on the use of empirical data as a "reality check" on overly conservative risk assessments, particularly those resulting from modeling or extrapolation of data? How do you view the application of additional safety factors – particularly when they become cumulative – for sensitive subpopulations or policy considerations such as environmental justice?

35. The NAS 2008 Report: Science and Decisions: Advancing Risk Assessment, frequently referred to as the "Silver Book" strongly recommended that EPA should consider the regulatory impacts of its IRIS hazard assessments. Since then, EPA has proposed IRIS assessments, including the cancer assessment for inorganic arsenic, which would drive regulatory standards below naturally occurring background levels in soil and water. EPA national and regional managers were highly critical of the IRIS proposed 17x increase in the cancer slope for inorganic arsenic, saying the science was " detached from reality" and would have "disastrous consequences" for EPA programs including Safe Drinking Water and RCRA.

    The NAS Silver Book urges EPA to perform extensive examination of risk management implications and options in the first phase of human health hazard assessments. It further recommends involving EPA national program managers (Air, Water, CERCLA, RCRA) in this early phase of assessment so that EPA can then use risk assessment to make more informed choices among those options.

    Do you support this particular recommendation from the NAS Silver Book? Do you believe EPA's IRIS assessments must properly consider the "real world" regulatory and risk management implications of its hazard assessments?

36. What is the cost of EPA's Hydraulic Fracturing study on the potential impacts of hydraulic fracturing on drinking water resources thus far? How long has the agency been engaged in the study? What has the agency done in terms of testing?

37. Has the EPA done any testing in real time for sites that are being drilled now? My understanding is that the agency has tested several sites that were drilled years ago, which is a problem because EPA does not have a good baseline of information and there are other factors which could have caused contamination (agriculture, mining, etc.). How does EPA plan on overcoming the lack of good baseline information and ensuring no conclusions are drawn about hydraulic fracturing without first ruling out any other possible sources of contamination?

38. Has the agency has expanded the scope of the study beyond looking at groundwater? What is the full scope of what the agency is now studying? What are all the various pieces that will be included in the study? Were those asked for by Congress? If the study has been expanded, what justification does the agency have for doing so?

39. What has been the extent of EPA's work with DOE and USGS to date on the study?

40. How are you accounting for fracturing technology, as it is changing quickly and beneficially, as part of the study?

41. There has been some controversy over methane leakage from shale development and hydraulic fracturing. But a recent study from the University of Texas that was published in the Proceedings

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[1] Gray & Cohen, "Rethink Chemical Risk Assessments," *Nature*, Vol. 489, p. 27 (9/6/12).

of the National Academy of Sciences found that methane leaks from natural gas development were in line with EPA's data, which showed a leakage rate of only about 1.5 percent. There are several other studies, some of which found high leakage rates, but most seem to suggest that leakage is low and manageable. Based on your review of the scientific literature, what's your understanding of methane leakage from natural gas development, and do you see any environmental benefits of increasing natural gas production and use in the United States?

42. Former EPA administrator Lisa Jackson said, 'I'm not aware of any proven case where the fracking process itself has affected water.' Secretary of Energy Ernest Moniz has said 'I still have not seen any evidence of fracking per se contaminating groundwater.' Interior Secretary Sally Jewell said she is 'not aware of documented cases' of hydraulic fracturing contaminating groundwater. I realize the EPA is currently studying this issue, but based on the evidence already available, do you agree with these officials' assessments?"

43. The increase in domestic energy production is due to the application of two proven engineering technologies – hydraulic fracturing and horizontal drilling. Hydraulic fracturing has been used commercially since the 1940s and directional drilling has been around since the 1930s. Development of resources using these technologies is responsible for 2.1 million American jobs and this number is expected to rise to 3.9 million in 2025. Furthermore, tens of thousands of wells are drilled every year using the process, and we have seen over a million wells drilled in the US with no cases of groundwater contamination. Do you agree that hydraulic fracturing is critical to our economy and our national security? Do you agree that it is a proven technology that has been used safely for over half a century and can be used safely?

    a. Are you aware of any cases where hydraulic fracturing has contaminated drinking water?

44. As part of the Congressionally-requested study on the relationship between hydraulic fracturing and drinking water, the conference report stated that "the study [shall] be conducted through a transparent, peer-reviewed process that will ensure the validity and accuracy of the data." The EPA Science Advisory Board (SAB) has set up an ad hoc panel specifically to provide the peer review for the study and its components.

    a. Will the SAB ad hoc panel peer review all of the reports and projects that are developed as part of the study? Do you believe it is the SAB ad hoc panel's role to peer review all of the study's reports and projects as part of the study?

45. Also included in the conference report is the statement that "The Agency shall consult with other Federal agencies as well as appropriate State and Interstate regulatory agencies in carrying out the study..."

    a. Are you aware of any other federal agencies currently being consulted in the study? Which agencies will you consult with should you be confirmed and head the ORD and lead the study?

46. Recently, EPA Administrator Gina McCarthy was quoted as saying that "developing some kind of uniform standard [as it relates to water] is very difficult given different geologies and different uses of water, different aquifers."

    a. Do you agree with that statement?

47. This June, ORD announced it would abandon its flawed drinking water investigation in Pavillion, WY and would instead support a further investigation by the State of Wyoming.

    a. Given the flawed science on display by the agency in Pavillion and ORD's withdrawal, will you exclude the agency's work and data prior to June 2013 from the agency's Congressionally-requested study on the relationship between hydraulic fracturing and drinking water? If not, why not?

    b. ORD abandoned its investigation, yet according to agency statements, continues to "stand[] behind its work and data." How can the agency reconcile these directly contradictory actions? How would you explain to the American people that continuing a flawed investigation is not worth taxpayer resources, yet the agency "stands behind" the work and data that it abandoned? If confirmed, will you correct the record and explain to the public that EPA does not stand behind flawed science?

    c. Are you aware of criticisms of EPA's work in Pavillion by other federal agencies? How would you respond to those criticisms?

    d. How are ORD and the EPA regional office in Denver currently supporting the State of Wyoming's investigation?

48. Is there a reason, particularly as it relates to air science impacts (PM, ozone, etc.) that we don't see the agency using nonlinear threshold analysis? There are concerns that EPA's analysis is allowing the agency to count benefits that just don't exist, or otherwise set standards below naturally occurring background levels. We've seen this in chemical assessments as well, such as on dioxin and inorganic arsenic. How do we resolve the distance between theoretical benefits and empirical evidence?

49. One of the most important responsibilities of the EPA Office of Research and Development is the development of health assessments for EPA's IRIS progam. In September 2011, EPA issued its long-awaited "Toxicological Review of Trichloroethylene (CAS No. 79-01-6) in Support of Summary Information on the Integrated Risk Information System (IRIS)."

    The IRIS Assessment contains a reference concentration ("RfC") of 0.0004 ppm (0.4 ppb or 2 μg/m3) and a reference dose ("RfD") of 0.0005 mg/kg/day for trichloroethylene (TCE). These are values that are considered by EPA to be protective for all noncancer critical effects. EPA's derivation of the RfC/RfD for TCE is based, in part, on Johnson *et al.*, Threshold of Trichloroethylene Contamination in Maternal Drinking Waters Affecting Fetal Heart Development in the Rat, Environmental Health Perspectives 111: 289-92 (March 2003).

    The RfC/RfD is within the range of background concentrations of TCE in urban air. There is a significant ongoing dispute among the EPA regions as to whether and how this RfC/RfD derived from Johnson *et al.* should be the basis for a short-term TCE exposure limit at Superfund sites. Thus, the proper interpretation and use of this non-GLP study in risk assessment is a question of the highest priority to EPA's Superfund program.

    As noted in the peer review of a recent EPA "TSCA Chemicals Work Plan" assessment of TCE which was highly critical of EPA's reliance on Johnson *et al.*, "[o]ne of the fundamental tenants in science is the reliability and reproducibility of results of scientific investigations."

    The peer reviewers noted:

- At least two GLP-compliant studies conducted under both EPA and OECD guidelines have been unable to reproduce the effect seen by Johnson *et al.*, despite the participation in one of the studies by Johnson herself.

- The dose-response relationship reported in Johnson *et al.* for doses spanning an extreme range of experimental dose levels is considered by many to be improbable, and has not been replicated by any other laboratory.

- The congenital heart defect incidence in control animals in Johnson *et al.* was 86 times the historical control incidence in Charles River rats.

- As California EPA noted in declining to rely upon Johnson *et al.*: "These results are also not consistent with earlier developmental and reproductive toxicological studies done outside this lab in mice, rats, and rabbits. The other studies did not find adverse effects on fertility or embryonic development, aside from those associated with maternal toxicity (Hardin et al., 2004)."

Is EPA concerned that the TCE IRIS Assessment appears to rely on an irreproducible study result? Is there any effort underway to correct this Assessment? Does this information presented seem to indicate that the EPA's IRIS program is no longer "crisis" and is being based on the best available science?

50. The Chemical Safety Improvement Act, which is bipartisan legislation drafted by myself and the late Senator Frank Lautenberg, calls for prioritization screening to identify high priority substances for the Agency to focus on. Is this type of priority setting part of problem formulation? And do you support EPA conducting priority setting? How should ORD programs like IRIS prioritize assessments?

    a. Once problem formulation has been completed, in conducting an assessment, do you believe EPA should use an objective evidence-based review system to evaluate studies?

    b. In integrating results across studies and lines of scientific evidence, should EPA use a systematic and transparent approach for assessing the overall weight of the evidence for observed biological or other effects, mechanistic information, and exposure? Will you commit to ensuring that EPA's scientific work product reflects such an approach?

    c. When developing new methods and procedures for conducting assessments, should EPA develop guidance and solicit stakeholder comments and conduct independent scientific peer review? Should peer review ever preclude the involvement of an individual solely based on a current or former affiliation with industry despite any actual showings of bias or conflict (i.e. does industry experience inherently prove bias in your opinion)?

    d. When assessing potential risk, should EPA use an integrated and tiered testing and assessment strategy in which animal testing is minimized by first using all available and relevant data, including information on structure activity relationships, chemical categories and exposure as part of an initial evaluation tier? With a subsequent second tier of additional animal tests and more detailed evaluation undertaken only when warranted?

Senator James Inhofe

1. Dr. Burke, as head of the EPA's R&D Office, you are going to have responsibility for the Congressionally-requested study on the relationship between hydraulic fracturing and drinking water. The conference report mandating the study state that "the study [shall] be conducted through a transparent, peer-reviewed process that will ensure the validity and accuracy of the data." The EPA Science Advisory Board (SAB) has set up an ad hoc panel specifically to provide the peer review for the study and its components.

   Will the SAB ad hoc panel peer review all of the reports and projects that are developed as part of the study?

2. Dr. Burke, a few weeks ago the EPA Administrator was quoted saying that "developing some kind of uniform standard [as it relates to water] is very difficult given different geologies and different uses of water, different aquifers."

   Do you agree with this statement?

3. Dr. Burke, you have served as a member of EPA's Science Advisory Board. The SAB serves an important function especially in regard to providing advice on EPA's study on hydraulic fracturing and drinking water.

   a. In your capacity on the SAB, did you have an opportunity to review EPA's study plan?

   b. Do you agree that all of the individual components of the study should be deemed highly influential scientific assessments?

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

JAN 17 2014

OFFICE OF CONGRESSIONAL
AND INTERGOVERNMENTAL RELATIONS

The Honorable Barbara Boxer
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510-6175

Dear Chairman Boxer:

Thank you for the opportunity to respond to the Questions for the Record following the December 17, 2013, hearing entitled, "Hearing on the Nominations of Rhea Sun Suh to be Assistant Secretary for Fish and Wildlife and Parks of the U.S. Department of Interior, Victoria Baecher Wassmer to be Chief Financial Officer of the U.S. Environmental Protection Agency (EPA), Roy K.J. Williams to be Assistant Secretary of Commerce for Economic Development of the U.S. Department of Commerce, and Dr. Thomas A. Burke to be Assistant Administrator for the Office of Research and Development of the EPA." The responses to the questions for Thomas Burke and Victoria Wassmer are enclosed. I hope that this information is helpful to you and the members of the Committee.

If you have any further questions, please contact me or your staff may contact Carolyn Levine in my office at levine.carolyn@epa.gov or (202) 564-1859.

Sincerely,

Laura Vaught
Associate Administrator

Enclosures

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

JAN 17 2014

OFFICE OF CONGRESSIONAL
AND INTERGOVERNMENTAL RELATIONS

The Honorable David Vitter
Ranking Member
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Senator Vitter:

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If you have any further questions, please contact me or your staff may contact Carolyn Levine in my office at levine.carolyn@epa.gov or (202) 564-1859.

Sincerely,

Laura Vaught

Laura Vaught
Associate Administrator

Enclosures

Questions for the Record
December 17, 2013 Hearing on the Nomination of
Victoria Baecher Wassmer
to be Chief Financial Officer of the
U.S. Environmental Protection Agency
Committee on Environment and Public Works
United States Senate

Senator Boxer

1. **Ms. Wassmer, can you describe how your background and experiences at the FAA and earlier at OMB have prepared you to be the Chief Financial Officer at EPA?**

   Response: I would bring to the role of Chief Financial Officer (CFO) of the Environmental Protection Agency (EPA) 20 years of proven professional experience in progressively high-profile positions, including 15 years of hands-on, practical financial management and leadership within the Federal government. My service to the Federal Aviation Administration (FAA), the Millennium Challenge Corporation, and Office of Management and Budget (OMB) has prepared me for this complex, invigorating opportunity by allowing me to learn firsthand the critical importance and practice of being a responsible, vigilant steward of the American taxpayers' dollars.

   Specifically, in regards to my experience at OMB and FAA, after completing graduate studies in public policy at the Kennedy School of Government, I spent six years at OMB. I gained experience as a policy analyst in the Office of Information and Regulatory Affairs before becoming a program examiner in the Transportation Branch. In these roles, I was responsible for overseeing management, regulatory, policy and budgetary issues over an array of agencies. I later joined the FAA as a manager and then Deputy Director in the Office of Budget. I went on to become a member of the Senior Executive Service and was named the Deputy CFO, responsible for managing the $16 billion annual budget that allows the FAA to achieve its mission of providing the safest, most efficient aerospace system in the world.

   In August 2011, I returned to the FAA as the Assistant Administrator for the Office of Finance and Management. Since then, I have overseen the transition of the agency's finance, acquisition, information technology, and region and center operations services into a single, integrated shared services model. I have also spearheaded agency reforms that ensure resources are properly managed and better optimized to drive cost reductions and financial accountability. Through our centralized approach for common financial services, my team and I have identified value-added financial strategies and performance measures that have realized cost savings, increased efficiency, and reduced duplication in order to better support our customers and the FAA mission. Our data-driven strategies helped the FAA identify approximately $637 million in FY 2013 budget reductions alone, of which approximately $320 million were through contract spending, travel, and other non-pay reductions. During my tenure, we also led the agency in achieving the Certificate of Excellence in

Accountability Reporting (CEAR) Award for the FAA's FYs 2011 and 2012 Performance and Accountability Report (PAR), marking the eighth and ninth time the agency has received this distinguished award. In addition, we led the FAA in receiving unqualified financial statements audit opinions from the agency's independent public accountants in FY2011, 2012 and 2013.

Combined with my formal education and leadership training, my practical experience has prepared me well to be the CFO at EPA.

2. **Ms. Wassmer, can you describe how, with your background and experiences working for the FAA, OMB, and with the Office of the Vice President's Millennium Challenge, you will provide a fresh perspective and how you will work to change, as appropriate, EPA's financial management systems?**

Response: If given the honor of serving as the Chief Financial Officer (CFO) of the Environmental Protection Agency (EPA), once I am a member of the EPA team, my first priority will be to use every means possible to identify the changes needed to improve the performance, integrity, and transparency of the EPA's financial management systems. As part of my immersion in the agency, I will meet with a range of internal stakeholders and external customers, review financial documents, and investigate existing practices, policies, and procedures to gain a comprehensive familiarity of the systems that are currently in place and to identify opportunities for improvement. While I cannot provide examples of specific changes I would make until I have an educated, hands-on understanding of the agency's current state, my goal and focus over the course of my appointment will be to make changes in the near-term that will expedite improvements needed to ensure the integrity of the EPA's financial practices while developing and implementing a long-term plan that will drive the continuous improvement of those practices. I will rely heavily on lessons learned and best practices gained over my 20-year career and specifically through my service to the Federal Aviation Administration (FAA), Office of Management and Budget (OMB), and the Millennium Challenge Corporation to apply a strategic, data-driven approach to implementing sound business practices that will ensure performance and accountability.

In my current work as Assistant Administrator for the Office of Finance and Management for the FAA as well as in my previous roles as Vice President of Administration & Finance/CFO for the Millennium Challenge Corporation and the FAA, I have been responsible for providing oversight and management for each agency's complex, multi-billion dollar appropriations and ensuring accountability to the American taxpayer for all laws, policies, and procedures. In each of these positions as well as in my role as Deputy Director of the Office of Budget at FAA, I have also spearheaded the reorganization of financial organizations and operations to optimize financial reporting, financial systems, internal controls, audit and accounting standards, budget formulation and execution, performance management and cost controls.

Regardless of the current health of a financial management system, my experience has taught me that the role of a leader is to ensure that the system remains on a continuous path of improvement. As with any process, something can always be done better. It is a matter of

proactively looking for those opportunities by tracking and analyzing meaningful data, listening to the feedback of stakeholders, and measuring performance against relevant targets. This is what I have done at the FAA, OMB, and the Millennium Challenge Corporation, and it is what I would do as CFO of the EPA.

3. **Ms. Wassmer, one of the roles of the Chief Financial Officer is to oversee EPA's goal setting process. Can you explain how you would ensure that EPA is working every day to enhance safeguards for pregnant women, children, and other vulnerable populations?**

   Response: If confirmed as the Chief Financial Officer (CFO), goal setting would be an important responsibility of mine and integral to Agency decision making. I look forward to working within EPA to set forth strategic direction and consider tough choices needed to meet our mission. As I have done at FAA and in previous positions, I will work with the relevant office(s) at EPA to use a data-driven approach to inform EPA's planning process to ensure that the appropriate level of safeguards are in place for all of the American public, including sensitive populations.

4. **Ms. Wassmer, can you describe what in your background best prepares you to be EPA's Chief Financial Officer?**

   Response: Over my 20+year career since graduate school, I have worked in all levels of the government's financial arena – from a new analyst to a seasoned Assistant Administrator for Finance and Management. I understand and have successfully shouldered the important responsibility, the increased scrutiny, and the critical accountability that comes with being a Chief Financial Officer (CFO) and ensuring the effective, judicious execution of an agency's budget. Yet, as with everyone, I am the sum total of my experiences. Many of those experiences have taught me what works in a particular situation, while others have shown me what does not work. In my professional life, the worker, the employee, the colleague, the leader I am today was formed by each of those experiences, and it is that, more than anything, which has best prepared me to successfully take on the role of the Environmental Protection Agency's CFO.

   Growing up, my parents instilled in me through their own careers and actions the belief that public service is a noble calling and that it is an honor to be in a position where you can serve others. In my first jobs out of college as a job developer for tradeswomen and project manager in Chicago, I learned how you can help others excel by ensuring they have the opportunity to be successful. Through my work in South Africa, I learned that if you engage the people who are most affected by a problem, their input will often help you identify the best solution. It also reinforced my belief that given opportunities, individuals can achieve great heights and that everyone deserves to be treated with dignity and respect. During my time at OMB, I learned from master senior executives and policy officials who showed me each day through their actions that integrity is always a personal option and that you should always strive to do the right thing, even when it is the harder or unpopular path. At the Millennium Challenge Corporation, I learned the true value of a dollar, and how far you can stretch it if you optimize your resources and focus on what is truly needed, not what is most wanted. I was reminded that a fresh perspective can help you identify new ways to work

smarter and achieve cost savings that can be reinvested in the programs that make the biggest difference.

As the Assistant Administrator for the Office of Finance and Management, I stood-up a new, first-of-its-kind shared services organization that today provides efficient and effective enterprise-wide business solutions and services to customers across the FAA as well as to the Department of Transportation and other government agencies. This has been an incredible learning experience. It taught me how to work with many diverse senior executives with differing opinions and personal agendas and how to facilitate consensus for the adoption of the best possible decisions for the agency. It also reinforced my belief that as the leader of an organization, you are ultimately responsible for the decisions made and the quality of the services provided. So, you have to set the bar high, make your expectations clear, continually take the pulse of your organization, proactively identify and try to fix what does not work or what could be improved, put reliable systems in place that measure performance, be open to a course correction, and help make the people you work with and the people you work for successful.

While I could not begin to list everything I have learned and been taught over the course of my career, I have a deep understanding of what it takes to be a leader in a government agency and to be a responsible steward of the taxpayers' resources. I will bring these experiences with me if I am given the opportunity to serve as the CFO of the EPA, and I will work every day to restore and ensure the integrity of the agency's financial management systems and to earn the trust of you and the American taxpayers.

5. **Ms. Wassmer, one of the EPA Chief Financial Officer's responsibilities is to be the agency audit follow-up official responsible for agency-wide audit resolution and ensuring action officials implement corrective actions in response to OIG recommendations. Do you agree that, if confirmed, you will work with agency officials to ensure that appropriate actions are taken to implement corrective actions in response to OIG recommendations?**

Response: I respect the Inspector Generals' independent oversight of agency programs and operations. I believe an IG's mission to promote efficiency, effectiveness, and prevent and detect fraud, waste, and abuse aligns with a Chief Financial Officer's ethical and legal responsibility to ensure sound and proper use of the American taxpayers' dollars. If confirmed, I will work with the EPA's OIG and program and regional offices, as appropriate, to agree on and implement appropriate corrective actions as expeditiously as possible.

Senator Vitter

1. **Are you familiar with the criminal case against John C. Beale? As you should know, Beale was a career civil servant that bilked the agency for millions in unearned bonus pay, unauthorized travel, and by simply being paid for work he did not do. As the chief financial officer for the agency, it will in large part be your responsibility to develop and implement new systems to protect against this sort of fraud in the future. Please share with the Committee the steps you will take in your first 100 days to reform the agency and prevent future fraudulent acts.**

   Response: I have only seen press coverage and early warning reports issued by the Inspector General in December that were prepared at your request. Based on what I have seen, strengthened internal controls and careful monitoring of those controls would deter such conduct in the future and, if detected, end it more quickly and effectively. I take very seriously my responsibility to be a trustworthy steward of taxpayers' dollars. If confirmed, I will review the facts of the incident and the actions EPA has completed or plans to complete to ensure that ineffective controls, which may have failed to prevent Mr. Beale's fraud, are addressed swiftly and that compliance is monitored closely.

2. **In the case of John Beale, it appears that he could not have been able to accomplish his fraud against the American taxpayer without the assistance, either knowing or unknowing, or other EPA staff. For example, the Committee has learned that Robert Brenner was often the one who approved Beale's requests for bonuses and that Beth Craig approved his travel. Have you had the opportunity to review the facts of this case? Do you concur with my assessment that others at the agency participated, perhaps unknowingly, in Beale's fraud? What do you plan to do in your position as CFO to ensure that EPA employees are not bilking the taxpayers out of millions?**

   Response: I have not had the opportunity to review the facts of this case in detail. However, if confirmed, I will conduct a thorough and expeditious review of the facts and the actions EPA has completed or plans to complete to ensure the appropriate internal controls and compliance monitoring are in place to prevent the fraud Mr. Beale perpetuated. I also will ensure the OIG receives my full cooperation in its ongoing investigation.

3. **In the case of John Beale-did you know that he was still on pay roll AFTER his manager-Gina McCarthy-believed he had retired from the agency? How can something like that happen? Do you agree with me that such a disconnect is unacceptable?**

   Response: Again, I am not familiar with the details of this case. If confirmed, I will review the facts of the incident and ensure that EPA has taken or takes the necessary actions to prevent future fraud such as this.

4. **Are you aware of the fact that the EPA Inspector General has identified "Workforce Planning" as a serious management and performance challenge for the agency? Are you aware of the fact that according to the EPAIG, EPA currently does not identify**

the essential functions of staff based on data? Do you agree with me that a failure to identify essential agency functions based on data is a serious failing? Wouldn't the Harvard School of Public Policy frown on such a shabby state of affairs?

Response: I can assure you that I value the prudent use of sound, reliable data to inform decisions. In fact, throughout my career, I have relied heavily on data-driven approaches to make strategic business decisions at the corporate level. I am aware of the Inspector General's work on this important issue and understand its concerns regarding workload planning at EPA. If confirmed, I will review the issue and the actions EPA has completed or plans to complete to improve workload planning across the Agency so I can make a more informed decision regarding the appropriate next steps to move the Agency forward on this issue.

5. **Are you aware of the fact that despite prodding from GAO and the IG, EPA has not developed analytical methods or collected data to measure its workload and the corresponding workforce levels necessary to carry out that workload? How do you intend to remedy that?**

   Response: I respect the Inspector Generals' and Government Accountability Office's independent oversight of agency programs and operations. Their work to promote the efficient and effective use of the American taxpayers' dollars aligns with a Chief Financial Officer's duty to be a responsible steward of those resources. I am aware of the OIG and GAO reports and understand their concerns regarding workload planning at EPA. If confirmed as CFO, I will take a close look at this issue so that I can determine the appropriate next steps to drive the Agency's progress on data-driven workforce planning.

6. **Are you aware that when the EPW Committee asked EPA how much money the agency spent to conduct the watershed assessment of the Bristol Bay Watershed in Alaska, EPA admitted to my staff that they had no way of calculating the amount of in house resources dedicated to the effort? Do you find such a state of affairs acceptable? If not, will you commit to me today that as the CFO you will develop a process that will require the agency to know how much taxpayer dollars are being spent on agency activities?**

   Response: I was not aware of this issue until recently, and I am not familiar with the details. However, in my experience, cost accounting can provide useful financial management data to inform decisions to allocate budget resources, initiate or modify programs or projects, improve efficiency, and evaluate performance. If confirmed as CFO, I will review the issue thoroughly and take the appropriate action to expeditiously respond to your concern.

7. **As you may know, there have been 3 OIG reports on EPA justification for workforce level with the first being released on December 20, 2010, the second on September 14, 2011 and the last on August 30, 2013. Over the span of 3 years these reports have come to the conclusion that EPA is not meeting the requirements set by Title 5 CFR Part 250.202 the *Human Capital Assessment and Accountability Framework*, which states that**

workforce planning systems include a workforce analysis process that identifies the size and characteristics of the workforce needed to meet organizational goals. Contrary to this requirement EPA has not conducted the necessary workload analysis to determine the correct number of FTEs needed to specifically carry out the most essential parts of its mission. EPA has not done so for 20 years and still does not do so as of 2013. If confirmed as EPA's next CFO, will you commit to implementing a system can accurately model the workforce needs of the agency.

Response: As I stated previously, I assure you that I value the prudent use of sound, reliable data to inform decisions, and I have relied heavily on data-driven approaches throughout my career to make strategic business decisions at the corporate level. I am aware of the OIG reports and understand its concerns regarding workload planning at EPA. If confirmed as CFO, I will take a close look at the specifics and determine the appropriate next steps to move the Agency forward on this issue.

Questions for the Record
December 17, 2013 Hearing on the Nomination of
Thomas Burke to be Assistant Administrator of the
Office of Research and Development, U.S. Environmental Protection Agency
Committee on Environment and Public Works
United States Senate

Senator Barbara Boxer

1. Dr. Burke, do you agree that the Environmental Protection Agency (EPA) should use the current, best available science when making decisions on how to best protect human health and the environment, including implementing the recommendations of the National Academy of Sciences (NAS)?

Response: I agree that EPA should use the most current and best available peer reviewed science to inform decisions on protecting health and the environment. As chair and member of several National Academy of Sciences studies examining EPA science, I also agree that the agency should be responsive to the recommendations of the Academy and work to implement them to the best degree possible.

2. Dr. Burke, can you describe how your experiences on numerous NAS Committees and EPA science advisory councils, including the EPA Science Advisory Board, have prepared you to lead scientific research and development at EPA?

Response: I have worked closely with the agency as a member of the Science Advisory Board and member of the Board of Scientific Counselors. I have also served on the Board on Environmental Studies and Toxicology of the National Academy of Sciences and chaired a number of major Academy studies of EPA science. This experience has given me a strong understanding of the strengths and challenges of the EPA Office of Research and Development, and has provided me a valuable perspective of the views of a broad range of EPA stakeholders including business and industry, state health and regulatory agencies, academia, and community and environmental advocates.

Senator David Vitter

1. During the December 17, 2013, nominations hearing you committed to making data and information that underlies scientific studies used to justify EPA rulemakings available to the public. However, when it comes to most regulations under the Clean Air Act, the EPA has a practice of withholding underlying data, making it impossible for Congress and the public to fully understand the scientific underpinnings of major federal regulations. How will you reconcile EPA's current practice of withholding underlying data? How will you ensure that EPA's scientific work is objective and reproducible?

Response: Transparency and scientific integrity are very important to the agency's work. I understand that EPA has taken appropriate and substantial steps to increase transparency and public access to information. However, it is essential to protect the privacy of individuals who have served as subjects in studies and their personal health information. If confirmed, I intend to continue the agency's ongoing efforts to ensure that scientific and technical information that is intended to inform or support agency decisions continues to be based on the best available science.

2. Do you believe it is a conflict of interest for a researcher to receive funding from the EPA to conduct research, and then sit on exclusive panels for the agency making decisions based on the very same research?

Response: I believe it is important to have a balanced perspective in any review of research results and findings. Receiving funding from EPA should not disqualify outstanding scientists from participating in scientific panels however it is important to have strong and transparent measures to identify conflicts of interest. In my experience, science advisors may provide recommendations regarding scientific evidence but are not "decision makers" for the agency.

3. Isn't it correct that you and at least one of your close colleagues, Dr. Jonathan Samet, have received millions of dollars in research grants from the agency? If so, how many EPA research grants have you received? Please describe the scope of the research, which person and office at EPA authorized the grant, and the amount of the grant.

Response: Dr. Samet is a former colleague; he left Johns Hopkins in 2008 to take a position at the University of Southern California. Although we worked together on many academic activities, I was not a co-investigator in any of his EPA funded research.

The only major research grant I have received from EPA was a highly competitive Science to Achieve Results (STAR) grant in 2008 from the ORD National Center for Environmental Research entitled "Longitudinal Indicators of Policy Impact on Pollution, Exposure and Health Risk" The amount of the award was $499,961. I received funding from EPA Region 3 through a cooperative agreement in 1994 to address community environmental health concerns in South Philadelphia. The project was entitled "Pilot Multi-Media Environmental Health Characterization of South and Southwest Philadelphia" and the total funding was $519,000.

4. EPA research grants are supposed to be awarded in an unbiased and merit-based fashion. However, concerns have been raised that EPA summarily awards the same applicants the limited number of grants. Moreover, Dr. Burke, along with several of his colleagues at the Johns Hopkins University have received numerous EPA research grants. To ensure a competitive and neutral grant process, will you commit to acting without bias or favoritism in distributing EPA research grants?

Response: If confirmed, I will work to ensure that the research grant process is competitive and that the criteria for scoring the applications are clearly presented and transparent.

5. In recent years, the EPA Inspector General (IG) and the Government Accountability Office (GAO) reported instances where EPA grants have been awarded with no public notice, competition, or accountability. Will you commit to adopting all of the IG and GAO's recommendations regarding EPA's grant programs?

Response: I take seriously the role that the Inspector General and Government Accountability Office play in assessing the accountability of government programs, and if confirmed, I would welcome their recommendations. While I am not familiar with reports referenced in this question, if confirmed, I commit to reviewing the recommendations of the IG and GAO and giving them due consideration.

6. Francesca Grifo, former senior scientist and director at the Union of Concerned Scientists was recently appointed to serve as EPA's Scientific Integrity Officer within the Office of Research and Development. If confirmed, how do you intend to work with the Scientific Integrity Officer?

Response: As I mentioned in my opening statement, I have a deep respect for the work of the agency scientists and I believe science is the "backbone" of EPA decision-making, and has been the foundation of our nation's environmental progress over the past four decades. Science should be credible, transparent, and inclusive. If confirmed, I look forward to working with Dr. Grifo to see that the agency's Scientific Integrity Policy is fully implemented across the Office of Research and Development and EPA as a whole.

7. Are you familiar with Francesca Grifo, EPA's recently appointed Scientific Integrity Officer? Do you believe there is any reason to be concerned that Dr. Grifo's work at the Union of Concerned Scientists may affect her ability to carry out the responsibilities of the Scientific Integrity Officer?

Response: Although I do not know Dr. Grifo personally, I have reviewed her vitae and believe that her training and experience, including her work with the Union of Concerned Scientists, provide her with strong credentials to serve as Scientific Integrity Officer. If confirmed, I look forward to working with her to ensure the integrity of EPA science.

8. In promulgating National Ambient Air Quality Standards (NAAQS), EPA has repeatedly relied on studies that are based on individual cohort data collected in the early 1980s. In 2004, NAS cautioned against relying solely on these studies because of

the potential problems given that "cohorts were established decades ago, and some critical data items, including residence history, smoking rates, dietary factors, and other potential confounding and modifying factors, have not been updated." Do you agree with the NAS's caution against using studies that rely so heavily on outdated cohorts? Will you commit to reviewing this issue and reporting back to the Committee with specific guidance on how you intend to use such studies in setting standards and assessing risk?

Response: EPA's work to protect public health and the environment through programs such as promulgating National Ambient Air Quality Standards needs to be based on strong science. The NAAQS program is very important, and if confirmed, I look forward to reviewing this issue and working to ensure that the Integrated Science Assessments that provide the foundation for NAAQS decisions reflect the best possible science.

9. In the Office of Management and Budget's 2013 report on benefits and costs of federal regulations, over 80 percent of the claimed monetized benefits of all federal regulations were based on PM2.5 reductions. However, the report listed six major uncertainties, including a core uncertainty that PM2.5 may not cause the increased risk of mortality at lower concentrations.

a. Do you agree that these uncertainties are significant within the context of cost-benefit analysis?

b. Do you believe that EPA should address these uncertainties by developing integrated quantitative uncertainty analyses?

c. Will you commit to conducting this type of uncertainty analysis in the upcoming ozone NAAQS review?

Response: EPA's work to protect public health and the environment needs to be based on strong science. I look forward to reviewing this issue and working to ensure that the scientific foundation for EPA decisions reflect the best possible science.

10. OMB Circular A-4 requires key uncertainties to be disclosed and quantified to the extent possible to inform decision makers and the public about the effects and uncertainties of alternative regulatory actions. However, EPA has a practice of excluding and failing to quantify key uncertainties in the cost-benefit analysis of rulemakings. Will you commit to following all OMB circulars and guidelines? How will you ensure that key uncertainties are included and quantified in the cost-benefit analysis of EPA rulemakings?

Response: While I am not familiar with the specific requirements of that OMB circular and how it relates to the duties of ORD, if confirmed, I would certainly commit to follow all applicable OMB circulars and guidelines and to support the broader agency's efforts to comply with any such requirements. A big part of the ORD mission is to help provide information to fill key data and science gaps which can help to more fully characterize

uncertainty. If confirmed, I will work very hard to provide the agency with the tools and data necessary to deal with uncertainty in our regulatory analyses.

11. In FY2013, ORD received approximately $725 million in new appropriations and had $150 in unobligated balances. Yet, no one knows exactly how these funds are used or whether they are being used most efficiently to produce beneficial gains. In effect, EPA has no way of evaluating the environmental "bang for the buck" for each ORD research program. Will you commit to providing Congress an accounting on the costs and potential and actual beneficial gains of each ORO research program? If confirmed, how will you allocate spending in the Office of Research and Development?

Response: I am not familiar with the details of ORD's budget. If confirmed, I look forward to reviewing this issue to ensure that the resources are being utilized prudently and are focused on the priorities important to supporting the agency's mission.

12. The psychologist Brian Nosek and colleagues recently wrote: "Publishing norms emphasize novel, positive results. As such, disciplinary incentives encourage design, analysis, and reporting decisions that elicit positive results and ignore negative results." Therefore, it seems that there is less of an emphasis on replication of findings to ensure scientific integrity than developing novel findings.

a. Do you believe that there is publication bias that leads to greater publication rates of studies reporting positive results compared to studies showing no relationship?

Response: Yes, I agree that there is a bias toward greater publication of positive studies. There may be many factors that contribute to this, including a lower submission rate by investigators when study results are negative and the possibility that weaknesses in study design may contribute to a higher likelihood of negative results.

b. Considering the likelihood of a possible publication bias by journals and a possible bias toward funding positive results by federal agencies, how do you recommend EPA consider this bias in weighing positive and negative studies?

Response: EPA should consider all relevant well-conducted and peer-reviewed studies, regardless of whether they are positive or negative, and include clear criteria for inclusion and exclusion of studies. Review and assessment of studies should be based upon the quality of the research, including study objectives and design, statistical power, presentation of the findings and conclusions, and consideration of study limitations, uncertainty, bias and confounding.

13. The scientific integrity of EPA's hallmark IRIS program has been questioned by Congress as well as the National Academy of Sciences (NAS). While Dr. Ken Olden is working to bring new leadership to the program, there is much more work that needs to be done.

a. Can you commit to ensuring that all draft and final assessments released by the IRIS program are consistent with the recommendations of the NAS Formaldehyde committee which recommended changes for all IRIS assessments, not just formaldehyde?

Response: My understanding is that the IRIS Program has been implementing the recommendations using a phased approach, consistent with the advice of the National Research Council (NRC), making the most extensive changes to assessments that are in the earlier stages of assessment development. Additionally, in July 2013, EPA announced enhancements to the IRIS Program that will improve the science quality of assessments, improve the productivity of the Program, and increase transparency. These changes are consistent with the NRC recommendations. If confirmed, I look forward to working with the National Center for Environmental Assessment.

b. Science has advanced significantly over the last 25 years. Will you ensure that as part of the improvements in the IRIS program, the Agency will move away from outdated default assumptions and instead always start with an evaluation of the data and use modem knowledge of mode of action -- how chemicals cause toxicity- instead of defaults?

c. Do you agree that standard protocols should be developed to enable all studies to be independently judged based on their quality, strength, and relevance regardless of the author affiliation or funding source? If so, will you make development of these standard approaches a priority?

d. To further improve the IRIS Program, can you commit to revising the way hazard values are presented to the public to ensure that critical science policy choices are transparently presented and not comingled with scientific assumptions?

Response: EPA's work to protect public health and the environment needs to be based on strong science. I look forward to reviewing this issue and working to ensure that the scientific foundation for EPA decisions reflects the best possible science and that information is communicated in a transparent manner.

14. While health protection is often seen as the responsibility of EPA risk managers, when it comes to scientific assessments, the job of a risk assessor or toxicologist should be to produce assessments that are predictive of risks.

a. Do you agree that the role of the IRIS program is to identify values that are predictive of the potential health risks rather than those that provide the most conservative (lowest) value?

b. Will you support an approach to chemical assessment that results in hazard values that are predictive of actual health risk?

Response: IRIS assessments are designed to be scientific reports that provide information on a chemical's hazards and, when supported by available data, quantitative toxicity values for cancer and non-cancer health effects. EPA's work to protect public health and the environment needs to be based on strong science. I look forward to reviewing this issue and working to ensure that the scientific foundation for EPA decisions reflect the best possible science.

15. It is my understanding that internally the IRIS program no longer relies on definitions that are still publicly used (for example, the definition of the RfD and the meaning of confidence values in IRIS), yet EPA has never used any formal stakeholder or public or peer review process to implement these changes. Instead EPA seems to be relying on a 2002 review received from EPA's Risk Assessment Forum Technical Panel, and staff appear to pick and choose which suggestions they will follow and which they will not implement.

a. Will you commit to engaging stakeholders before changes to critical definitions and methodologies in the NAAQS and IRIS program are made?

Response: Yes, if confirmed, I will review the definition of the RfD and the confidence values.

16. Currently, when developing hazard values for exogenous exposures the IRIS Program does not consider natural environmental levels of chemicals, e.g., exposure to minerals from geologic formation, exposure to off-gassing from foliage, or levels naturally produced by the human body as part of its metabolic processes.

a. Do you agree that chemicals associated with the body's natural metabolic processes should be addressed specifically and separately in the development of a hazard value?

Response: This is an important consideration in understanding and managing incremental risk from environmental exposure. Since there are many natural products of metabolism that may have toxic effects if they are out of balance, the fact that they are naturally produced does not make them "safe" at all doses.

b. What is your position about addressing natural environmental chemical levels as distinct from background man-made emission?

Response: I believe that these are important considerations that should be presented as part of the problem formulation prior to undertaking a risk assessment. However, health based regulatory standards do not distinguish between natural occurring and man-made sources. Addressing incremental risks above background is an important consideration in risk management and the determination of "acceptable" risk in regulatory decision making. Reducing risks below background levels may not always be technically feasible.

c. Do you agree that IRIS hazard values should be able to pass a reality check and accommodate levels associated with existing natural exposures that are not known to be associated with any adverse effects at these low exposure levels?

Response: I cannot agree without more information about the specific pollutant of concern. The adverse effects of hazardous agents are not driven by whether or not they are "naturally" occurring. For example radon is known to increase risk of lung cancer. The source of the exposure does not impact the dose at which an adverse effect is observed. Natural occurrence and background levels are more appropriately considered in the risk management strategy.

17. There is a pressing need for priority setting when it comes to chemical evaluations within ORD and throughout EPA.

a. Can you commit to developing a clearly articulated prioritization process for high priority IRIS assessments that benefits from, and is responsive to, engagement from all stakeholders? Will you ensure coordination with other EPA program offices?

Response: I understand that EPA has previously committed to the Government Accountability Office that it will better describe for internal and external stakeholders and the public the nomination and selection process for chemicals for IRIS toxicity assessments, including the rationale for not selecting nominated chemicals for the full IRIS assessment. If confirmed, I look forward to working with scientists in the National Center for Environmental Assessment on this issue.

18. A 2011 GAO report recommended that EPA needed a more coordinated approach to managing its laboratories. In 2013 a National Academies (NAS) panel began reviewing EPA's laboratory capabilities. If the NAS study and EPA's own review substantiates that unnecessary and costly redundancy do indeed exist, do you commit to expeditiously undertake appropriate actions to consolidate or close labs, and reduce redundant staff?

Response: I understand that EPA has undertaken to do a study of the laboratory enterprise and has engaged the National Academies as part of this process. If confirmed, I will look into the progress of this effort.

a. Can you commit to developing a plan to undertake research in order to build the datasets necessary to establish scientific confidence for regulatory use of a tiered, risk-based approach for using high-throughput/high-content screening assays for safety evaluations (looking to approaches already developed such as the from the Hamner Institute)?

Response: EPA's computational toxicology research program is recognized nationally and internationally as bringing new science to bear on chemical safety and has made great progress in this area since the release of the NAS report.

19. Industry and federal research efforts have invested millions to better understand how chemicals interact with biological systems at human exposure levels in order to ensure development of human health risk assessment prediction models that are as accurate -and science-based as possible. However, IRIS has a long track record of dismissing these types of scientific biologically-based models and asserting that such approaches cannot prove the defaults are not warranted. Demanding that science proves a negative is an anti-scientific policy and indicates a deep seated prejudice against use of mode of action knowledge to replace defaults.

a. Why shouldn't EPA use the most up to date knowledge on mode of action and dose response at environmentally relevant exposures in lieu of outdated default approaches for hazard identification and dose response throughout the Agency, including in the IRIS Program?

Response: EPA's work to protect public health and the environment needs to be based on strong science. If confirmed, I will work with scientists within and outside of the agency to ensure that EPA's work reflects the best possible science.

b. Many scientists have criticized IRIS for its current framework and suggested using a weight of evidence framework. Thus, a litmus test for an improved IRIS will be adoption and use of a weight of evidence framework that incorporates all of the relevant and reliable data and knowledge of hypothesized modes of action, so that there is a clear and objective presentation of the extent to which existing data and knowledge do, or do not, support each hypothesis, including the default. Assuming you support such an approach, can you provide us with a timeline for when we might see such an approach adopted within IRIS?

Response: Hazard identification involves integrating evidence from human, animal, and mechanistic studies in order to draw conclusions about the hazards associated with exposure to a chemical. In general, IRIS assessments integrate evidence consistent with a framework developed by Sir Bradford Hill, which outlines aspects — such as consistency, strength, coherence, specificity, dose-response, temporality, and biological plausibility — for consideration of causality in epidemiologic investigations. These were later modified by others and extended to experimental studies. My understanding is that, currently, the National Center for Environmental Assessment uses existing guidelines that address these issues to inform assessments. If confirmed, I look forward to working with the National Center for Environmental Assessment on these issues.

20. In developing chemical assessments, such as those in IRIS, there is a blending of science, policy and science policy assumptions and choices throughout the evaluations.

a. Do you agree that IRIS assessments should explicitly acknowledge and transparently convey the science and assumptions around the science (i.e., handling uncertainty) inherent in IRIS assessments?

Response: Strong science and transparency are essential to the IRIS Program and important to all of EPA's work. If confirmed, I look forward to working with the National Center for Environmental Assessment on this issue.

21. In the 2009 NAS committee you chaired issued a report recommending there should be one unified approach for dose- response modeling. Unfortunately, such an approach may not always consider the millions of dollars of research that have been invested to explore the mechanisms of action of individual chemicals. Significant activities, coordinated by the Alliance for Risk Assessment, have been undertaken since 2009 to broaden the understanding of dose-response and to link different approaches to conducting dose response to problem formulation. This has resulting in more than 30 published case studies, illustrating qualitative categorization, quantitative screening and in-depth assessments.

a. Do you support linking dose response to problem formulation such that the complexity of the dose response approach is "fit for purpose" and reflects the range of decision options and likely regulatory impacts?

b. Do you believe that any approach implemented needs to put chemical specific information and test data ahead of standardize approaches?

c. Will you support an approach the puts chemical specific information and test data ahead of standardized approaches in the IRIS program?

Response: EPA's work to protect public health and the environment needs to be based on strong science. If confirmed, I will work with scientists within and outside of the agency to ensure that our work reflects the best possible science.

22. In the past you have suggested, in an NAS report you chaired, that information on nonchemical stressors should be incorporated into assessments and EPA should put further research dollars into evaluating the interactions between chemical and nonchemical stressors.

a. Considering the struggles ORD is having simply evaluating chemical stressors in the IRIS program, do you believe that ORD has the staff, with requisite qualifications and financial capacity, to also take on evaluations of nonchemical stressors?

b. Shouldn't ORD first convince Congress, NAS, and all other stakeholders that they can appropriately evaluate chemical stressors before broadening their scope?

Response: If confirmed, I look forward to further exploring this important issue with scientists within and outside of the agency.

23. As noted in "Science and Decisions: Advancing Risk Assessment" (NRC, 2009) "... formal consideration of numerous simultaneous chemical, physical, and psychosocial exposures with evaluation of background disease processes and other

dimensions of vulnerability could quickly become analytically intractable if the standard risk-assessment paradigm is followed, both because of the computational burden and because of the likelihood that important exposure and dose-response data will be missing. That points toward the need for simplification of risk- assessment tools in the spirit of iterative risk assessment..."

a. Since the NAS 2009 report there have been significant advances in the development and application of tiered, iterative tools for cumulative risk assessment, including development by the World Health Organization of a formal framework for risk assessment of combined exposure to multiple chemicals. Do you support use of this WHO framework? If not, why not?

Response: EPA's work to protect public health and the environment needs to be based on strong science. If confirmed, I will work with scientists within and outside of the agency to ensure that all of our work reflects the best possible science.

24. Currently the staff in the IRIS Program are the sole arbiters of determining whether and to what extent draft IRIS assessments should be revised to reflect input from peer reviewers and the public. EPA's own Scientific Advisory Board has recommended the use of a "monitor" or "editor."

a. Can you commit to ensuring that a 3rd party, independent of the IRIS Program, is tasked with ensuring that EPA staff have sufficiently considered and responded to peer reviewer and public input before assessments and other documents are finalized?

Response: Public comment and robust expert peer review is an important part of the agency's scientific work, and responding to public and peer review comments is an important step in completing a scientific product. It is my understanding that responses to public comments are documented in an appendix to each IRIS assessment so that interested parties can judge the adequacy of the response. If confirmed, I look forward to working with scientists in the agency to explore this issue further.

25. In previous comments on IRIS reform, you said that EPA's IRIS program is in "crisis" and is in need of reform while further stating "the sleeping giant is that EPA science is on the rocks ... if you fail, you become irrelevant, and that is kind of a crisis." Further, you admonished, "You can't fail at this time."

In response to a question you said, "We owe it to the American public, we owe it to the scientific community... to have risk assessments based in sound science. It would be better to do it right than destroy the credibility of the process."

The NAS report on formaldehyde was critical of the process as well as the underlying science that EPA used in its draft assessment. Your October 2011 testimony emphasized not only the importance of the process but, more importantly, the scientific conclusions or scientific content of the IRIS assessments.

a. Given the significance of this risk assessment to the scientific process and for restoring the public confidence in EPA's science, it is imperative that you commit to having the NAS retook at the next iteration of the formaldehyde IRIS assessment. Can I have your assurance that this peer review will take place?

Response: If confirmed, I will work to implement the recommendations of the NAS Formaldehyde Committee, not only for formaldehyde but for all IRIS documents. While I can assure there will be rigorous peer review of the revised formaldehyde document, I believe it is premature for me to provide assurance that another NAS committee will be convened specifically to re-review formaldehyde. I do look forward to working closely with the NAS to continually improve the quality of EPA science.

26. EPA, at the urging of stakeholders, will convene a scientific workshop on formaldehyde in the first half of 2014. Three key issues have been identified for discussion. I am concerned that this workshop will be similar to typical EPA science workshops of the past where the agency solicits input from a variety of stakeholders, irrespective of their qualifications, listens politely and without comment' and provides no resolution or feedback. Quite frankly, that is a waste of time and resources. I want to see difference in interpretation of the data, particularly from the epidemiological studies, narrowed. It is my hope that a robust dialog will help accomplish that. EPA staff should be engaged participants in the dialog, not mute listeners and I suggest EPA engage a professional facilitator and have the proceedings of the workshop published. Will you commit to be personally involved in the development and conduct of this workshop and ensure that the right scientists with the relevant subject matter expertise are at the table?

Response: Workshops to address important scientific issues, such as those related to assessing the health risks of formaldehyde, can help the agency in conducting its work. If confirmed, I look forward to working with the National Center for Environmental Assessment to ensure that this workshop is successful and includes experts with the appropriate background and knowledge.

27. The EPA workshop is timely, important at both the scientific and policy levels, and deals with scientific challenges of the highest order. How will you assure EPA integrates high quality information to help inform regulatory decisions for formaldehyde that presents complex challenges? How will EPA conduct a thorough, state-of-the-art WOE evaluation of the entire database?

Response: EPA's work to protect public health and the environment needs to be based on strong science. If confirmed, I will work with scientists within and outside of the agency to ensure that all of our work reflects the best possible science.

28. If you are confirmed, what commitment will you make to ensure EPA's scientific content and scientific conclusions are sound in light of the series of significant scientific shortcomings that the NAS Formaldehyde report identifies and the subsequent recommendations put forward?

Response: EPA has initiated a number of changes in response to the NAS Formaldehyde report. At the present time there is an NAS panel examining the overall IRIS process. If confirmed, I look forward to receiving the findings of the NAS and taking any necessary steps to address shortcomings and continually evaluate and improve the process.

29. As you know, Congress directed EPA to contract with the NAS to review the cancer and non- cancer IRIS assessments of inorganic arsenic. It is our understanding that a senior scientist in the IRIS program stated publically in a meeting that any recommendations from the NAS would be unlikely to change the agency's views on the arsenic IRIS assessment If confirmed, are you prepared to effect organizational and staffing changes to ensure that scientific integrity characterized by objectivity, transparency and scientific rigor is restored?

Response: I am not aware of any specific details relating to this purported statement by the senior scientist. As an active participant in NAS activities and Chair of multiple studies, I have tremendous respect for the work of the Academy. I can assure you that, if confirmed, I look forward to meeting with the NAS committee and working to implement recommendations they may provide to improve the IRIS assessment for both cancer and non-cancer effects of inorganic arsenic. I will also devote myself to ensuring integrity of all IRIS assessments and working with the staff to continually improve quality, objectivity, and transparency.

30. What are your views on how best to use systematic review as a tool to identify and review the body of scientific literature pertinent to a risk assessment of a chemical or substance? It is our understanding that the systematic review method developed by Dr. Birnbaum at the NTP and planned to be used by EPA IRIS automatically codes studies in the literature funded by industry as biased. That would mean that industry studies would not be given the same weight as other studies possibly funded by other organizations. How do you view this practice? How can you justify automatically ascribing bias to studies from or funded by industry, ignoring their scientific merit? Couldn't this distort the science by leaving out reliable and sound scientific studies?

Response: Systematic review of epidemiologic studies provides a valuable way to consider the findings from multiple investigations in evaluating the evidence for adverse effects. The review process also provides a framework for selection of studies for inclusion. The consideration of studies should be driven by the quality of the science. The systematic review process can address potential questions about investigator bias can still include studies that may be funded by industry. In risk assessment the systematic review process should be as robust as possible, with clear and transparent criteria for inclusion and exclusion of studies. Funding source alone should not be the basis for the decision to exclude a study from consideration. A full examination of study quality and potential bias is essential.

a. Others have pointed to different sources of bias, such as publication bias, which creates incentives, including increased likelihood of funding, toward studies that report positive associations; what are your views on this and similar concerns and how do you plan to take these kinds of bias into account?

Response: The issue of publication bias can be challenging. It is recognized that positive studies are more likely than negative studies to be published in peer reviewed journals. There may be many reasons contributing to this trend, including investigator choice not to submit negative studies and other design considerations that may contribute to the failure of a study to achieve statistically significant positive results. As a peer reviewer for many journals, I have never recommended rejection of a paper solely because of a negative result. Nor am I aware of any editors or editorial guidelines that recommend rejection of epidemiology studies with negative results. However, recognizing there may be a publication bias I believe it is very important that the systematic review process cast a broad net to be as inclusive as possible and include well conducted studies with both positive and negative findings.

31. The recent NAS interim report on inorganic arsenic states, "EPA proposes to use linear low-dose extrapolation as the default for cancer and non-cancer effects." This is in contrast with the EPA cancer guidelines, which supports the use of mode-of-action to determine the shape of the dose- effect relationship. It is also in contrast with general mechanistic understanding of non-cancer dose-response relationships. What are your views on linear versus non-linear approaches to risk assessment? Do you think EPA should pursue the establishment of a threshold at low exposures if the data support such association?

Response: Understanding the impact of chemical exposures at extremely low doses is perhaps the most challenging issue in risk assessment. Unfortunately, for the large majority of chemicals there is currently limited information about mode of action and great uncertainty about the dose-response relationship. For carcinogens, the default continues to be linear extrapolation at low doses. For non-carcinogens the dominant default has been to assume the existence of a threshold and use a safety factor approach in the face of limited information. The "Silver Book" provides guidance on addressing the issues of thresholds and urges that EPA develop tools to quantify non-cancer risks. Establishing a population threshold is very challenging, particularly when considering the most vulnerable members of our population such as developing infants or the elderly. If there is strong data supporting a threshold it should be presented as part of the risk assessment. In general, risk assessments should present the fullest characterization of risks possible, presenting both cancer and non-cancer findings, and providing risk managers with both linear and non-linear model results where there is sufficient data.

32. As an epidemiologist, please describe how you think the body of epidemiology on a specific substance should be reviewed. For instance, many observers, including the NAS, have criticized EPA for giving too much weight to epidemiological studies of large populations exposed to inorganic arsenic, such as the Taiwan data, just because of the large number of subjects, while giving little credence to studies from the US that observe smaller populations, although the lifestyles, including nutrition, of the large populations are totally different from US lifestyle. Meta-analysis studies have been conducted of US populations that address the smaller number of study subjects, but EPA has ignored those studies. These meta-analyses provide evidence that the dose-response relationship used by NRC 200 I from Taiwan is not consistent with findings from the US, and is higher than what would be derived from studies of US populations. What is your view on

the use of meta-analyses as a way to integrate information from smaller studies and to provide a reality check on EPA risk calculations?

Response: Within the field of epidemiology there is currently a great emphasis on improving the methods and application of meta-analysis and systematic review. This was in part stimulated by the recommendations of the NAS Formaldehyde report. The current process for review and refinement of the IRIS arsenic document will be addressing the challenge of improving the presentation and consideration of epidemiological findings. I am optimistic that an improved process will be more inclusive of smaller studies and provide a more transparent scientific basis for the selection of the critical studies used to calculate risks.

33. Studies from places like Bangladesh and Taiwan involve populations with very different nutritional statuses than is found in the US. The NAS Interim Report notes the importance of taking account of these differences in applying these study findings to the US (at p.59). How would you extrapolate from those studies to make the data relevant to the US?

Response: I agree that cultural, nutritional, and exposure difference should be considered in assessing and managing risks to the U.S. population. If confirmed a look forward to examining the recommendations of the NAS committee and actively working with the IRIS program to address the questions regarding relevance to the U.S. population.

34. How do you view the intersection between epidemiology and toxicology? Many critics believe EPA has been overly reliant on epidemiology and deemphasized mechanistic research that provides guidance for dose-response calculations. Some EPA critics suggest that a reluctance to identify modes of action is a deliberate approach by EPA to allow it to use epidemiological data to validate their modeling.

a. What steps can you take to correct this bias, whether real or perceived?

Response: Toxicology and epidemiology are both essential if we are to understand and manage risks. Both types of studies have advantages and limitations, and the best approach is to improve how we consider the full body of evidence from both of these disciplines. While well conducted studies of human populations are considered the "gold standard" for assessing human health risks, toxicology provides important information when human studies are lacking or not possible. The large majority of IRIS risk assessments are based upon animal toxicology, including assessments of cancer risk, because the dose response data from most human studies is very limited.

I do not believe there is a bias against toxicology studies. If confirmed, I will work with risk assessors and other scientists to provide clear criteria for consideration of epidemiology and toxicology in the risk characterization process. I will also support continued research to improve the application of mechanistic data to risk assessment.

b. Science commentators have noted a concern about "normative science," which is defined as "information that is developed, presented or interpreted based on an

assumed, usually unstated, preference for a particular policy choice." [Lackey, Robert T. Normative Science. *Terra Magazine,* Oregon State University, Volume 8, Issue 2 (2013).] What steps will you take to ensure that EPA's science assessments on your watch do not include this kind of normative science?

Response: I do not believe that "normative science" is practiced at EPA, and the best approach to this concern is open and credible peer review throughout the scientific process. It also it is important to separate the scientific assessment of evidence from the ultimate policy decision that must consider other social and economic factors.

c. Another type of concern has been identified: "EPA's use of assumptions that it claims are 'public health protective,' which err on the side of overstating risk when data are lacking.... Such inflated risk estimates can lead to overly stringent regulations and can scramble agency Priorities because the degree of precaution differs across chemicals. How do you intend to guard against this problem? What are your views on the use of empirical data as a "reality check" on overly conservative risk assessments, particularly those resulting from modeling or extrapolation of data? How do you view the application of additional safety factors - particularly when they become cumulative- for sensitive subpopulations or policy considerations such as environmental justice?

Response: First, I believe that the fundamental mission of EPA is to protect public health, and therefore agree with approaches that are "public health protective". I also believe that the fundamental challenge in assessing chemical risks is a lack of data. Therefore, it is not really valid to say that the EPA assumptions "overstate the risks when data are lacking". For example, in the absence of data about a specific unrecognized health effect it may be the case that risks are underestimated. The current drinking water emergency in West Virginia is an example of the challenge of safeguarding public health when the data about health effects is limited. In the absence of data, safety factors provide a time tested public health strategy to safeguard communities.

I agree that more specific evidenced based approaches to safety factors and the protection of vulnerable subpopulations are needed. Also, risk characterization should include presentation of multiple modeling approaches to assist decision making and provide a "reality check" based on empirical data. Cumulative risk presents a difficult challenge. I support continued research to refine our methods of considering interaction of multiple stressors in risk assessment, particularly regarding sensitive populations and environmental health disparities.

35. The NAS 2008 Report: <u>Science and Decisions: Advancing Risk Assessment,</u> frequently referred to as the "Silver Book" strongly recommended that EPA should consider the regulatory impacts of its IRIS hazard assessments. Since then, EPA has proposed IRIS assessments, including the cancer assessment for inorganic arsenic, which would drive regulatory standards below naturally occurring background levels in soil and water. EPA national and regional managers were highly critical of the IRIS proposed 17x increase in the cancer slope for inorganic arsenic, saying the science was " detached from reality" and would have "disastrous consequences" for EPA programs including Safe Drinking Water and RCRA.

The NAS Silver Book urges EPA to perform extensive examination of risk management implications and options in the first phase of human health hazard assessments. It further recommends involving EPA national program managers (Air, Water, CERCLA, RCRA) in this early phase of assessment so that EPA can then use risk assessment to make more informed choices among those options.

Do you support this particular recommendation from the NAS Silver Book? Do you believe EPA's IRIS assessments must properly consider the "real world" regulatory and risk management implications of its hazard assessments?

Response: As Chair of the NAS Committee, I strongly support the recommendations of the "Silver Book". It is important that risk assessment be designed to address the needs of decision makers and risk managers. However, the risk management process should be recognized as distinct from the characterization of health risks. The ultimate decision on the application of risk information for risk management is a policy decision. Issues of feasibility and cost are essential components of the decision process and are not driven by dose response findings. The risk management decision must consider the "real world". The full process presented in the Silver Book is a continuum from problem formulation through risk management.

36. What is the cost of EPA's Hydraulic Fracturing study on the potential impacts of hydraulic fracturing on drinking water resources thus far? How long has the agency been engaged in the study? What has the agency done in terms of testing?

Response: To my knowledge, the work began in 2010 in response to a request from Congress. If confirmed, I will look into the budget of the EPA's study as well as the specific research projects.

37. Has the EPA done any testing in real time for sites that are being drilled now? My understanding is that the agency has tested several sites that were drilled years ago, which is a problem because EPA does not have a good baseline of information and there are other factors which could have caused contamination (agriculture, mining, etc.). How does EPA plan on overcoming the lack of good baseline information and ensuring no conclusions are drawn about hydraulic fracturing without first ruling out any other possible sources of contamination?

Response: Although I participated in a 2011 EPA SAB review of the study, I am not familiar with the specific details of EPA's sampling work, the availability of baseline information, or how the agency will use this information to draw conclusions about potential sources of contamination. If confirmed, I look forward to working with scientists in the agency to explore this issue further.

38. Has the agency has expanded the scope of the study beyond looking at groundwater? What is the full scope of what the agency is now studying? What are all the various pieces that will be included in the study? Were those asked for by Congress? If the study has been expanded, what justification does the agency have for doing so?

Response: I am not familiar with the specific details of the study including the scope, as it may have changed from the Study Plan that I commented on in 2011. If confirmed, I will support a scope that is responsive to Congress' request.

39. What has been the extent of EPA's work with DOE and USGS to date on the study?

Response: If confirmed, I look forward to gaining an understanding of how EPA has worked with other agencies to ensure that research efforts are done efficiently and effectively. However, at this time I do not know the extent to which EPA is working with other federal agencies on the hydraulic fracturing study.

40. How are you accounting for fracturing technology, as it is changing quickly and beneficially, as part of the study?

Response: I am not familiar with EPA's approach for staying up to date on changes in industrial practices related to hydraulic fracturing. If confirmed, I look forward to working with scientists in the agency to ensure that this study is based on the best available science.

41. There has been some controversy over methane leakage from shale development and hydraulic fracturing. But a recent study from the University of Texas that was published in the Proceedings of the National Academy of Sciences found that methane leaks from natural gas development were in line with EPA's data, which showed a leakage rate of only about 1.5 percent. There are several other studies, some of which found high leakage rates, but most seem to suggest that leakage is low and manageable. Based on your review of the scientific literature, what's your understanding of methane leakage from natural gas development, and do you see any environmental benefits of increasing natural gas production and use in the United States?

Response: I have not reviewed the National Academy of Sciences paper and cannot speak to the issue of methane leakage at this time. If confirmed, I will look into this issue.

42. Former EPA administrator Lisa Jackson said, 'I'm not aware of any proven case where the fracking process itself has affected water.' Secretary of Energy Ernest Moniz has said 'I still have not seen any evidence of fracking per se contaminating groundwater.' Interior Secretary Sally Jewell said she is 'not aware of documented cases' of hydraulic fracturing contaminating groundwater. I realize the EPA is currently studying this issue, but based on the evidence already available, do you agree with these officials' assessments?"

Response: I am not familiar with the details of the scientific literature, but will look into the issue if I am confirmed.

43. The increase in domestic energy production is due to the application of two proven engineering technologies- hydraulic fracturing and horizontal drilling. Hydraulic

fracturing has been used commercially since the 1940s and directional drilling has been around since the 1930s. Development of resources using these technologies is responsible for 2.1 million American jobs and this number is expected to rise to 3.9 million in 2025. Furthermore, tens of thousands of wells are drilled every year using the process, and we have seen over a million wells drilled in the US with no cases of groundwater contamination. Do you agree that hydraulic fracturing is critical to our economy and our national security? Do you agree that it is a proven technology that has been used safely for over half a century and can be used safely?

a. Are you aware of any cases where hydraulic fracturing has contaminated drinking water?

Response: Energy production is critical to our economy and our national security and hydraulic fracturing should be done in a manner that protects human health and the environment. At this time, I cannot speak to the level of safety associated with hydraulic fracturing, as it has not been my professional focus to date. However, if confirmed, I am committed to ensuring that EPA has all of the information available about the safety of the technology. As I mentioned during my hearing last month, from my own experience, having done many studies of groundwater contamination, I am not familiar with a specific case of drinking water contamination from hydraulic fracturing.

44. As part of the Congressionally-requested study on the relationship between hydraulic fracturing and drinking water, the conference report stated that "the study [shall] be conducted through a transparent, peer-reviewed process that will ensure the validity and accuracy of the data." The EPA Science Advisory Board (SAB) has set up an ad hoc panel specifically to provide the peer review for the study and its components.

a. Will the SAB ad hoc panel peer review all of the reports and projects that are developed as part of the study? Do you believe it is the SAB ad hoc panel's role to peer review all of the study's reports and projects as part of the study?

Response: I believe that rigorous peer review is an important element to ensure the quality of the science. I am not familiar with the details of ORD's peer review plan for the study. If confirmed, I will look into this issue and support decisions that ensure valid and accurate data as well as transparency.

45. Also included in the conference report is the statement that "The Agency shall consult with other Federal agencies as well as appropriate State and Interstate regulatory agencies in carrying out the study..."

a. Are you aware of any other federal agencies currently being consulted in the study? Which agencies will you consult with should you be confirmed and head the ORD and lead the study?

Response: I am not familiar with the extent to which EPA is working with other federal agencies. If confirmed, I look forward to learning about how EPA has worked with other agencies to ensure that research efforts are done efficiently and effectively.

46. Recently, EPA Administrator Gina McCarthy was quoted as saying that "developing some kind of uniform standard [as it relates to water] is very difficult given different geologies and different uses of water, different aquifers."

a. Do you agree with that statement?

Response: I am not familiar with the Administrator's statement. If confirmed, I will look forward to learning more about the issue.

47. This June, ORD announced it would abandon its flawed drinking water investigation in Pavillion, WY and would instead support a further investigation by the State of Wyoming.

a. Given the flawed science on display by the agency in Pavillion and ORD's withdrawal, will you exclude the agency's work and data prior to June 2013 from the agency's Congressionally-requested study on the relationship between hydraulic fracturing and drinking water? If not, why not?

Response: I am not familiar with the specific details of ORD's support of the Agency's Pavillion investigation. If confirmed, I look forward to learning about EPA's work in this area.

b. ORD abandoned its investigation, yet according to agency statements, continues to "stand behind its work and data." How can the agency reconcile these directly contradictory actions? How would you explain to the American people that continuing a flawed investigation is not worth taxpayer resources, yet the agency "stands behind" the work and data that it abandoned? If confirmed, will you correct the record and explain to the public that EPA does not stand behind flawed science?

Response: I am not familiar with the specific details of the agency's Pavillion investigation. If confirmed, I will look into this issue.

c. Are you aware of criticisms of EPA's work in Pavillion by other federal agencies? How would you respond to those criticisms?

Response: I am not aware of any specific criticisms from any agency.

d. How are ORD and the EPA regional office in Denver currently supporting the State of Wyoming's investigation?

Response: I am not aware of any specific details of the investigation.

48. Is there a reason, particularly as it relates to air science impacts (PM, ozone, etc.) that we don't see the agency using nonlinear threshold analysis? There are concerns that EPA's analysis is allowing the agency to count benefits that just don't exist, or otherwise set standards below naturally occurring background levels. We've seen this in chemical assessments as well, such as on dioxin and inorganic arsenic. How do we resolve the distance between theoretical benefits and empirical evidence?

Response: EPA's work to protect public health and the environment needs to be based on strong science. If confirmed, I will work with scientists within and outside of the agency to ensure that all of our work reflects the best possible science.

49. One of the most important responsibilities of the EPA Office of Research and Development is the development of health assessments for EPA's IRIS program. In September 2011, EPA issued its long-awaited "Toxicological Review of Trichloroethylene (CAS No. 79-01-6) in Support of Summary Information on the Integrated Risk Information System (IRIS)."

The IRIS Assessment contains a reference concentration ("RfC") of 0.0004 ppm (0.4 ppb or 2 J.Lg/m3) and a reference dose ("RfD") of 0.0005 mglkg/day for trichloroethylene (TCE). These are values that are considered by EPA to be protective for all noncancer critical effects. EPA's derivation of the RfC/RfD for TCE is based, in part, on Johnson *eta/.*, Threshold of Trichloroethylene Contamination in Maternal Drinking Waters Affecting Fetal Heart Development in the Rat, Environmental Health Perspectives 111: 289-92 (March 2003).

The RfC/RfD is within the range of background concentrations of TCE in urban air. There is a significant ongoing dispute among the EPA regions as to whether and how this RfC/RfD derived from Johnson *et al*.should be the basis for a short-term TCE exposure limit at Superfund sites. Thus, the proper interpretation and use of this non-GLP study in risk assessment is a question of the highest priority to EPA's Superfund program.

As noted in the peer review of a recent EPA "TSCA Chemicals Work Plan" assessment of TCE which was highly critical of EPA's reliance on Johnson *et al/.*, "[o]ne of the fundamental tenants in science is the reliability and reproducibility of results of scientific investigations."

The peer reviewers noted:

- **At least two GLP-compliant studies conducted under both EPA and OECD guidelines have been unable to reproduce the effect seen by Johnson *et al.*, despite the participation in one of the studies by Johnson herself.**

- **The dose-response relationship reported in Johnson *et al.* for doses spanning an extreme range of experimental dose levels is considered by many to be improbable, and has not been replicated by any other laboratory.**

- **The congenital heart defect incidence in control animals in Johnson *et al.* was 86 times the historical control incidence in Charles River rats.**

- **As California EPA noted in declining to rely upon Johnson *et* al, "These results are also not consistent with earlier developmental and reproductive toxicological studies done outside this lab in mice, rats, and rabbits. The other studies did not find adverse effects on fertility or embryonic development, aside from those associated with maternal toxicity (Hardin et al.,2004)."**

Is EPA concerned that the TCE IRIS Assessment appears to rely on an irreproducible study result? Is there any effort underway to correct this Assessment? Does this information presented seem to indicate that the EPA's IRIS program is no longer "crisis" and is being based on the best available science?

Response: I am not aware of any EPA effort to review the IRIS assessment for TCE. EPA's work to protect public health and the environment needs to be based on strong science. If confirmed, I will work with scientists within and outside of the agency to ensure that our work reflects the best possible science.

Senator James Inhofe

1. Dr. Burke, as head of the EPA's R&D Office, you are going to have responsibility for the Congressionally-requested study on the relationship between hydraulic fracturing and drinking water. The conference report mandating the study state that "the study [shall] be conducted through a transparent, peer-reviewed process that will ensure the validity and accuracy of the data." The EPA Science Advisory Board (SAB) has set up an ad hoc panel specifically to provide the peer review for the study and its components.

Will the SAB ad hoc panel peer review all of the reports and projects that are developed as part of the study?

Response: I am not familiar with the details of ORD's peer review plan for the study. If confirmed, I will look into this issue and support decisions that ensure valid and accurate data as well as transparency.

2. Dr. Burke, a few weeks ago the EPA Administrator was quoted saying that "developing some kind of uniform standard [as it relates to water] is very difficult given different geologies and different uses of water, different aquifiers."

Do you agree with this statement?

Response: I am not familiar with the Administrator's statement. If confirmed, I will look forward to learning more about the issue.

3. Dr. Burke, you have served as a member of EPA's Science Advisory Board. The SAB serves an important function especially in regard to providing advice on EPA's study on hydraulic fracturing and drinking water.

a. In your capacity on the SAB, did you have an opportunity to review EPA's study plan?

Response: As a member of the Charter Board of the Science Advisory Board, I did review the study plan. I submitted written comments on July 5, 2011. These comments are part of the public record and are available on the SAB website. The comments were generally supportive of the study plan and included suggestions for reaching out to local health officials and improving the evaluation of potential health risks to communities.

b. Do you agree that all of the individual components of the study should be deemed highly influential scientific assessments?

Response: I am not familiar with the EPA practices regarding defining a study as a highly influential scientific assessment. If confirmed I look forward to working with the scientific staff and learning more about these designations and their impact on the peer review process.

AL-15-000-3699

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

December 19, 2014

The Honorable Mathy Stanislaus
Assistant Administrator
Office of Solid Waste and Emergency Response
U.S. Environmental Protection Agency
Washington, DC 20460

Dear Assistant Administrator Stanislaus:

Thank you for appearing before the Committee on Environment and Public Works on December 11, 2014, at the hearing entitled, "Oversight of the Implementation of the President's Executive Order on Improving Chemical Facility Safety and Security." We appreciate your testimony and we know that your input will prove valuable as we continue our work on this important topic.

Enclosed are questions for you that have been submitted by Senators Boxer, Markey, Murray, and Enzi for the hearing record. Please submit your answers to these questions by COB December 31, 2014, to the attention of Drew Kramer, Senate Committee on Environment and Public Works, 410 Dirksen Senate Office Building, Washington, DC 20510. In addition, please provide the Committee with a copy of your answers via electronic mail to Drew_Kramer@epw.senate.gov. To facilitate the publication of the record, please reproduce the questions with your responses.

Again, thank you for your assistance. Please contact Jason Albritton of the EPW Committee's Majority staff at 202-224-8832, Bryan Zumwalt of the EPW Committee's Minority staff at 202-224-6176, Michael Waske of the HELP Committee's Majority staff at 202-224-5375, or Kyle Fortson of the HELP Committee's Minority staff at 202-224-6770 with any questions you may have. We look forward to reviewing your answers.

Sincerely,

Barbara Boxer
Chairman
Committee on Environment and Public Works

David Vitter
Ranking Member
Committee on Environment and Public Works

Tom Harkin
Chairman
Committee on Health, Education,
Labor, and Pensions

Lamar Alexander
Ranking Member
Committee on Health, Education,
Labor, and Pensions

Environment and Public Works Committee Hearing
December 11, 2014
Follow-Up Questions for Written Submission

Questions for Stanislaus

Questions from:

Senator Barbara Boxer

1. On what date do you commit to completing ALL of the Executive Order's directives within your Agency's jurisdiction?

2. Since 2002, the Chemical Safety Board (CSB) has recommended that ammonium nitrate hazards be incorporated into EPA's risk management program. Will EPA commit to address ammonium nitrate fertilizer hazards under its risk management program, and if so, when? Will implementation of these changes be completed before the President leaves office?

3. On March 5, 2014, I asked Administrator McCarthy to have the Working Group consider using EPA's existing authority under the Clean Water Act to address risks posed by above ground chemical storage tanks in the wake of the Freedom Industries spill. In your May 8, 2014 response to me, you assured me that the Working Group would consider exercising this authority. Despite your assurance, the Working Group's Status Report to the President does not even mention this authority. Will EPA commit to fully evaluate options for actions under Section 311(j)(1)(C) of the Clean Water Act to regulate above ground chemical storage tanks? If so, when will this analysis be complete? Will you commit to give me a complete report on your analysis?

4. Methyl mercaptan is a toxic chemical that recently killed 4 workers at the DuPont chemical plant in La Porte, Texas. In 1994, EPA tried to put methyl mercaptan on a list of chemicals that must be reported in EPA's Toxics Release Inventory, which is supposed to help communities better prepare for the risk of a chemical release. When industry challenged the listing, EPA agreed to withdraw it to avoid litigation [59 Fed. Reg. 43048, Aug. 22, 1994]. However, EPA also said that it would promptly act to address the questions about listing the chemical that were raised by industry. It has been 20 years since then, and EPA has not yet taken the action it promised to take. When will EPA act to ensure that methyl mercaptan is reported by chemical companies on their Toxics Release Inventory reports?

5. During the toxic chemical leak at the DuPont chemical plant in La Porte, Texas, last month, a facility employee called 911, but gave no useful details about the chemical released in his call with the 911 operator. In response to the 911 operator's question whether there was a risk to the public from toxic chemicals escaping the facility, he answered "No ma'am, it is not." When the first responders arrived, they were unable to enter the facility where the employees died because they did not have the proper personal protective gear. First responders need information to protect themselves and to most effectively respond to the accident.

    a. What actions will the Working Group take to ensure that first responders have accurate information before they arrive at the accident scene when there are toxic chemical releases?
    b. The Working Group's June 4, 2014 Report to the President states that first responders believe information sharing efforts need significant improvement, and that first responders want to be able to obtain the most-actionable information in a user-friendly format. What steps is the

Working Group taking to ensure the information provided to first responders is in an actionable and user-friendly format?

c. The Working Group's June 4, 2014 Report to the President states that a key lesson learned is that first responders want access to information about enforcement actions taken or violations discovered at facilities, in order to better understand and respond to hazards at chemical facilities. Has the Working Group taken any steps to make this information available to first responders? If not, what steps will the Working Group take to share this information in an easily accessible and user-friendly format?

d. In its Report to the President, the Working Group commits to share "certain data elements of CFATS, RMP, PSM, and MTSA data" with first responders and other state, local, and tribal entities. What specific data elements does the Working Group commit to provide first responders? How will that information be made available to first responders?

6. Given the number of accidents that have occurred since the President issued the Executive Order, including the recent fatal toxic gas release at the DuPont plant in Texas that killed four workers, has the urgency to prevent future disasters caused the EPA to expedite the rule-making process to ensure that new RMP rules are issued promptly? Has EPA considered issuing an Alert or other Guidance concurrently with a notice of proposed rulemaking?

7. After the tragic explosion at the fertilizer plant in West, Texas, the Government Accountability Office (GAO) conducted a review of the federal regulatory agencies' oversight of the safety of ammonium nitrate fertilizer. In the course of conducting that review, GAO was denied access by a number of States to EPCRA reporting data from facilities that handle ammonium nitrate. In addition, the Attorney General of Texas, now Governor-elect, issued a legal opinion arguing that State law allowed for the withholding from the public of information required to be reported under the federal EPCRA statute. When asked by the media how the state could justify withholding this information, he stated that members of the public could simply drive up to the chemical facilities and ask them directly.

   a. Is EPA aware of other instances in which access to EPCRA reporting data was restricted or refused? If so, please provide a list of all such instances, along with a description of what data was restricted or refused, who restricted or refused it, how and when EPA was made aware of the restriction or refusal, and what EPA did to resolve the problem.
   b. Will EPA commit to issuing guidance to States making clear that the federal EPCRA statute requires that this information be made public?

8. The Working Group coordinated a pilot in New York-New Jersey involving multiple agencies at the Federal, state, and local levels.
   a. What kinds of best practices or innovative methods were developed in the Region 2 Pilot Project developed under the Executive Order and what lessons were learned from the pilot?
   b. How and when will EPA and the other Working Group agencies apply these lessons in other regions of the country?
   c. The pilot specifically revealed "the need for Federal, State, and local partners to work together to increase industry's compliance with EPCRA requirements." After reviewing state data on reporting under EPCRA, EPA identified violations at 4 facilities in New York and 13 facilities in New Jersey. Is the Working Group taking steps to ensure that this process of information sharing to increase compliance with EPCRA requirements occurs in other regions? How does the Working Group propose to ensure that such information sharing continues to take place in the future?
   d. Please provide me with a copy of any report detailing the outcome of the pilot project.

9. What, if anything, has the EPA done to improve communities' access to information and participation during planning for emergency responses? Does the EPA have any plans to further improve this, along with coordination with local responders? If so, please describe all such plans along with a timeline for their completion.

10. The Executive Order directed the Working Group to look at existing statutory authorities, but also required your agency to make recommended legislative changes. The Working Group's report to the President does not contain any recommended legislative changes to the statutes governing EPA's oversight of chemical facility safety. Please provide the Committee with your recommended legislative changes that would improve safety at chemical facilities.

Questions from Senators Barbara Boxer and Edward J. Markey

11. Executive Order 13650 ordered a number of specific actions to be completed by the Working Group. For the following list of actions, please indicate: i) whether the action was completed as directed in the Executive Order; ii) if so, provide a copy of the plan, assessment, list, analysis, recommendations, proposal, options, determination, Request for Information, or Solicitation of Public Input/Comment; and, iii) if not, indicate the date on which the action will be completed as directed. In each response, please also describe how the Working Group had addressed each specific element within each of the specific actions required by the Executive Order.

    a. The **assessment** conducted by the Attorney General, through the head of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), into the feasibility of sharing data related to the storage of explosive materials with State Emergency Response Commissions (SERCs), Tribal Emergency Response Commissions (TERCs), Local Emergency Planning Committees (LEPCs), Tribal Emergency Planning Committees (TEPCs). (Sec. 3(b); Within 90 days).
    b. The **assessment** conducted by the Secretary of Homeland Security into the feasibility of sharing Chemical Facility Anti-Terrorism Standards (CFATS) data with SERCs, TEPCs, and LEPCs on a categorical basis. (Sec. 3(c); Within 90 days).
    c. A **list** of any changes determined to be needed to existing memorandums of understanding (MOUs) and processes between EPA and CSB, ATF and CSB, and the Occupational Safety and Health Administration (OSHA) and CSB for timely and full disclosure of information. Please provide copies of the current drafts of the revised MOUs; or, if it was deemed to be appropriate by the Working Group, a draft of the single model MOU developed with CSB in lieu of existing agreements. (Sec. 4(c); Within 90 days).
    d. The **analysis**, including **recommendations**, on the potential to improve information collection by and sharing between agencies to help identify chemical facilities which may not have provided all required information or may be non-compliant with Federal requirements to ensure chemical facility safety. (Sec. 5(a); Within 90 days).
    e. The **recommendations** for possible changes to streamline and otherwise improve data collection to meet the needs of the public and Federal, State, local, and tribal agencies (including those charged with protecting workers and the public), consistent with the Paperwork Reduction Act and other relevant authorities, including opportunities to lessen the reporting burden on regulated industries. (Sec. 5(c); Within 180 days).
    f. The **options** developed for improved chemical facility safety and security that identifies improvements to existing risk management practices through agency

programs, private sector initiatives, Government guidance, outreach, standards, and regulations. (Sec. 6(a)(i); Within 90 days).

g. The **list** of potential regulatory and legislative proposals to improve the safe and secure storage, handling, and sale of ammonium nitrate and identify ways in which ammonium nitrate safety and security can be enhanced under existing authorities. (Sec. 6(b); Within 90 days).

h. The **determination** of whether the EPA's Risk Management Program (RMP) and the OSHA's Process Safety Management Standard (PSM) can and should be expanded to address additional regulated substances and types of hazards, and the **plan**, including a timeline and resource requirements, to expand, implement, and enforce the RMP and PSM in a manner that addresses the additional regulated substances and types of hazards. (Sec. 6(c); Within 90 days).

i. The **list** of chemicals, including poisons and reactive substances that should be considered for addition to the CFATS Chemicals of Interest list. (Sec. 6(d); Within 90 days).

j. The **list** of changes that need to be made in the retail and commercial grade exemptions in the PSM Standard and the Request for Information designed to identify issues related to modernization of the PSM Standard and related standards necessary to meet the goal of preventing major chemical accidents. (Sec. 6(e); Within 90 days).

Questions from:

Senator Edward J. Markey

1) In 2009, during consideration of H.R. 2868, the Administration went through an inter-agency process to establish policy principles related to the use of inherently safer technology. Those principles are pasted below, and were delivered in Congressional testimony by Peter S. Silva, then-Assistant Administrator for Water at EPA as well as a witness representing the Department of Homeland Security. While these principles related to a piece of legislation that was not enacted and thus also not referred to in E.O. 13650, some of the principles do represent general policy statements. You did not fully or directly respond to these questions when I submitted them to you following our March 2014 hearing. Please do so now.

    a. Does the Administration continue to believe that all high-risk chemical facilities should assess IST methods and report the assessment to the federal government? If not, why not (and please provide copies of documents that establish the Administration's new policy)?
    b. Does the Administration continue to believe that regulators should have the authority to direct the highest risk chemical facilities to implement IST methods if such methods enhance overall security, are feasible, and, in the case of water sector facilities, consider public health and environmental requirements? If not, why not (and please provide copies of documents that establish the Administration's new policy)?
        i. The Administration supports consistency of IST approaches for facilities regardless of sector.
        ii. The Administration believes that all high-risk chemical facilities, Tiers 1-4, should assess IST methods and report the assessment in the facilities' site security plans. Further, the appropriate regulatory entity should have the authority to require facilities posing the highest degree of risk (Tiers 1 and 2) to implement IST method(s) if such methods enhance overall security, are feasible, and, in the case of water sector facilities, consider public health and environmental requirements.
        iii. For Tier 3 and 4 facilities, the appropriate regulatory entity should review the IST assessment contained in the site security plan. The entity should be authorized to provide recommendations on implementing IST, but it would not require facilities to implement the IST methods.
        iv. The Administration believes that flexibility and staggered implementation would be required in implementing this new IST policy. DHS, in coordination with EPA, would develop an IST implementation plan for timing and phase-in at water facilities designated as high-risk chemical facilities. DHS would develop an IST implementation plan for high-risk chemical facilities in all other applicable sectors."

2) The Department of Homeland Security[1] and EPA[2] have both repeatedly stated in Congressional testimony that the exclusion of drinking water and wastewater treatment facilities from federal chemical security regulations is a critical security gap.

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[1] https://www.dhs.gov/news/2011/03/30/written-testimony-nppd-house-committee-energy-and-commerce-hearing-titled-hr-908,

a. Does EPA still agree with its prior statements? If not, please explain why not
b. In 2009, the Administration also believed that "EPA should be the lead agency for chemical security for both drinking water and wastewater systems, with DHS supporting EPA's efforts." Does EPA still agree with this statement, and if not, why not, given the nexus between the requirements for safe drinking water and treatment of wastewater and the need to secure and protect the public from the chemicals that are often used to achieve these requirements?
c. Will EPA use its RMP, Safe Drinking Water Act or Clean Water Act authority to require upgrades to security for drinking and wastewater facilities in light of the long-standing critical security gap for these facilities? Please provide me with the specific actions EPA plans to take along with a timeline for their completion. If not, why not?
d. Numerous drinking and wastewater facilities have successfully and inexpensively incorporated IST into their operations, including the replacement of chlorine gas with sodium hypochlorite or UV systems. Does EPA believe that the adoption of IST should be considered by all drinking and wastewater facilities as one measure that could address the critical security gap that exists for these facilities? Why or why not?

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http://democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Beers-EE-Drinking-Water-System-Security-CFAT-Act-2009-10-1.pdf

[2] http://www.epa.gov/ocir/hearings/testimony/111_2009_2010/2010_0728_ccd.pdf, http://www.epa.gov/ocirpage/hearings/testimony/111_2009_2010/2009_1001_pss.pdf

Questions from:

Senator Patty Murray

1. As you know, the Emergency Planning and Community Right-to-Know Act was passed in 1986, and provides resources to plan for chemical emergencies. Since its enactment there have been a large number of incidents, highlighting the need for substantial emergency planning.

    a. Do the recent events at the DuPont industrial plant and the West Fertilizer Company facility in Texas warrant a statutory update of the Emergency Planning and Community Right-to-Know Act?

        i. How have the owners of chemical facilities contributed to the training of first responders to potential accidents? How has the agency ensured that first responders are receiving adequate training?

    b. How have Congress' repeated cuts to the EPA's budget and governing from crisis to crisis impacted the agency's ability to reach out to stakeholders and gather meaningful information? If Congress fails to repeal sequestration for the next fiscal year, how will implementation of the President's executive order be impacted?

Questions from:

Senator Michael B. Enzi

1. The Federal Action Plan outlined in the "Action to Improve Chemical Facility Safety and Security" report includes, under Item 4, 'Expanding Tools to Assist SERCs, TERCs, LEPCs, and TEPCs in Collecting, Storing, and Using Chemical Facility Information,' the intention to improve the Computer-Aided Management of Emergency Operations (CAMEO) hazardous material response software in order to expand analytical capabilities and promote information sharing. My understanding is that this is being developed at the EPA. Is the EPA considering options for enhancing, supplementing, or superseding CAMEO that include tools, apps, or software developed by the private sector?

    a. Has the EPA considered cost-savings that could be derived from allowing the private sector to provide this resource?

2. The "Action to Improve Chemical Facility Safety and Security" report included discussion on information sharing among stakeholders in the New York/New Jersey pilot program. Can you clarify how information sharing will be structured going forward, and what specific types of data will be shared with federal, state, tribal, regional, local, and other stakeholders?

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

MAR 2 6 2015

OFFICE OF CONGRESSIONAL AND INTERGOVERNMENTAL RELATIONS

The Honorable James M. Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find the U.S. Environmental Protection Agency's responses to the Committee's Questions for the Record following the December 11, 2014, hearing entitled "Oversight of the Implementation of the President's Executive Order on Improving Chemical Facility Safety and Security."

I hope this information is helpful to you and the members of the Committee. If you have further questions, please contact me or your staff may contact Carolyn Levine in my office at levine.carolyn@epa.gov or (202) 564-1859.

Sincerely,

Laura J Vaught

Laura Vaught
Associate Administrator

Enclosure

U.S. Environmental Protection Agency
Responses to Questions for the Record
from the
Senate Environment and Public Works Committee Hearing
December 11, 2014

Questions from Senator Boxer:

1. On what date do you commit to completing ALL of the Executive Order's directives within your Agency's jurisdiction?

Response: The agency remains on track to meet the timeframes in EO 13650, as referenced in the federal Working Group's Report to the President.

2. Since 2002, the Chemical Safety Board (CSB) has recommended that ammonium nitrate hazards be incorporated into EPA's risk management program. Will EPA commit to address ammonium nitrate fertilizer hazards under its risk management program, and if so, when? Will implementation of these changes be completed before the President leaves office?

Response: Ammonium nitrate (AN) poses a unique challenge because it is a high-volume chemical used in both the fertilizer and explosives industries. Because of the uses of ammonium nitrate, the Occupational Safety and Health Administration (OSHA), the EPA, the Department of Homeland Security (DHS), and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) all have federal regulations that govern its management and, therefore, any efforts the EPA pursues regarding AN must be coordinated with these agencies and departments to ensure that the most appropriate vehicle for any additional regulation is utilized.

Ammonium nitrate is currently covered under the Emergency Planning, Community Right to Know Act (EPCRA), which requires facilities to report the Safety Data Sheet (SDS) and annual inventory information such as chemical name/description, physical and health hazards, pounds of the chemical, and type of storage, storage conditions, and location to State Emergency Planning Commissions (SERCs), Tribal Emergency Response Commissions (TERCs), Tribal Emergency Planning Commissions (TEPCs), Local Emergency Response Commissions (LEPCs), and fire departments. This information should be used to develop local emergency plans and also be shared with the community.

With respect to EPA regulation, the EPA issued a Request for Information (RFI) seeking, among other Risk Management Program (RMP) updates, public input on whether regulation of ammonium nitrate under the RMP is appropriate given the Clean Air Act authorities and the availability of regulatory options under OSHA's Process Safety Management (PSM) standard. The EPA is in the process of reviewing responses to the RFI and expects to issue a proposed rulemaking on the RMP more broadly by Summer 2015.

In the meantime, the EPA, OSHA, and ATF expect to update the *Chemical Advisory: Safe Storage, Handling, and Management of Ammonium Nitrate* published on August 30, 2013, in

early June 2015. This advisory, jointly prepared by the EPA, OSHA, and ATF, outlined regulatory requirements and best practices for the storing and handling of ammonium nitrate. In the future update, the agencies will consider new information learned as a result of the investigation of the West, Texas, incident, newly developed procedures and practices, new technical information, and clarifications and corrections.

3. On March 5, 2014, I asked Administrator McCarthy to have the Working Group consider using EPA's existing authority under the Clean Water Act to address risks posed by above ground chemical storage tanks in the wake of the Freedom Industries spill. In your May 8, 2014 response to me, you assured me that the Working Group would consider exercising this authority. Despite your assurance, the Working Group's Status Report to the President does not even mention this authority. Will EPA commit to fully evaluate options for actions under Section 311(j)(1)(C) of the Clean Water Act to regulate above ground chemical storage tanks? If so, when will this analysis be complete? Will you commit to give me a complete report on your analysis?

Response: As referenced in the federal Working Group's report to the President, the EPA is engaging with state drinking water administrators to encourage them to revisit existing source water assessments, review and update existing plans using information available through the various chemical regulatory programs, and determine whether adequate warning, preparedness, and preventive measures are in place.

The EPA Administrator recently announced that the Source Water Collaborative, a group of 25 national organizations united to protect America's sources of drinking water, launched a call to action that includes actions for water utilities to partner with landowners and businesses to protect local source water, and make sure they have plans in place with emergency responders and local governments to update source water assessments.

The agency is also engaging with states to assess actions to protect drinking water sources using Drinking Water Mapping Application for Protecting Source Waters (DWMAPS) and chemical plant information provided to local responders. This will enable local responders to identify potential risks to drinking water sources from potential spills from chemical plants and actions to prevent/minimize such risk.

Additionally, the EPA is committed to providing critical facility information directly to the people who need it most - local emergency planners and first responders - and helping them use the information to effectively prepare for and respond to chemical releases. Based on broad stakeholder feedback, the EPA believes that getting critical information to local communities in a timely manner is where we need to focus. At this time, the EPA is not planning to update the existing Spill Prevention, Control and Countermeasure (SPCC) rule.

EPCRA and community right-to-know regulations provide states and local communities with important chemical facility information and the authority to work with and, as needed, inspect these facilities to ensure compliance with the requirements, help them gain an understanding of the chemical risks at the facility, and know what steps to take to prepare for and respond to those risks. When communities work with their states officials who have the lead in overseeing

operations at facilities, they are better able to jointly address and prepare for potential risks from chemical facilities. For example, in the aftermath of the chemical release into the Elk River in West Virginia in 2014, the state of Oklahoma developed a GIS layer that identified Tier II chemical facility locations (as reported in compliance with the EPCRA requirements) and nearby public drinking water intakes and provided that information to their LEPCs and public water systems to ensure their local emergency planning efforts included this information and took steps to reduce these risks.

4. Methyl mercaptan is a toxic chemical that recently killed 4 workers at the DuPont chemical plant in La Porte, Texas. In 1994, EPA tried to put methyl mercaptan on a list of chemicals that must be reported in EPA's Toxics Release Inventory, which is supposed to help communities better prepare for the risk of a chemical release. When industry challenged the listing, EPA agreed to withdraw it to avoid litigation [59 Fed. Reg. 43048, Aug. 22, 1994]. However, EPA also said that it would promptly act to address the questions about listing the chemical that were raised by industry. It has been 20 years since then, and EPA has not yet taken the action it promised to take. When will EPA act to ensure that methyl mercaptan is reported by chemical companies on their Toxics Release Inventory reports?

Response: Methyl mercaptan does in fact remain on the EPCRA Section 302 Extremely Hazardous Substances list and is subject to the emergency planning reporting requirements under EPCRA sections 311 and 312 (a 500 pound reporting threshold). The reporting limitation you reference regarding methyl mercaptan applies to the annual reporting requirements under EPCRA section 313 (Toxics Release Inventory – TRI). States, LEPCs and local responders currently have the information they need under sections 311 and 312 of EPCRA (e.g. the amounts and locations of methyl mercaptan handled at a facility) to carry out their emergency planning and community right-to-know obligations.

5. During the toxic chemical leak at the DuPont chemical plant in La Porte, Texas, last month, a facility employee called 911, but gave no useful details about the chemical released in his call with the 911 operator. In response to the 911 operator's question whether there was a risk to the public from toxic chemicals escaping the facility, he answered "No ma'am, it is not." When the first responders arrived, they were unable to enter the facility where the employees died because they did not have the proper personal protective gear. First responders need information to protect themselves and to most effectively respond to the accident.

a. What actions will the Working Group take to ensure that first responders have accurate information before they arrive at the accident scene when there are toxic chemical releases?

b. The Working Group's June 4, 2014 Report to the President states that first responders believe information sharing efforts need significant improvement, and that first responders want to be able to obtain the most-actionable information in a user-friendly format. What steps is the Working Group taking to ensure the information provided to first responders is in an actionable and user-friendly format?

c. The Working Group's June 4, 2014 Report to the President states that a key lesson learned is that first responders want access to information about enforcement actions taken or violations discovered at facilities, in order to better understand and respond to hazards at chemical facilities. Has the Working Group taken any steps to make this information available to first responders? If not, what steps will the Working Group take to share this information in an easily accessible and user-friendly format?

d. In its Report to the President, the Working Group commits to share "certain data elements of CFATS, RMP, PSM, and MTSA data" with first responders and other state, local, and tribal entities. What specific data elements does the Working Group commit to provide first responders? How will that information be made available to first responders?

Response: The ability to communicate risks at chemical facilities with local first responders has been a key component of the Working Group's effort to improve chemical facility safety and security under the President's Executive Order. In response to the needs identified by LEPCs, SERCs, and first responders, the EPA held 32 workshops throughout Texas, Arkansas, Louisiana, Oklahoma, and New Mexico to reinforce the authorities, roles, and responsibilities under EPCRA and identify potential barriers to meeting requirements for developing and implementing a local emergency response plan. In order to respond to requests from SERCs and TERCs for assistance in clarifying EPCRA responsibilities to support emergency preparedness and planning efforts, the EPA is also developing informational factsheets for SERCs/TERCs and LEPCs/TEPCs and industry to assist them in understanding and meeting their responsibilities under EPCRA.

The EPA continues to upgrade its Computer-Aided Management of Emergency Operations (CAMEO) suite of applications, available online to emergency planners, first responders, and the general public. These upgrades will help emergency planners and first responders to access, store, and evaluate critical chemical facility and multi-agency regulatory data and information for developing emergency plans. Additional enhancements to CAMEO will expand analytical capability for LEPCs/TEPCs and promote information sharing. These enhancements include: ensuring that emergency planners and first responders have chemical and regulatory information on all Chemical Facility Anti-Terrorism Standard (CFATS) regulated facilities; adding new data fields to ensure that LEPCs integrate all available chemical facility information into their local CAMEO database; and developing and providing a complete web-based version of CAMEO that states can host on their own servers. This allows LEPCs an online method of accessing the state Tier II facility/chemical data and allows facilities to report online.

The President's FY 2016 budget includes a $12 million increase for the risk management program in order to enhance the outreach and emergency planning technical assistance to local communities and accelerate the pace of CAMEO upgrades.

The EPA is also working to improve coordination at all levels of the regulator community and update the tools at their disposal. In August of 2013, a pilot program was launched in New York and New Jersey to evaluate best practices and test innovative methods for interagency collaboration on chemical facility safety and security. The pilot program brought together all

levels of government with the first responder community, along with other stakeholders, to identify actions for improving chemical facility safety and security. The resulting Standard Operating Procedures (SOPs) and lessons learned from the pilot program have helped to advance chemical facility safety. Specifically, the pilot enhanced areas of risk management by increasing local access to high-risk facility information to support more effective emergency planning and response; improving the sharing of inspection information to inform LEPC emergency planning; and identifying chemical facility points of contact to support local emergency response. Additionally, the pilot facilitated a better understanding of the information needs of first responders and communities before and during a chemical release, and SOPs have been established to develop and share best practices on sharing EPCRA Tier II and other critical information with first responders, and developing procedures to take advantage of existing drills and exercise opportunities to support and test existing LEPC contingency plans.

The EPA's Substance Registry Services (SRS) tool assists facilities housing chemical substances to determine their regulatory requirements by providing information about chemical substances tracked or regulated by the EPA or other sources. The SRS has been updated to include CFATS and Process Safety Management (PSM)-covered substances, which allows facilities to be informed about potential regulatory coverage under PSM and CFATS in addition to other EPA regulatory programs. SRS was also expanded to include Maritime Transportation Security Act (MTSA) and ATF's List of Explosive Materials based on the needs of industry members, state and federal regulators, and other stakeholders. An analysis has been done comparing the list against SRS to identify those substances that are in SRS versus not in SRS.

Additionally, the EPA's Facility Registry Service (FRS) tool integrates facility data from nearly 90 different federal and state systems, allowing users to compare facilities between systems, including chemical data and compliance history. The FRS has been updated to include facilities that complete a DHS Top-Screen submission for CFATS, which allows federal departments and agencies to identify: (1) facilities that are covered by multiple federal regulatory entities, and (2) potentially non-compliant facilities, often referred to as outliers.

6. Given the number of accidents that have occurred since the President issued the Executive Order, including the recent fatal toxic gas release at the DuPont plant in Texas that killed four workers, has the urgency to prevent future disasters caused the EPA to expedite the rule-making process to ensure that new RMP rules are issued promptly? Has EPA considered issuing an Alert or other Guidance concurrently with a notice of proposed rulemaking?

Response: OSHA and the Chemical Safety Board are still investigating the circumstances regarding the DuPont facility incident.

Based upon information gathered through the EPA's implementation of the RMP program, recommendations and practices developed by process safety professionals, and stakeholder comments to the EPA's RFI, the EPA plans to propose amendments to the RMP regulation in 2015 with the intent to finalize such amendments in 2016, depending on any potential additional information. These amendments would be complimented by alerts and guidance documents.

The RMP regulation has been effective in preventing and mitigating chemical incidents in the United States and protecting human health and the environment from chemical risks and hazards. However, major incidents highlight the importance of reviewing and evaluating current practices and regulatory requirements and applying lessons learned to continuously advance process safety management.

7. After the tragic explosion at the fertilizer plant in West, Texas, the Government Accountability Office (GAO) conducted a review of the federal regulatory agencies' oversight of the safety of ammonium nitrate fertilizer. In the course of conducting that review, GAO was denied access by a number of States to EPCRA reporting data from facilities that handle ammonium nitrate. In addition, the Attorney General of Texas, now Governor-elect, issued a legal opinion arguing that State law allowed for the withholding from the public of information required to be reported under the federal EPCRA statute. When asked by the media how the state could justify withholding this information, he stated that members of the public could simply drive up to the chemical facilities and ask them directly.

a. Is EPA aware of other instances in which access to EPCRA reporting data was restricted or refused? If so, please provide a list of all such instances, along with a description of what data was restricted or refused, who restricted or refused it, how and when EPA was made aware of the restriction or refusal, and what EPA did to resolve the problem.

b. Will EPA commit to issuing guidance to States making clear that the federal EPCRA statute requires that this information be made public?

Response: Under EPCRA sections 311 and 312, covered facilities *must* provide chemical information to LEPCs and first responders for emergency planning and preparedness. The EPA does not have information on instances where governmental entities or facilities may have limited or failed to provide EPCRA reporting data to the local community.

Regarding public access to facility and hazardous chemical information, EPCRA section 312 provides that the owner or operator of any facility required to prepare a Safety Data Sheet (SDS) for a hazardous chemical under OSHA shall submit to the SERC, LEPCs, and fire departments an annual inventory of the SDS hazardous chemicals present at the facility during the preceding calendar year. This annual inventory is commonly referred to as the Tier II form. Pursuant to EPCRA Sec. 312(e)(3) and EPCRA Sec. 324(a), Tier II information for a specific facility may be obtained by sending a written request to the SERC or the LEPC. If the SERC or LEPC does not have the requested Tier II information, they shall obtain it from the facility on behalf of the requestor. The EPA is developing factsheets and online training for SERCs/TERCs and LEPCs/TEPCs to assist them in clarifying, understanding and meeting their responsibilities under EPCRA.

8. The Working Group coordinated a pilot in New York-New Jersey involving multiple agencies at the Federal, state, and local levels.

a. What kinds of best practices or innovative methods were developed in the Region 2 Pilot Project developed under the Executive Order and what lessons were learned from the pilot?

b. How and when will EPA and the other Working Group agencies apply these lessons in other regions of the country?

c. The pilot specifically revealed "the need for Federal, State, and local partners to work together to increase industry's compliance with EPCRA requirements." After reviewing state data on reporting under EPCRA, EPA identified violations at 4 facilities in New York and 13 facilities in New Jersey. Is the Working Group taking steps to ensure that this process of information sharing to increase compliance with EPCRA requirements occurs in other regions? How does the Working Group propose to ensure that such information sharing continues to take place in the future?

d. Please provide me with a copy of any report detailing the outcome of the pilot project.

Response: In August of 2013, a pilot program was launched in New York and New Jersey to evaluate best practices and test innovative methods for interagency collaboration on chemical facility safety and security. The pilot program brought together all levels of government with the first responder community, along with other stakeholders to identify actions for improving chemical facility safety and security. The resulting SOPs and lessons learned from the pilot program have helped to advance chemical facility safety. Specifically, the pilot enhanced areas of risk management by increasing local access to high-risk facility information to support more effective emergency planning and response; improving the sharing of inspection information to inform LEPC emergency planning and enforcement; and identifying chemical facility points of contact to support local emergency response.

Additionally, the pilot facilitated a better understanding of the information needs of first responders and communities before and during a chemical release, and SOPs have been established to develop and share best practices on sharing EPCRA Tier II and other critical information with first responders, and developing procedures to take advantage of existing drills and exercise opportunities to support and test existing LEPC contingency plans. Other EPA regional offices are collaborating with their federal partners to review the SOPs and to adopt the pilot SOPs or to tailor and establish their own.

9. What, if anything, has the EPA done to improve communities' access to information and participation during planning for emergency responses? Does the EPA have any plans to further improve this, along with coordination with local responders? If so, please describe all such plans along with a timeline for their completion.

Response: In response to the needs identified by LEPCs and SERCs, the EPA is taking a number of steps to strengthen and further support the state and local infrastructure and ensure stakeholder involvement. The EPA held 32 workshops for LEPCs throughout Texas, Arkansas, Louisiana, Oklahoma, and New Mexico to reinforce their authorities, roles, and responsibilities

under EPCRA and identify barriers to meeting their requirement for developing and implementing a local emergency response plan.

Another issue consistently raised by SERCs and LEPCs was the need for training. The EPA is moving forward on developing online EPCRA training modules for SERCs/TERCs and LEPCs/TEPCs. This training is intended to reinforce their authorities and roles to meet their responsibilities under EPCRA for the development and implementation of local emergency response plans, and is on schedule for completion by June 6, 2015. In addition, the EPA is working to update, and revise as necessary, planning and response guidance materials for SERCs and LEPCs. This will help ensure SERCs/TERCs and LEPCs/TEPCs have the latest information in a format that allows them to share and exchange among themselves and with other organizations and stakeholders.

In order to respond to requests from SERCs and TERCs for assistance in clarifying EPCRA responsibilities to support emergency preparedness and planning efforts, the EPA is also developing factsheets for SERCs/TERCs and LEPCs/TEPCs and industry to assist them in understanding and meeting their responsibilities under EPCRA. Further, the EPA established an email list-serve to provide monthly Working Group updates to SERCs/TERCs to keep them informed about upcoming conference and meetings, new guidance and other materials, and other EO-related information they will be receiving. The agency is on track to implement all of the short and medium term EPA actions in the federal Wording Group Action Plan related to strengthening community planning and preparedness.

10. The Executive Order directed the Working Group to look at existing statutory authorities, but also required your agency to make recommended legislative changes. The Working Group's report to the President does not contain any recommended legislative changes to the statutes governing EPA's oversight of chemical facility safety. Please provide the Committee with your recommended legislative changes that would improve safety at chemical facilities.

Response: As discussed in the Working Group's Report to the President, the EPA's efforts are focused on modernizing EPA's regulations and guidances. The EPA is not recommending legislative changes of its own authorizing statutes at this time, but continues to support the other legislative recommendations referenced in the Report.

Questions from Senators Barbara Boxer and Edward Markey:

1. Executive Order 13650 ordered a number of specific actions to be completed by the Working Group. For the following list of actions, please indicate: i) whether the action was completed as directed in the Executive Order; ii) if so, provide a copy of the plan, assessment, list, analysis, recommendations, proposal, options, determination, Request for Information, or Solicitation of Public Input/Comment; and, iii) if not, indicate the date on which the action will be completed as directed. In each response, please also describe how the Working Group had addressed each specific element within each of the specific actions required by the Executive Order.

a. The assessment conducted by the Attorney General, through the head of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), into the feasibility of sharing data related to the storage of explosive materials with State Emergency Response Commissions (SERCs), Tribal Emergency Response Commissions (TERCs), Local Emergency Planning Committees (LEPCs), Tribal Emergency Planning Committees (TEPCs). (Sec. 3(b); Within 90 days).

Response: Each of the requirements of the EO were completed within the timeframe designated in the Executive Order as noted in the Progress Updates provided to Congress in December 2013, and February 2014, which can be found at: https://www.osha.gov/chemicalexecutiveorder/index.html. The Report to the President issued on June 6, 2014, included the findings, lessons learned, actions taken by that date, prioritized next steps, and the path forward. As noted in the report, the federal Working Group is working with the SERCs, TERCs, LEPCs, and TEPCs on information sharing and will be updating various guidance and regulations in accordance with the schedule set forth in the Federal Action Plan on pages xiii through xviii.

Regarding the storage of explosive materials, following the issuance of the Report to the President, the Chemical EO Working Group has been addressing data-sharing related to the storage of explosive materials. As the owner of data related to explosive materials, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) has taken the lead on this issue. The EPA defers to ATF to address data sharing related to the storage of explosive materials.

b. The assessment conducted by the Secretary of Homeland Security into the feasibility of sharing Chemical Facility Anti-Terrorism Standards (CFATS) data with SERCs, TEPCs, and LEPCs on a categorical basis. (Sec. 3(c); Within 90 days).

Response: Each of the requirements of the EO were completed within the timeframe designated in the Executive Order as noted in the Progress Updates provided to Congress in December 2013, and February 2014. The Report to the President issued on June 6, 2014, included the findings, lessons learned, actions taken by that date, prioritized next steps, and the path forward.

With respect to sharing CFATS data, following the issuance of the Report to the President, the Chemical EO Working Group has been developing a mechanism and procedures for sharing CFATS data. As the owner of CFATS data, the Department of Homeland Security has taken the lead on this issue. The EPA defers to DHS to address sharing of CFATS data.

c. A list of any changes determined to be needed to existing memorandums of understanding (MOUs) and processes between EPA and CSB, ATF and CSB, and the Occupational Safety and Health Administration (OSHA) and CSB for timely and full disclosure of information. Please provide copies of the current drafts of the revised MOUs; or, if it was deemed to be appropriate by the Working Group, a draft of the single model MOU developed with CSB in lieu of existing agreements. (Sec. 4(c); Within 90 days).

Response: The EPA recommended continued implementation of the current EPA-CSB MOU. The Department of Justice is continuing deliberations with the CSB regarding federal department and agency MOU development and implementation.

d. The analysis, including recommendations, on the potential to improve information collection by and sharing between agencies to help identify chemical facilities which may not have provided all required information or may be non-compliant with Federal requirements to ensure chemical facility safety. (Sec. 5(a); Within 90 days).

Response: Each of the requirements of the EO were completed within the timeframe designated in the Executive Order as noted in the Progress Updates provided to Congress in December 2013, and February 2014. The Report to the President issued on June 6, 2014, included the findings, lessons learned, actions taken by that date, prioritized next steps, and the path forward.

In order to improve data sharing among federal departments and agencies used to identify potentially noncompliant facilities, prior to issuing the Report to the President, the EPA and DHS adopted new procedures to identify facilities that, based on their required filings, could possess threshold levels of CFATS Chemicals of Interest but have not yet filed required Top-Screen information with DHS or a required Risk Management Plan (RMP) with the EPA.

Another key step to assist federal departments and agencies in identifying non-compliant facilities and/or other potential compliance issues is linking data from multiple agencies. Since the issuance of the Report to the President, the EPA's Facility Registry Service (FRS) integrated facility data from nearly 90 different federal and state systems, allowing users to compare facilities between systems, including chemical data and compliance history. The FRS has been updated to include facilities that complete a DHS Top-Screen submission for CFATS, which allows federal departments and agencies to identify: (1) facilities that are covered by multiple federal regulatory entities, and (2) potentially non-compliant facilities, often referred to as outliers.

DHS and the EPA also initiated a process to compare the CFATS 'Top Screen' database and the RMP database to determine if the CFATS database included facilities that should have also reported under the RMP chemical accident prevention program. As a result of this effort, the EPA contacted hundreds of facilities to request information and visited some facilities to help determine whether the facility meets criteria to implement a risk management program requiring submittal of a risk management plan. Following this extensive review, fewer than 15 non-filing facilities were identified and the EPA has worked with these facilities to ensure they comply with the rule. This information indicates that the vast majority of CFATS-covered facilities are reporting under the RMP program.

e. The recommendations for possible changes to streamline and otherwise improve data collection to meet the needs of the public and Federal, State, local, and tribal agencies (including those charged with protecting workers and the public), consistent with the Paperwork Reduction Act and other relevant authorities, including opportunities to lessen the reporting burden on regulated industries. (Sec. 5c); Within 180 days).

Response: Each of the requirements of the Executive Order were completed within the timeframe designated in the executive order as noted in the Progress Updates provided to Congress in December 2013, and February 2014. The Report to the President issued on June 6, 2014, included the findings, lessons learned, actions taken by that date, prioritized next steps, and the path forward.

The EPA continues to work with stakeholders, including federal, state, local, and tribal agencies as well as the public and industry, to identify ways to improve data collection and sharing while lessening the burden on regulated entities. Specifically, the EPA is working with NOAA to enhance the Computer-Aided Management of Emergency Operations (CAMEO) suite of applications, available online to emergency planners and first responders, to assist them in planning for and responding to chemical emergencies. These upgrades will help emergency planners and first responders to better access, store, and evaluate critical chemical facility and multi-agency regulatory data and information for developing emergency plans.

Additional enhancements to CAMEO will expand analytical capability for LEPCs/TEPCs and promote information sharing by: ensuring that emergency planners and first responders have chemical and regulatory information on all CFATS regulated facilities; adding new data fields to ensure that LEPCs integrate all available chemical facility information into their local CAMEO database; and developing and providing a complete web-based version of CAMEO that states can host on their own servers. This allows LEPCs an online method of accessing the state Tier II facility/chemical data and allows facilities to report online. Additionally, when the EPA proposes any changes to the RMP regulation to advance safety, we will look at potential opportunities to eliminate unnecessary information collected in the Risk Management Plans and will provide any changes in data collection.

f. The options developed for improved chemical facility safety and security that identifies improvements to existing risk management practices through agency programs, private sector initiatives, Government guidance, outreach, standards, and regulations. (Sec. 6(a)(i); Within 90 days).

Response: To meet the directive of the EO to modernize key policies, regulations, and standards, the Working Group published a preliminary list of options for improving chemical facility safety and security for stakeholder comment on January 3, 2014. The options identified resulted from reviewing existing programs, recommendations from the safety and security communities, and feedback from the EO listening sessions as well as reviewing investigation reports of major incidents.

As a result of stakeholder comments, the Working Group plan for modernizing policies and regulations are detailed in the Report to the President. As a result of this effort, the EPA issued an RFI seeking comment on potential changes to the RMP regulation with the expectation to issue a proposed rule in the summer of 2015 and expects to issue updated guidance on issues such as safer alternatives and AN handling and storage. The EPA will continue to engage with the chemical industry and professional organizations on private sector safety initiatives such as consensus safety codes and standards.

g. The list of potential regulatory and legislative proposals to improve the safe and secure storage, handling, and sale of ammonium nitrate and identify ways in which ammonium nitrate safety and security can be enhanced under existing authorities. (Sec. 6(b); Within 90 days).

Response: On August 30, 2013, the EPA, the Occupational Safety and Health Administration, and the Bureau of Alcohol, Tobacco, Firearms and Explosives released a chemical advisory that provides information to communities, workers, first responders and commercial sectors on the hazards of ammonium nitrate (AN) storage, handling, and management. To further bolster these efforts, in February 2014, Assistant Secretary of Labor for Occupational Safety and Health, Dr. David Michaels, signed a letter that was circulated by agricultural trade associations to provide more than 7,000 employers with legal requirements and best practice recommendations for safely storing and handling ammonium nitrate.

OSHA is currently developing rulemaking options to better cover AN hazards through either the PSM standard or improvements to the Explosives and Blasting Agents standard. As OSHA develops its approach to improve workplace safety associated with ammonium nitrate hazards, the EPA will consider if additional action to protect the community is needed to complement OSHA regulations. As far as non-regulatory approaches are concerned, the EPA, OSHA, and ATF plan to update the *Chemical Advisory: Safe Storage, Handling, and Management of Ammonium Nitrate* (published on August 30, 2013) in June of 2015, which will include new information resulting from the West, Texas, incident investigation, newly developed procedures and practices, new technical information, and clarifications and corrections.

h. The determination of whether the EPA's Risk Management Program (RMP) and the OSHA's Process Safety Management Standard (PSM) can and should be expanded to address additional regulated substances and types of hazards, and the plan, including a timeline and resource requirements, to expand, implement, and enforce the RMP and PSM in a manner that addresses the additional regulated substances and types of hazards. (Sec. 6(c); Within 90 days).

Response: To meet the directive of the EO to modernize key policies, regulations, and standards, the Working Group published a preliminary list of options for improving chemical facility safety and security for stakeholder comment on January 3, 2014. The options identified resulted from reviewing existing programs, recommendations from the safety and security communities, and feedback from the EO listening sessions as well as reviewing investigation reports of major incidents. Drawing on stakeholder comment, the Working Group developed a plan for modernizing policies, which is laid out in the May 2014, Report for the President *Actions To Improve Chemical Facility Safety and Security – A Shared Commitment.*

The RMP regulation has been effective in helping to prevent and mitigate chemical facility incidents in the United States and protecting human health and the environment from chemical risks and hazards. However, major incidents highlight the importance of reviewing and evaluating current practices and regulatory requirements and applying lessons learned to continuously advance process safety management. In order to gather the information necessary to proceed with regulatory modernization of RMP and retain close coordination with OSHA on

its implementation of the PSM standard, the EPA published a RFI on July 29, 2014. The RFI sought public input on 19 process safety and risk management issues relevant to the RMP regulations. The public comment period closed on October 29, 2014, and the EPA is reviewing nearly 100,000 comments received. The EPA's goal would be to propose any appropriate priority amendments to the RMP regulation to advance safety in 2015.

i. The list of chemicals, including poisons and reactive substances that should be considered for addition to the CFATS Chemicals of Interest list. (Sec. 6(d); Within 90 days).

Response: Each of the requirements of the EO were completed within the timeframe designated in the Executive Order as noted in the Progress Updates provided to Congress in December 2013, and February 2014. The Report to the President issued on June 6, 2014, included the findings, lessons learned, actions taken by that date, prioritized next steps, and the path forward.

The Chemical EO Working Group has been addressing the issue of listing additional CFATS Chemicals of Interest. As the agency responsible for issuing CFATS regulations, the Department of Homeland Security is the lead on this issue. The EPA defers to DHS to respond to the issue of listing additional Chemicals of Interest.

j. The list of changes that need to be made in the retail and commercial grade exemptions in the PSM Standard and the Request for Information designed to identify issues related to modernization of the PSM Standard and related standards necessary to meet the goal of preventing major chemical accidents. (Sec. 6(e); Within 90 days)

Response: Each of the requirements of the Executive Order were completed within the timeframe designated in the executive order as noted in the Progress Updates provided to Congress in December 2013, and February 2014. The Report to the President issued on June 6, 2014, included the findings, lessons learned, actions taken by that date, prioritized next steps, and the path forward.

The Chemical EO Working Group has been addressing the issue of revising the PSM standard. As the agency responsible for issuing PSM regulations, the Department of Labor is the lead on this issue. The EPA defers to the Department of Labor, Occupational Safety and Health Administration to respond.

Questions from Senator Edward Markey:

1) In 2009, during consideration of H.R. 2868, the Administration went through an inter-agency process to establish policy principles related to the use of inherently safer technology. Those principles are pasted below, and were delivered in Congressional testimony by Peter S. Silva, then-Assistant Administrator for Water at EPA as well as a witness representing the Department of Homeland Security. While these principles related to a piece of legislation that was not enacted and thus also not referred to in E.O. 13650, some of the principles do represent general policy statements. You did not fully or

directly respond to these questions when I submitted them to you following our March 2014 hearing. Please do so now.

a. Does the Administration continue to believe that all high-risk chemical facilities should assess IST methods and report the assessment to the federal government? If not, why not (and please provide copies of documents that establish the Administration's new policy)?

Response: Consideration and adoption of safer technologies and alternatives at high risk chemical facilities represent important steps to reduce risks. As part of the implementation of EO 13650, the Working Group solicited public comment on options, including the use of safer technologies, to encourage such risk reduction at chemical facilities and is currently evaluating those comments and potential next steps.

As discussed in the Report to the President, based upon information and feedback from RFIs and other efforts, OSHA and EPA are considering the best mechanism for promoting the use of safer technologies and alternatives. The EPA and OSHA are also considering other possible options to reinforce and further spread the use of safer technology and alternatives in managing chemical risk, including issuing an alert on safer technology and alternatives, working with industry to promote examples of best practices, and developing guidance to inform chemical operators of safer technology, processes, and alternative solutions.

b. Does the Administration continue to believe that regulators should have the authority to direct the highest risk chemical facilities to implement IST methods if such methods enhance overall security, are feasible, and, in the case of water sector facilities, consider public health and environmental requirements? If not, why not (and please provide copies of documents that establish the Administration's new policy)?

Response: The EPA continues to support the consideration and adoption of safer technologies and alternatives at high risk chemical facilities as important steps to reduce risks.

Based on stakeholder requests for more robust preventative measures, the EPA and OSHA developed a plan set forth in the Report to the President to encourage chemical facilities to integrate safer technology and alternatives into a facility's process safety programs. The plan consists of three steps, which are not mutually exclusive: 1. Issue an Alert; 2. Develop Voluntary Guidance; and 3. Consider Regulatory Options. The EPA and OSHA are analyzing the feedback received from the RFIs to determine the appropriate course of action with respect to any modifications to the RMP and/or PSM requirements to include specific safer technology and alternatives analysis and documentation of actions taken to implement feasible alternatives. The EPA or OSHA would not, however, determine specific technology, design, or process selection by chemical facility owners or operators.

The EPA and OSHA are also considering other possible options to reinforce and further spread the use of safer technology and alternatives in managing chemical risk throughout industry. Such options include a partnership with industry in order to encourage such approaches through existing stewardship programs, work with industry on a safer technology and alternatives/

inherent safety clearinghouse, and recognition programs.

2) The Department of Homeland Security[1] and EPA[2] have both repeatedly stated in Congressional testimony that the exclusion of drinking water and wastewater treatment facilities from federal chemical security regulations is a critical security gap.

a. Does EPA still agree with its prior statements? If not, please explain why not.

b. In 2009, the Administration also believed that "EPA should be the lead agency for chemical security for both drinking water and wastewater systems, with DHS supporting EPA's efforts." Does EPA still agree with this statement, and if not, why not, given the nexus between the requirements for safe drinking water and treatment of wastewater and the need to secure and protect the public from the chemicals that are often used to achieve these requirements?

c. Will EPA use its RMP, Safe Drinking Water Act or Clean Water Act authority to require upgrades to security for drinking and wastewater facilities in light of the long-standing critical security gap for these facilities? Please provide me with the specific actions EPA plans to take along with a timeline for their completion. If not, why not?

d. Numerous drinking and wastewater facilities have successfully and inexpensively incorporated IST into their operations, including the replacement of chlorine gas with sodium hypochlorite or UV systems. Does EPA believe that the adoption of IST should be considered by all drinking and wastewater facilities as one measure that could address the critical security gap that exists for these facilities? Why or why not?

Response: The EPA continues to support including waste water and drinking water facilities under chemical facility safety and security programs and continues to support the consideration and adoption of safer technologies and alternatives at high risk chemical facilities as important steps to reduce risks.

Safe drinking water and properly treated wastewater are critical to modern life. The EPA provides information to help drinking water and wastewater utilities:
• Assess and reduce vulnerabilities to potential terrorist attacks;
• Plan for and practice response to emergencies and incidents; and
• Develop new security technologies to detect and monitor contaminants and prevent security breaches.

It is important for drinking water and wastewater utility managers, board members, elected and appointed officials to understand the benefits of investing in preparedness, prevention and mitigation activities at the utility. Federal and state agencies have long been active in addressing

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[1] See https://www.dhs.gov/news/2011/0330/written-testimonynppd-house-energy-and commerce-hearing titled -hr -908, and http://democrats.energycommerce.house.gov/sites/default/files/documents/TestimonyBeers-EE-Drinking-Water-System-Security-CFAT-Act-2009-10-1-pdf.

[2] See: http://www.epa.gov/ocirpage/hearings/testimony/111 2009 2010/2010 0728 ccd.pdf.

the risks and threats to water and wastewater utilities through regulations, technical assistance, research, and outreach programs. As a result, an extensive system of regulations governing maximum contaminant levels of 90 conventional contaminants (most established by EPA), construction and operating standards (implemented mostly by the states), monitoring, emergency response planning, training, research, and education have been developed to better protect the nation's drinking water supply and receiving waters.

Since the events of 9/11, the EPA has been designated as the sector-specific agency responsible for infrastructure protection activities for the nation's drinking water and wastewater systems. EPA is utilizing its position within the water sector and working with its stakeholders to provide information to help protect the nation's drinking water supply from terrorist or other intentional acts. For more information, see:
http://water.epa.gov/infrastructure/watersecurity/basicinformation.cfm

Questions from Senator Patty Murray

1. As you know, the Emergency Planning and Community Right-to-Know Act was passed in 1986, and provides resources to plan for chemical emergencies. Since its enactment there have been a large number of incidents, highlighting the need for substantial emergency planning.

a. Do the recent events at the DuPont industrial plant and the West Fertilizer Company facility in Texas warrant a statutory update of the Emergency Planning and Community Right-to-Know Act?

Response: EPCRA does not provide resources for State Emergency Response Commissions and Local Emergency Response Commissions (SERCs and LEPCs) to implement the requirements stipulated in the statute. The statute provides for the establishment of a state and local infrastructure for chemical facility emergency response, preparedness, and prevention and necessary authorities for those entities to implement the requirements of EPCRA.

As identified through the listening sessions and outreach efforts of the Executive Order on Improving Chemical Facility Safety and Security, SERCs and LEPCs need technical support and assistance in meeting the planning and preparedness requirement of EPCRA, including assessing the risks associated with hazardous chemicals in their communities and ensuring community preparedness for incidents that may occur.

In this regard, the EPA is moving forward on developing online EPCRA training modules for SERCs/TERCs and LEPCs and TERCs. This training is intended to reinforce their authorities and roles to meet their responsibilities under EPCRA for the development and implementation of local emergency response plans, and is on schedule for completion by June 6, 2015. In addition, the EPA is working to update, and revise as necessary, planning and response guidance materials for SERCs and LEPCs. This will help ensure SERCs/TERCs and LEPCs/TEPCs have the latest information in a format that allows them to share and exchange among themselves and with other organizations and stakeholders.

In order to respond to requests from SERCs and TERCs for assistance in clarifying EPCRA responsibilities to support emergency preparedness and planning efforts, the EPA is also developing factsheets for SERCs/TERCs and LEPCs/TEPCs and industry to assist them in understanding and meeting their responsibilities under EPCRA.

i. How have the owners of chemical facilities contributed to the training of first responders to potential accidents? How has the agency ensured that first responders are receiving adequate training?

Response: The EPA is moving forward on developing online EPCRA training modules for SERCs/TERCs and LEPCs/TERCs. This training is intended to reinforce their authorities and roles to meet their responsibilities under EPCRA for the development and implementation of local emergency response plans, and is on schedule for completion by June 6, 2015. In addition, the EPA is working to update, and revise as necessary, planning and response guidance materials for SERCs and LEPCs. During the listening sessions conducted by the Working Group, there were many examples identified of facility operators working with state and local response officials in the training of first responders.

a. How have Congress' repeated cuts to the EPA's budget and governing from crisis to crisis impacted the agency's ability to reach out to stakeholders and gather meaningful information? If Congress fails to repeal sequestration for the next fiscal year, how will implementation of the President's executive order be impacted?

Response: The 2015 President's Budget requested additional resources to support state and local prevention and preparedness efforts. The EPA did not receive additional funding to fully support local prevention and preparedness efforts in the enacted FY 2015 Omnibus Appropriations bill. The EPA is making a concerted effort to prioritize the limited FY 2015 resources within the program area for the EO action items, but some upgrades to CAMEO and outreach will be delayed. The FY 2016 President's Budget requests a $12 million increase.

Questions from Senator Michael Enzi

1. The Federal Action Plan outlined in the "Action to Improve Chemical Facility Safety and Security" report includes, under Item 4, 'Expanding Tools to Assist SERCs, TERCs, LEPCs, and TEPCs in Collecting, Storing, and Using Chemical Facility Information,' the intention to improve the Computer-Aided Management of Emergency Operations (CAMEO) hazardous material response software in order to expand analytical capabilities and promote information sharing. My understanding is that this is being developed at the EPA. Is the EPA considering options for enhancing, supplementing, or superseding CAMEO that include tools, apps, or software developed by the private sector?

a. **Has the EPA considered cost-savings that could be derived from allowing the private sector to provide this resource?**

Response: The private sector is heavily involved in all CAMEO life-cycle activities. This includes programming, scientific support, documentation, user support, and the use of commercial software and database systems.

Since its inception over 25 years ago, CAMEO has been a joint project between the EPA and NOAA. Formerly, system development was split between the two agencies. Currently all development is performed by NOAA. NOAA also provides chemists for maintaining the chemical reference database, GIS experts for the mapping function, and air modelling experts for the air-dispersion modelling program. The EPA provides funding, project management, regulatory expertise, user support, distribution, and website services.

The primary reason the EPA and NOAA initially developed CAMEO was because most local communities could not afford commercial emergency management software as EPCRA provided no funding for SERCs and LEPCs to meet their requirements under the statute. The CAMEO project was designed to provide local communities with the essential capability needed to meet their responsibilities free of charge.

As identified through the listening sessions and outreach efforts of the Executive Order on Improving Chemical Facility Safety and Security, SERCs and LEPCs need technical support and assistance in meeting the planning and preparedness requirement of EPCRA including assessing the risks associated with hazardous chemicals in their communities and ensuring the development and implementation of the local contingency plan for chemical incidents that may occur. CAMEO and the planned further enhancements to the CAMEO suites will be a significant step in assisting the SERCs and LEPCs meet these needs while maintaining their limited resources to support their coordination with industry and outreach to the community on what they should do when an accident occurs. Through EPA and NOAA contracts, the private sector plays a critical role in the success of CAMEO.

2. The "Action to Improve Chemical Facility Safety and Security" report included discussion on information sharing among stakeholders in the New York/New Jersey pilot program. Can you clarify how information sharing will be structured going forward, and what specific types of data will be shared with federal, state, tribal, regional, local, and other stakeholders?

Response: The New York/New Jersey pilot facilitated a better understanding of the information needs of first responders and communities before and during a chemical release. Standard Operating Procedures (SOPs) have been established to develop and share best practices on sharing EPRCA Tier II and other critical information to first responders, and developing procedures to take advantage of existing drills and exercise opportunities to support and test existing LEPC contingency plans. Over the next nine months, the Regional Working Groups established under the EO will work to identify and implement the appropriate SOPs for their Region. This will include the process for sharing information and what information will be shared with stakeholders.

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

MAR 2 6 2015

OFFICE OF CONGRESSIONAL AND INTERGOVERNMENTAL RELATIONS

The Honorable Lamar Alexander
Chairman
Committee on Health, Education, Labor and Pensions
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find the U.S. Environmental Protection Agency's responses to the Committee's Questions for the Record following the December 11, 2014, hearing entitled "Oversight of the Implementation of the President's Executive Order on Improving Chemical Facility Safety and Security."

I hope this information is helpful to you and the members of the Committee. If you have further questions, please contact me or your staff may contact Carolyn Levine in my office at levine.carolyn@epa.gov or (202) 564-1859.

Sincerely,

Laura J. Vaught

Laura Vaught
Associate Administrator

Enclosure

U.S. Environmental Protection Agency
Responses to Questions for the Record
from the
Senate Environment and Public Works Committee Hearing
December 11, 2014

Questions from Senator Boxer:

1. On what date do you commit to completing ALL of the Executive Order's directives within your Agency's jurisdiction?

Response: The agency remains on track to meet the timeframes in EO 13650, as referenced in the federal Working Group's Report to the President.

2. Since 2002, the Chemical Safety Board (CSB) has recommended that ammonium nitrate hazards be incorporated into EPA's risk management program. Will EPA commit to address ammonium nitrate fertilizer hazards under its risk management program, and if so, when? Will implementation of these changes be completed before the President leaves office?

Response: Ammonium nitrate (AN) poses a unique challenge because it is a high-volume chemical used in both the fertilizer and explosives industries. Because of the uses of ammonium nitrate, the Occupational Safety and Health Administration (OSHA), the EPA, the Department of Homeland Security (DHS), and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) all have federal regulations that govern its management and, therefore, any efforts the EPA pursues regarding AN must be coordinated with these agencies and departments to ensure that the most appropriate vehicle for any additional regulation is utilized.

Ammonium nitrate is currently covered under the Emergency Planning, Community Right to Know Act (EPCRA), which requires facilities to report the Safety Data Sheet (SDS) and annual inventory information such as chemical name/description, physical and health hazards, pounds of the chemical, and type of storage, storage conditions, and location to State Emergency Planning Commissions (SERCs), Tribal Emergency Response Commissions (TERCs), Tribal Emergency Planning Commissions (TEPCs), Local Emergency Response Commissions (LEPCs), and fire departments. This information should be used to develop local emergency plans and also be shared with the community.

With respect to EPA regulation, the EPA issued a Request for Information (RFI) seeking, among other Risk Management Program (RMP) updates, public input on whether regulation of ammonium nitrate under the RMP is appropriate given the Clean Air Act authorities and the availability of regulatory options under OSHA's Process Safety Management (PSM) standard. The EPA is in the process of reviewing responses to the RFI and expects to issue a proposed rulemaking on the RMP more broadly by Summer 2015.

In the meantime, the EPA, OSHA, and ATF expect to update the *Chemical Advisory: Safe Storage, Handling, and Management of Ammonium Nitrate* published on August 30, 2013, in

early June 2015. This advisory, jointly prepared by the EPA, OSHA, and ATF, outlined regulatory requirements and best practices for the storing and handling of ammonium nitrate. In the future update, the agencies will consider new information learned as a result of the investigation of the West, Texas, incident, newly developed procedures and practices, new technical information, and clarifications and corrections.

3. On March 5, 2014, I asked Administrator McCarthy to have the Working Group consider using EPA's existing authority under the Clean Water Act to address risks posed by above ground chemical storage tanks in the wake of the Freedom Industries spill. In your May 8, 2014 response to me, you assured me that the Working Group would consider exercising this authority. Despite your assurance, the Working Group's Status Report to the President does not even mention this authority. Will EPA commit to fully evaluate options for actions under Section 311(j)(1)(C) of the Clean Water Act to regulate above ground chemical storage tanks? If so, when will this analysis be complete? Will you commit to give me a complete report on your analysis?

Response: As referenced in the federal Working Group's report to the President, the EPA is engaging with state drinking water administrators to encourage them to revisit existing source water assessments, review and update existing plans using information available through the various chemical regulatory programs, and determine whether adequate warning, preparedness, and preventive measures are in place.

The EPA Administrator recently announced that the Source Water Collaborative, a group of 25 national organizations united to protect America's sources of drinking water, launched a call to action that includes actions for water utilities to partner with landowners and businesses to protect local source water, and make sure they have plans in place with emergency responders and local governments to update source water assessments.

The agency is also engaging with states to assess actions to protect drinking water sources using Drinking Water Mapping Application for Protecting Source Waters (DWMAPS) and chemical plant information provided to local responders. This will enable local responders to identify potential risks to drinking water sources from potential spills from chemical plants and actions to prevent/minimize such risk.

Additionally, the EPA is committed to providing critical facility information directly to the people who need it most - local emergency planners and first responders - and helping them use the information to effectively prepare for and respond to chemical releases. Based on broad stakeholder feedback, the EPA believes that getting critical information to local communities in a timely manner is where we need to focus. At this time, the EPA is not planning to update the existing Spill Prevention, Control and Countermeasure (SPCC) rule.

EPCRA and community right-to-know regulations provide states and local communities with important chemical facility information and the authority to work with and, as needed, inspect these facilities to ensure compliance with the requirements, help them gain an understanding of the chemical risks at the facility, and know what steps to take to prepare for and respond to those risks. When communities work with their states officials who have the lead in overseeing

operations at facilities, they are better able to jointly address and prepare for potential risks from chemical facilities. For example, in the aftermath of the chemical release into the Elk River in West Virginia in 2014, the state of Oklahoma developed a GIS layer that identified Tier II chemical facility locations (as reported in compliance with the EPCRA requirements) and nearby public drinking water intakes and provided that information to their LEPCs and public water systems to ensure their local emergency planning efforts included this information and took steps to reduce these risks.

4. Methyl mercaptan is a toxic chemical that recently killed 4 workers at the DuPont chemical plant in La Porte, Texas. In 1994, EPA tried to put methyl mercaptan on a list of chemicals that must be reported in EPA's Toxics Release Inventory, which is supposed to help communities better prepare for the risk of a chemical release. When industry challenged the listing, EPA agreed to withdraw it to avoid litigation [59 Fed. Reg. 43048, Aug. 22, 1994]. However, EPA also said that it would promptly act to address the questions about listing the chemical that were raised by industry. It has been 20 years since then, and EPA has not yet taken the action it promised to take. When will EPA act to ensure that methyl mercaptan is reported by chemical companies on their Toxics Release Inventory reports?

Response: Methyl mercaptan does in fact remain on the EPCRA Section 302 Extremely Hazardous Substances list and is subject to the emergency planning reporting requirements under EPCRA sections 311 and 312 (a 500 pound reporting threshold). The reporting limitation you reference regarding methyl mercaptan applies to the annual reporting requirements under EPCRA section 313 (Toxics Release Inventory – TRI). States, LEPCs and local responders currently have the information they need under sections 311 and 312 of EPCRA (e.g. the amounts and locations of methyl mercaptan handled at a facility) to carry out their emergency planning and community right-to-know obligations.

5. During the toxic chemical leak at the DuPont chemical plant in La Porte, Texas, last month, a facility employee called 911, but gave no useful details about the chemical released in his call with the 911 operator. In response to the 911 operator's question whether there was a risk to the public from toxic chemicals escaping the facility, he answered "No ma'am, it is not." When the first responders arrived, they were unable to enter the facility where the employees died because they did not have the proper personal protective gear. First responders need information to protect themselves and to most effectively respond to the accident.

a. What actions will the Working Group take to ensure that first responders have accurate information before they arrive at the accident scene when there are toxic chemical releases?

b. The Working Group's June 4, 2014 Report to the President states that first responders believe information sharing efforts need significant improvement, and that first responders want to be able to obtain the most-actionable information in a user-friendly format. What steps is the Working Group taking to ensure the information provided to first responders is in an actionable and user-friendly format?

c. The Working Group's June 4, 2014 Report to the President states that a key lesson learned is that first responders want access to information about enforcement actions taken or violations discovered at facilities, in order to better understand and respond to hazards at chemical facilities. Has the Working Group taken any steps to make this information available to first responders? If not, what steps will the Working Group take to share this information in an easily accessible and user-friendly format?

d. In its Report to the President, the Working Group commits to share "certain data elements of CFATS, RMP, PSM, and MTSA data" with first responders and other state, local, and tribal entities. What specific data elements does the Working Group commit to provide first responders? How will that information be made available to first responders?

Response: The ability to communicate risks at chemical facilities with local first responders has been a key component of the Working Group's effort to improve chemical facility safety and security under the President's Executive Order. In response to the needs identified by LEPCs, SERCs, and first responders, the EPA held 32 workshops throughout Texas, Arkansas, Louisiana, Oklahoma, and New Mexico to reinforce the authorities, roles, and responsibilities under EPCRA and identify potential barriers to meeting requirements for developing and implementing a local emergency response plan. In order to respond to requests from SERCs and TERCs for assistance in clarifying EPCRA responsibilities to support emergency preparedness and planning efforts, the EPA is also developing informational factsheets for SERCs/TERCs and LEPCs/TEPCs and industry to assist them in understanding and meeting their responsibilities under EPCRA.

The EPA continues to upgrade its Computer-Aided Management of Emergency Operations (CAMEO) suite of applications, available online to emergency planners, first responders, and the general public. These upgrades will help emergency planners and first responders to access, store, and evaluate critical chemical facility and multi-agency regulatory data and information for developing emergency plans. Additional enhancements to CAMEO will expand analytical capability for LEPCs/TEPCs and promote information sharing. These enhancements include: ensuring that emergency planners and first responders have chemical and regulatory information on all Chemical Facility Anti-Terrorism Standard (CFATS) regulated facilities; adding new data fields to ensure that LEPCs integrate all available chemical facility information into their local CAMEO database; and developing and providing a complete web-based version of CAMEO that states can host on their own servers. This allows LEPCs an online method of accessing the state Tier II facility/chemical data and allows facilities to report online.

The President's FY 2016 budget includes a $12 million increase for the risk management program in order to enhance the outreach and emergency planning technical assistance to local communities and accelerate the pace of CAMEO upgrades.

The EPA is also working to improve coordination at all levels of the regulator community and update the tools at their disposal. In August of 2013, a pilot program was launched in New York and New Jersey to evaluate best practices and test innovative methods for interagency collaboration on chemical facility safety and security. The pilot program brought together all

levels of government with the first responder community, along with other stakeholders, to identify actions for improving chemical facility safety and security. The resulting Standard Operating Procedures (SOPs) and lessons learned from the pilot program have helped to advance chemical facility safety. Specifically, the pilot enhanced areas of risk management by increasing local access to high-risk facility information to support more effective emergency planning and response; improving the sharing of inspection information to inform LEPC emergency planning; and identifying chemical facility points of contact to support local emergency response. Additionally, the pilot facilitated a better understanding of the information needs of first responders and communities before and during a chemical release, and SOPs have been established to develop and share best practices on sharing EPCRA Tier II and other critical information with first responders, and developing procedures to take advantage of existing drills and exercise opportunities to support and test existing LEPC contingency plans.

The EPA's Substance Registry Services (SRS) tool assists facilities housing chemical substances to determine their regulatory requirements by providing information about chemical substances tracked or regulated by the EPA or other sources. The SRS has been updated to include CFATS and Process Safety Management (PSM)-covered substances, which allows facilities to be informed about potential regulatory coverage under PSM and CFATS in addition to other EPA regulatory programs. SRS was also expanded to include Maritime Transportation Security Act (MTSA) and ATF's List of Explosive Materials based on the needs of industry members, state and federal regulators, and other stakeholders. An analysis has been done comparing the list against SRS to identify those substances that are in SRS versus not in SRS.

Additionally, the EPA's Facility Registry Service (FRS) tool integrates facility data from nearly 90 different federal and state systems, allowing users to compare facilities between systems, including chemical data and compliance history. The FRS has been updated to include facilities that complete a DHS Top-Screen submission for CFATS, which allows federal departments and agencies to identify: (1) facilities that are covered by multiple federal regulatory entities, and (2) potentially non-compliant facilities, often referred to as outliers.

6. Given the number of accidents that have occurred since the President issued the Executive Order, including the recent fatal toxic gas release at the DuPont plant in Texas that killed four workers, has the urgency to prevent future disasters caused the EPA to expedite the rule-making process to ensure that new RMP rules are issued promptly? Has EPA considered issuing an Alert or other Guidance concurrently with a notice of proposed rulemaking?

Response: OSHA and the Chemical Safety Board are still investigating the circumstances regarding the DuPont facility incident.

Based upon information gathered through the EPA's implementation of the RMP program, recommendations and practices developed by process safety professionals, and stakeholder comments to the EPA's RFI, the EPA plans to propose amendments to the RMP regulation in 2015 with the intent to finalize such amendments in 2016, depending on any potential additional information. These amendments would be complimented by alerts and guidance documents.

The RMP regulation has been effective in preventing and mitigating chemical incidents in the United States and protecting human health and the environment from chemical risks and hazards. However, major incidents highlight the importance of reviewing and evaluating current practices and regulatory requirements and applying lessons learned to continuously advance process safety management.

7. After the tragic explosion at the fertilizer plant in West, Texas, the Government Accountability Office (GAO) conducted a review of the federal regulatory agencies' oversight of the safety of ammonium nitrate fertilizer. In the course of conducting that review, GAO was denied access by a number of States to EPCRA reporting data from facilities that handle ammonium nitrate. In addition, the Attorney General of Texas, now Governor-elect, issued a legal opinion arguing that State law allowed for the withholding from the public of information required to be reported under the federal EPCRA statute. When asked by the media how the state could justify withholding this information, he stated that members of the public could simply drive up to the chemical facilities and ask them directly.

a. Is EPA aware of other instances in which access to EPCRA reporting data was restricted or refused? If so, please provide a list of all such instances, along with a description of what data was restricted or refused, who restricted or refused it, how and when EPA was made aware of the restriction or refusal, and what EPA did to resolve the problem.

b. Will EPA commit to issuing guidance to States making clear that the federal EPCRA statute requires that this information be made public?

Response: Under EPCRA sections 311 and 312, covered facilities *must* provide chemical information to LEPCs and first responders for emergency planning and preparedness. The EPA does not have information on instances where governmental entities or facilities may have limited or failed to provide EPCRA reporting data to the local community.

Regarding public access to facility and hazardous chemical information, EPCRA section 312 provides that the owner or operator of any facility required to prepare a Safety Data Sheet (SDS) for a hazardous chemical under OSHA shall submit to the SERC, LEPCs, and fire departments an annual inventory of the SDS hazardous chemicals present at the facility during the preceding calendar year. This annual inventory is commonly referred to as the Tier II form. Pursuant to EPCRA Sec. 312(e)(3) and EPCRA Sec. 324(a), Tier II information for a specific facility may be obtained by sending a written request to the SERC or the LEPC. If the SERC or LEPC does not have the requested Tier II information, they shall obtain it from the facility on behalf of the requestor. The EPA is developing factsheets and online training for SERCs/TERCs and LEPCs/TEPCs to assist them in clarifying, understanding and meeting their responsibilities under EPCRA.

8. The Working Group coordinated a pilot in New York-New Jersey involving multiple agencies at the Federal, state, and local levels.

a. What kinds of best practices or innovative methods were developed in the Region 2 Pilot Project developed under the Executive Order and what lessons were learned from the pilot?

b. How and when will EPA and the other Working Group agencies apply these lessons in other regions of the country?

c. The pilot specifically revealed "the need for Federal, State, and local partners to work together to increase industry's compliance with EPCRA requirements." After reviewing state data on reporting under EPCRA, EPA identified violations at 4 facilities in New York and 13 facilities in New Jersey. Is the Working Group taking steps to ensure that this process of information sharing to increase compliance with EPCRA requirements occurs in other regions? How does the Working Group propose to ensure that such information sharing continues to take place in the future?

d. Please provide me with a copy of any report detailing the outcome of the pilot project.

Response: In August of 2013, a pilot program was launched in New York and New Jersey to evaluate best practices and test innovative methods for interagency collaboration on chemical facility safety and security. The pilot program brought together all levels of government with the first responder community, along with other stakeholders to identify actions for improving chemical facility safety and security. The resulting SOPs and lessons learned from the pilot program have helped to advance chemical facility safety. Specifically, the pilot enhanced areas of risk management by increasing local access to high-risk facility information to support more effective emergency planning and response; improving the sharing of inspection information to inform LEPC emergency planning and enforcement; and identifying chemical facility points of contact to support local emergency response.

Additionally, the pilot facilitated a better understanding of the information needs of first responders and communities before and during a chemical release, and SOPs have been established to develop and share best practices on sharing EPCRA Tier II and other critical information with first responders, and developing procedures to take advantage of existing drills and exercise opportunities to support and test existing LEPC contingency plans. Other EPA regional offices are collaborating with their federal partners to review the SOPs and to adopt the pilot SOPs or to tailor and establish their own.

9. What, if anything, has the EPA done to improve communities' access to information and participation during planning for emergency responses? Does the EPA have any plans to further improve this, along with coordination with local responders? If so, please describe all such plans along with a timeline for their completion.

Response: In response to the needs identified by LEPCs and SERCs, the EPA is taking a number of steps to strengthen and further support the state and local infrastructure and ensure stakeholder involvement. The EPA held 32 workshops for LEPCs throughout Texas, Arkansas, Louisiana, Oklahoma, and New Mexico to reinforce their authorities, roles, and responsibilities

under EPCRA and identify barriers to meeting their requirement for developing and implementing a local emergency response plan.

Another issue consistently raised by SERCs and LEPCs was the need for training. The EPA is moving forward on developing online EPCRA training modules for SERCs/TERCs and LEPCs/TEPCs. This training is intended to reinforce their authorities and roles to meet their responsibilities under EPCRA for the development and implementation of local emergency response plans, and is on schedule for completion by June 6, 2015. In addition, the EPA is working to update, and revise as necessary, planning and response guidance materials for SERCs and LEPCs. This will help ensure SERCs/TERCs and LEPCs/TEPCs have the latest information in a format that allows them to share and exchange among themselves and with other organizations and stakeholders.

In order to respond to requests from SERCs and TERCs for assistance in clarifying EPCRA responsibilities to support emergency preparedness and planning efforts, the EPA is also developing factsheets for SERCs/TERCs and LEPCs/TEPCs and industry to assist them in understanding and meeting their responsibilities under EPCRA. Further, the EPA established an email list-serve to provide monthly Working Group updates to SERCs/TERCs to keep them informed about upcoming conference and meetings, new guidance and other materials, and other EO-related information they will be receiving. The agency is on track to implement all of the short and medium term EPA actions in the federal Wording Group Action Plan related to strengthening community planning and preparedness.

10. The Executive Order directed the Working Group to look at existing statutory authorities, but also required your agency to make recommended legislative changes. The Working Group's report to the President does not contain any recommended legislative changes to the statutes governing EPA's oversight of chemical facility safety. Please provide the Committee with your recommended legislative changes that would improve safety at chemical facilities.

Response: As discussed in the Working Group's Report to the President, the EPA's efforts are focused on modernizing EPA's regulations and guidances. The EPA is not recommending legislative changes of its own authorizing statutes at this time, but continues to support the other legislative recommendations referenced in the Report.

Questions from Senators Barbara Boxer and Edward Markey:

1. Executive Order 13650 ordered a number of specific actions to be completed by the Working Group. For the following list of actions, please indicate: i) whether the action was completed as directed in the Executive Order; ii) if so, provide a copy of the plan, assessment, list, analysis, recommendations, proposal, options, determination, Request for Information, or Solicitation of Public Input/Comment; and, iii) if not, indicate the date on which the action will be completed as directed. In each response, please also describe how the Working Group had addressed each specific element within each of the specific actions required by the Executive Order.

a. The assessment conducted by the Attorney General, through the head of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), into the feasibility of sharing data related to the storage of explosive materials with State Emergency Response Commissions (SERCs), Tribal Emergency Response Commissions (TERCs), Local Emergency Planning Committees (LEPCs), Tribal Emergency Planning Committees (TEPCs). (Sec. 3(b); Within 90 days).

Response: Each of the requirements of the EO were completed within the timeframe designated in the Executive Order as noted in the Progress Updates provided to Congress in December 2013, and February 2014, which can be found at: https://www.osha.gov/chemicalexecutiveorder/index.html. The Report to the President issued on June 6, 2014, included the findings, lessons learned, actions taken by that date, prioritized next steps, and the path forward. As noted in the report, the federal Working Group is working with the SERCs, TERCs, LEPCs, and TEPCs on information sharing and will be updating various guidance and regulations in accordance with the schedule set forth in the Federal Action Plan on pages xiii through xviii.

Regarding the storage of explosive materials, following the issuance of the Report to the President, the Chemical EO Working Group has been addressing data-sharing related to the storage of explosive materials. As the owner of data related to explosive materials, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) has taken the lead on this issue. The EPA defers to ATF to address data sharing related to the storage of explosive materials.

b. The assessment conducted by the Secretary of Homeland Security into the feasibility of sharing Chemical Facility Anti-Terrorism Standards (CFATS) data with SERCs, TEPCs, and LEPCs on a categorical basis. (Sec. 3(c); Within 90 days).

Response: Each of the requirements of the EO were completed within the timeframe designated in the Executive Order as noted in the Progress Updates provided to Congress in December 2013, and February 2014. The Report to the President issued on June 6, 2014, included the findings, lessons learned, actions taken by that date, prioritized next steps, and the path forward.

With respect to sharing CFATS data, following the issuance of the Report to the President, the Chemical EO Working Group has been developing a mechanism and procedures for sharing CFATS data. As the owner of CFATS data, the Department of Homeland Security has taken the lead on this issue. The EPA defers to DHS to address sharing of CFATS data.

c. A list of any changes determined to be needed to existing memorandums of understanding (MOUs) and processes between EPA and CSB, ATF and CSB, and the Occupational Safety and Health Administration (OSHA) and CSB for timely and full disclosure of information. Please provide copies of the current drafts of the revised MOUs; or, if it was deemed to be appropriate by the Working Group, a draft of the single model MOU developed with CSB in lieu of existing agreements. (Sec. 4(c); Within 90 days).

Response: The EPA recommended continued implementation of the current EPA-CSB MOU. The Department of Justice is continuing deliberations with the CSB regarding federal department and agency MOU development and implementation.

d. The analysis, including recommendations, on the potential to improve information collection by and sharing between agencies to help identify chemical facilities which may not have provided all required information or may be non-compliant with Federal requirements to ensure chemical facility safety. (Sec. 5(a); Within 90 days).

Response: Each of the requirements of the EO were completed within the timeframe designated in the Executive Order as noted in the Progress Updates provided to Congress in December 2013, and February 2014. The Report to the President issued on June 6, 2014, included the findings, lessons learned, actions taken by that date, prioritized next steps, and the path forward.

In order to improve data sharing among federal departments and agencies used to identify potentially noncompliant facilities, prior to issuing the Report to the President, the EPA and DHS adopted new procedures to identify facilities that, based on their required filings, could possess threshold levels of CFATS Chemicals of Interest but have not yet filed required Top-Screen information with DHS or a required Risk Management Plan (RMP) with the EPA.

Another key step to assist federal departments and agencies in identifying non-compliant facilities and/or other potential compliance issues is linking data from multiple agencies. Since the issuance of the Report to the President, the EPA's Facility Registry Service (FRS) integrated facility data from nearly 90 different federal and state systems, allowing users to compare facilities between systems, including chemical data and compliance history. The FRS has been updated to include facilities that complete a DHS Top-Screen submission for CFATS, which allows federal departments and agencies to identify: (1) facilities that are covered by multiple federal regulatory entities, and (2) potentially non-compliant facilities, often referred to as outliers.

DHS and the EPA also initiated a process to compare the CFATS 'Top Screen' database and the RMP database to determine if the CFATS database included facilities that should have also reported under the RMP chemical accident prevention program. As a result of this effort, the EPA contacted hundreds of facilities to request information and visited some facilities to help determine whether the facility meets criteria to implement a risk management program requiring submittal of a risk management plan. Following this extensive review, fewer than 15 non-filing facilities were identified and the EPA has worked with these facilities to ensure they comply with the rule. This information indicates that the vast majority of CFATS-covered facilities are reporting under the RMP program.

e. The recommendations for possible changes to streamline and otherwise improve data collection to meet the needs of the public and Federal, State, local, and tribal agencies (including those charged with protecting workers and the public), consistent with the Paperwork Reduction Act and other relevant authorities, including opportunities to lessen the reporting burden on regulated industries. (Sec. 5c); Within 180 days).

Response: Each of the requirements of the Executive Order were completed within the timeframe designated in the executive order as noted in the Progress Updates provided to Congress in December 2013, and February 2014. The Report to the President issued on June 6, 2014, included the findings, lessons learned, actions taken by that date, prioritized next steps, and the path forward.

The EPA continues to work with stakeholders, including federal, state, local, and tribal agencies as well as the public and industry, to identify ways to improve data collection and sharing while lessening the burden on regulated entities. Specifically, the EPA is working with NOAA to enhance the Computer-Aided Management of Emergency Operations (CAMEO) suite of applications, available online to emergency planners and first responders, to assist them in planning for and responding to chemical emergencies. These upgrades will help emergency planners and first responders to better access, store, and evaluate critical chemical facility and multi-agency regulatory data and information for developing emergency plans.

Additional enhancements to CAMEO will expand analytical capability for LEPCs/TEPCs and promote information sharing by: ensuring that emergency planners and first responders have chemical and regulatory information on all CFATS regulated facilities; adding new data fields to ensure that LEPCs integrate all available chemical facility information into their local CAMEO database; and developing and providing a complete web-based version of CAMEO that states can host on their own servers. This allows LEPCs an online method of accessing the state Tier II facility/chemical data and allows facilities to report online. Additionally, when the EPA proposes any changes to the RMP regulation to advance safety, we will look at potential opportunities to eliminate unnecessary information collected in the Risk Management Plans and will provide any changes in data collection.

f. The options developed for improved chemical facility safety and security that identifies improvements to existing risk management practices through agency programs, private sector initiatives, Government guidance, outreach, standards, and regulations. (Sec. 6(a)(i); Within 90 days).

Response: To meet the directive of the EO to modernize key policies, regulations, and standards, the Working Group published a preliminary list of options for improving chemical facility safety and security for stakeholder comment on January 3, 2014. The options identified resulted from reviewing existing programs, recommendations from the safety and security communities, and feedback from the EO listening sessions as well as reviewing investigation reports of major incidents.

As a result of stakeholder comments, the Working Group plan for modernizing policies and regulations are detailed in the Report to the President. As a result of this effort, the EPA issued an RFI seeking comment on potential changes to the RMP regulation with the expectation to issue a proposed rule in the summer of 2015 and expects to issue updated guidance on issues such as safer alternatives and AN handling and storage. The EPA will continue to engage with the chemical industry and professional organizations on private sector safety initiatives such as consensus safety codes and standards.

g. The list of potential regulatory and legislative proposals to improve the safe and secure storage, handling, and sale of ammonium nitrate and identify ways in which ammonium nitrate safety and security can be enhanced under existing authorities. (Sec. 6(b); Within 90 days).

Response: On August 30, 2013, the EPA, the Occupational Safety and Health Administration, and the Bureau of Alcohol, Tobacco, Firearms and Explosives released a chemical advisory that provides information to communities, workers, first responders and commercial sectors on the hazards of ammonium nitrate (AN) storage, handling, and management. To further bolster these efforts, in February 2014, Assistant Secretary of Labor for Occupational Safety and Health, Dr. David Michaels, signed a letter that was circulated by agricultural trade associations to provide more than 7,000 employers with legal requirements and best practice recommendations for safely storing and handling ammonium nitrate.

OSHA is currently developing rulemaking options to better cover AN hazards through either the PSM standard or improvements to the Explosives and Blasting Agents standard. As OSHA develops its approach to improve workplace safety associated with ammonium nitrate hazards, the EPA will consider if additional action to protect the community is needed to complement OSHA regulations. As far as non-regulatory approaches are concerned, the EPA, OSHA, and ATF plan to update the *Chemical Advisory: Safe Storage, Handling, and Management of Ammonium Nitrate* (published on August 30, 2013) in June of 2015, which will include new information resulting from the West, Texas, incident investigation, newly developed procedures and practices, new technical information, and clarifications and corrections.

h. The determination of whether the EPA's Risk Management Program (RMP) and the OSHA's Process Safety Management Standard (PSM) can and should be expanded to address additional regulated substances and types of hazards, and the plan, including a timeline and resource requirements, to expand, implement, and enforce the RMP and PSM in a manner that addresses the additional regulated substances and types of hazards. (Sec. 6(c); Within 90 days).

Response: To meet the directive of the EO to modernize key policies, regulations, and standards, the Working Group published a preliminary list of options for improving chemical facility safety and security for stakeholder comment on January 3, 2014. The options identified resulted from reviewing existing programs, recommendations from the safety and security communities, and feedback from the EO listening sessions as well as reviewing investigation reports of major incidents. Drawing on stakeholder comment, the Working Group developed a plan for modernizing policies, which is laid out in the May 2014, Report for the President *Actions To Improve Chemical Facility Safety and Security – A Shared Commitment.*

The RMP regulation has been effective in helping to prevent and mitigate chemical facility incidents in the United States and protecting human health and the environment from chemical risks and hazards. However, major incidents highlight the importance of reviewing and evaluating current practices and regulatory requirements and applying lessons learned to continuously advance process safety management. In order to gather the information necessary to proceed with regulatory modernization of RMP and retain close coordination with OSHA on

its implementation of the PSM standard, the EPA published a RFI on July 29, 2014. The RFI sought public input on 19 process safety and risk management issues relevant to the RMP regulations. The public comment period closed on October 29, 2014, and the EPA is reviewing nearly 100,000 comments received. The EPA's goal would be to propose any appropriate priority amendments to the RMP regulation to advance safety in 2015.

i. The list of chemicals, including poisons and reactive substances that should be considered for addition to the CFATS Chemicals of Interest list. (Sec. 6(d); Within 90 days).

Response: Each of the requirements of the EO were completed within the timeframe designated in the Executive Order as noted in the Progress Updates provided to Congress in December 2013, and February 2014. The Report to the President issued on June 6, 2014, included the findings, lessons learned, actions taken by that date, prioritized next steps, and the path forward.

The Chemical EO Working Group has been addressing the issue of listing additional CFATS Chemicals of Interest. As the agency responsible for issuing CFATS regulations, the Department of Homeland Security is the lead on this issue. The EPA defers to DHS to respond to the issue of listing additional Chemicals of Interest.

j. The list of changes that need to be made in the retail and commercial grade exemptions in the PSM Standard and the Request for Information designed to identify issues related to modernization of the PSM Standard and related standards necessary to meet the goal of preventing major chemical accidents. (Sec. 6(e); Within 90 days)

Response: Each of the requirements of the Executive Order were completed within the timeframe designated in the executive order as noted in the Progress Updates provided to Congress in December 2013, and February 2014. The Report to the President issued on June 6, 2014, included the findings, lessons learned, actions taken by that date, prioritized next steps, and the path forward.

The Chemical EO Working Group has been addressing the issue of revising the PSM standard. As the agency responsible for issuing PSM regulations, the Department of Labor is the lead on this issue. The EPA defers to the Department of Labor, Occupational Safety and Health Administration to respond.

Questions from Senator Edward Markey:

1) In 2009, during consideration of H.R. 2868, the Administration went through an inter-agency process to establish policy principles related to the use of inherently safer technology. Those principles are pasted below, and were delivered in Congressional testimony by Peter S. Silva, then-Assistant Administrator for Water at EPA as well as a witness representing the Department of Homeland Security. While these principles related to a piece of legislation that was not enacted and thus also not referred to in E.O. 13650, some of the principles do represent general policy statements. You did not fully or

directly respond to these questions when I submitted them to you following our March 2014 hearing. Please do so now.

a. Does the Administration continue to believe that all high-risk chemical facilities should assess IST methods and report the assessment to the federal government? If not, why not (and please provide copies of documents that establish the Administration's new policy)?

Response: Consideration and adoption of safer technologies and alternatives at high risk chemical facilities represent important steps to reduce risks. As part of the implementation of EO 13650, the Working Group solicited public comment on options, including the use of safer technologies, to encourage such risk reduction at chemical facilities and is currently evaluating those comments and potential next steps.

As discussed in the Report to the President, based upon information and feedback from RFIs and other efforts, OSHA and EPA are considering the best mechanism for promoting the use of safer technologies and alternatives. The EPA and OSHA are also considering other possible options to reinforce and further spread the use of safer technology and alternatives in managing chemical risk, including issuing an alert on safer technology and alternatives, working with industry to promote examples of best practices, and developing guidance to inform chemical operators of safer technology, processes, and alternative solutions.

b. Does the Administration continue to believe that regulators should have the authority to direct the highest risk chemical facilities to implement IST methods if such methods enhance overall security, are feasible, and, in the case of water sector facilities, consider public health and environmental requirements? If not, why not (and please provide copies of documents that establish the Administration's new policy)?

Response: The EPA continues to support the consideration and adoption of safer technologies and alternatives at high risk chemical facilities as important steps to reduce risks.

Based on stakeholder requests for more robust preventative measures, the EPA and OSHA developed a plan set forth in the Report to the President to encourage chemical facilities to integrate safer technology and alternatives into a facility's process safety programs. The plan consists of three steps, which are not mutually exclusive: 1. Issue an Alert; 2. Develop Voluntary Guidance; and 3. Consider Regulatory Options. The EPA and OSHA are analyzing the feedback received from the RFIs to determine the appropriate course of action with respect to any modifications to the RMP and/or PSM requirements to include specific safer technology and alternatives analysis and documentation of actions taken to implement feasible alternatives. The EPA or OSHA would not, however, determine specific technology, design, or process selection by chemical facility owners or operators.

The EPA and OSHA are also considering other possible options to reinforce and further spread the use of safer technology and alternatives in managing chemical risk throughout industry. Such options include a partnership with industry in order to encourage such approaches through existing stewardship programs, work with industry on a safer technology and alternatives/

inherent safety clearinghouse, and recognition programs.

2) The Department of Homeland Security[1] and EPA[2] have both repeatedly stated in Congressional testimony that the exclusion of drinking water and wastewater treatment facilities from federal chemical security regulations is a critical security gap.

a. Does EPA still agree with its prior statements? If not, please explain why not.

b. In 2009, the Administration also believed that "EPA should be the lead agency for chemical security for both drinking water and wastewater systems, with DHS supporting EPA's efforts." Does EPA still agree with this statement, and if not, why not, given the nexus between the requirements for safe drinking water and treatment of wastewater and the need to secure and protect the public from the chemicals that are often used to achieve these requirements?

c. Will EPA use its RMP, Safe Drinking Water Act or Clean Water Act authority to require upgrades to security for drinking and wastewater facilities in light of the long-standing critical security gap for these facilities? Please provide me with the specific actions EPA plans to take along with a timeline for their completion. If not, why not?

d. Numerous drinking and wastewater facilities have successfully and inexpensively incorporated IST into their operations, including the replacement of chlorine gas with sodium hypochlorite or UV systems. Does EPA believe that the adoption of IST should be considered by all drinking and wastewater facilities as one measure that could address the critical security gap that exists for these facilities? Why or why not?

Response: The EPA continues to support including waste water and drinking water facilities under chemical facility safety and security programs and continues to support the consideration and adoption of safer technologies and alternatives at high risk chemical facilities as important steps to reduce risks.

Safe drinking water and properly treated wastewater are critical to modern life. The EPA provides information to help drinking water and wastewater utilities:
• Assess and reduce vulnerabilities to potential terrorist attacks;
• Plan for and practice response to emergencies and incidents; and
• Develop new security technologies to detect and monitor contaminants and prevent security breaches.

It is important for drinking water and wastewater utility managers, board members, elected and appointed officials to understand the benefits of investing in preparedness, prevention and mitigation activities at the utility. Federal and state agencies have long been active in addressing

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[1] See https://www.dhs.gov/news/2011/0330/written-testimonynppd-house-energy-and commerce-hearing titled hr -908, and http://democrats.energycommerce.house.gov/sites/default/files/documents/TestimonyBeers-EE-Drinking-Water-System-Security-CFAT-Act-2009-10-1-pdf.

[2] See: http://www.epa.gov/ocirpage/hearings/testimony/111 2009 2010/2010 0728 ccd.pdf.

the risks and threats to water and wastewater utilities through regulations, technical assistance, research, and outreach programs. As a result, an extensive system of regulations governing maximum contaminant levels of 90 conventional contaminants (most established by EPA), construction and operating standards (implemented mostly by the states), monitoring, emergency response planning, training, research, and education have been developed to better protect the nation's drinking water supply and receiving waters.

Since the events of 9/11, the EPA has been designated as the sector-specific agency responsible for infrastructure protection activities for the nation's drinking water and wastewater systems. EPA is utilizing its position within the water sector and working with its stakeholders to provide information to help protect the nation's drinking water supply from terrorist or other intentional acts. For more information, see:
http://water.epa.gov/infrastructure/watersecurity/basicinformation.cfm

Questions from Senator Patty Murray

1. As you know, the Emergency Planning and Community Right-to-Know Act was passed in 1986, and provides resources to plan for chemical emergencies. Since its enactment there have been a large number of incidents, highlighting the need for substantial emergency planning.

a. Do the recent events at the DuPont industrial plant and the West Fertilizer Company facility in Texas warrant a statutory update of the Emergency Planning and Community Right-to-Know Act?

Response: EPCRA does not provide resources for State Emergency Response Commissions and Local Emergency Response Commissions (SERCs and LEPCs) to implement the requirements stipulated in the statute. The statute provides for the establishment of a state and local infrastructure for chemical facility emergency response, preparedness, and prevention and necessary authorities for those entities to implement the requirements of EPCRA.

As identified through the listening sessions and outreach efforts of the Executive Order on Improving Chemical Facility Safety and Security, SERCs and LEPCs need technical support and assistance in meeting the planning and preparedness requirement of EPCRA, including assessing the risks associated with hazardous chemicals in their communities and ensuring community preparedness for incidents that may occur.

In this regard, the EPA is moving forward on developing online EPCRA training modules for SERCs/TERCs and LEPCs and TERCs. This training is intended to reinforce their authorities and roles to meet their responsibilities under EPCRA for the development and implementation of local emergency response plans, and is on schedule for completion by June 6, 2015. In addition, the EPA is working to update, and revise as necessary, planning and response guidance materials for SERCs and LEPCs. This will help ensure SERCs/TERCs and LEPCs/TEPCs have the latest information in a format that allows them to share and exchange among themselves and with other organizations and stakeholders.

In order to respond to requests from SERCs and TERCs for assistance in clarifying EPCRA responsibilities to support emergency preparedness and planning efforts, the EPA is also developing factsheets for SERCs/TERCs and LEPCs/TEPCs and industry to assist them in understanding and meeting their responsibilities under EPCRA.

i. How have the owners of chemical facilities contributed to the training of first responders to potential accidents? How has the agency ensured that first responders are receiving adequate training?

Response: The EPA is moving forward on developing online EPCRA training modules for SERCs/TERCs and LEPCs/TERCs. This training is intended to reinforce their authorities and roles to meet their responsibilities under EPCRA for the development and implementation of local emergency response plans, and is on schedule for completion by June 6, 2015. In addition, the EPA is working to update, and revise as necessary, planning and response guidance materials for SERCs and LEPCs. During the listening sessions conducted by the Working Group, there were many examples identified of facility operators working with state and local response officials in the training of first responders.

a. How have Congress' repeated cuts to the EPA's budget and governing from crisis to crisis impacted the agency's ability to reach out to stakeholders and gather meaningful information? If Congress fails to repeal sequestration for the next fiscal year, how will implementation of the President's executive order be impacted?

Response: The 2015 President's Budget requested additional resources to support state and local prevention and preparedness efforts. The EPA did not receive additional funding to fully support local prevention and preparedness efforts in the enacted FY 2015 Omnibus Appropriations bill. The EPA is making a concerted effort to prioritize the limited FY 2015 resources within the program area for the EO action items, but some upgrades to CAMEO and outreach will be delayed. The FY 2016 President's Budget requests a $12 million increase.

Questions from Senator Michael Enzi

1. The Federal Action Plan outlined in the "Action to Improve Chemical Facility Safety and Security" report includes, under Item 4, 'Expanding Tools to Assist SERCs, TERCs, LEPCs, and TEPCs in Collecting, Storing, and Using Chemical Facility Information,' the intention to improve the Computer-Aided Management of Emergency Operations (CAMEO) hazardous material response software in order to expand analytical capabilities and promote information sharing. My understanding is that this is being developed at the EPA. Is the EPA considering options for enhancing, supplementing, or superseding CAMEO that include tools, apps, or software developed by the private sector?

a. **Has the EPA considered cost-savings that could be derived from allowing the private sector to provide this resource?**

Response: The private sector is heavily involved in all CAMEO life-cycle activities. This includes programming, scientific support, documentation, user support, and the use of commercial software and database systems.

Since its inception over 25 years ago, CAMEO has been a joint project between the EPA and NOAA. Formerly, system development was split between the two agencies. Currently all development is performed by NOAA. NOAA also provides chemists for maintaining the chemical reference database, GIS experts for the mapping function, and air modelling experts for the air-dispersion modelling program. The EPA provides funding, project management, regulatory expertise, user support, distribution, and website services.

The primary reason the EPA and NOAA initially developed CAMEO was because most local communities could not afford commercial emergency management software as EPCRA provided no funding for SERCs and LEPCs to meet their requirements under the statute. The CAMEO project was designed to provide local communities with the essential capability needed to meet their responsibilities free of charge.

As identified through the listening sessions and outreach efforts of the Executive Order on Improving Chemical Facility Safety and Security, SERCs and LEPCs need technical support and assistance in meeting the planning and preparedness requirement of EPCRA including assessing the risks associated with hazardous chemicals in their communities and ensuring the development and implementation of the local contingency plan for chemical incidents that may occur. CAMEO and the planned further enhancements to the CAMEO suites will be a significant step in assisting the SERCs and LEPCs meet these needs while maintaining their limited resources to support their coordination with industry and outreach to the community on what they should do when an accident occurs. Through EPA and NOAA contracts, the private sector plays a critical role in the success of CAMEO.

2. The "Action to Improve Chemical Facility Safety and Security" report included discussion on information sharing among stakeholders in the New York/New Jersey pilot program. Can you clarify how information sharing will be structured going forward, and what specific types of data will be shared with federal, state, tribal, regional, local, and other stakeholders?

Response: The New York/New Jersey pilot facilitated a better understanding of the information needs of first responders and communities before and during a chemical release. Standard Operating Procedures (SOPs) have been established to develop and share best practices on sharing EPRCA Tier II and other critical information to first responders, and developing procedures to take advantage of existing drills and exercise opportunities to support and test existing LEPC contingency plans. Over the next nine months, the Regional Working Groups established under the EO will work to identify and implement the appropriate SOPs for their Region. This will include the process for sharing information and what information will be shared with stakeholders.