

Congress of the United States  
House of Representatives  
Washington, DC 20515-1701

October 15, 2012

President Barack Obama  
The White House  
1600 Pennsylvania Ave NW  
Washington, D.C. 20500

Dear Mr. President:

Shortly after you took office, in a January 21, 2009 address to your cabinet and senior staff, you set forth the following expectation: *"Let me say it as simply as I can: Transparency and the rule of law will be the touchstones of this presidency."*<sup>1</sup>

EPA Administrator Lisa Jackson echoed that commitment to transparency and the rule of law in her confirmation hearings and in statements and letters to her employees,<sup>2</sup> but those principles have been absent in far too many of the agency's actions. The result is a regulatory agenda that regularly exceeds the scope of the agency's statutory authority. This is not just my view, but as cited below, a conclusion reached by the ultimate arbiters of our nation's laws, the courts. I am deeply troubled by an agency operating outside of its legal authority and in a manner clearly inconsistent with the expectations you set forth, and accordingly, I ask that you take action to halt EPA's diverging course and ensure the agency is held to the standards you established. As our country struggles to create jobs and grow the economy, it cannot afford EPA's costly freelancing beyond the bounds of existing laws.

As you address these concerns, I urge you to consider the following decisions and rationale from the Federal courts.

- In an August 2012 decision vacating EPA's "Cross-State Air Pollution Rule," the D.C. Circuit Court of Appeals stated the following—
  1. *"EPA has transgressed statutory boundaries."*
  2. *"EPA pursues its reading of the statutory text down the rabbit hole to a wonderland where EPA defines its target after the States' chance to comply with the target has already passed."*

<sup>1</sup> <http://www.whitehouse.gov/the-press-office/remarks-president-welcoming-senior-staff-and-cabinet-secretaries-white-house>.

<sup>2</sup> <http://blog.epa.gov/administrator/2009/04/24/memo-to-epa-employees-transparency-in-epas-operations/>.

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3. *“EPA’s authority to issue these [Federal Implementation Plans] rests on our accepting its rickety statutory logic. We decline the invitation.”*
- In March 2012, in the Spruce Mine decision, a Federal judge rejected the EPA’s attempt to invalidate a West Virginia coal mining permit issued by the Corps of Engineers, stating the following—
    1. *“This attempt to withdraw the specification of discharge sites after a permit has been issued is unprecedented in the history of the Clean Water Act.”*
    2. *“EPA’s position is that section 404(c) grants plenary authority to unilaterally modify or revoke a permit that has been duly issued by the Corps- the only permitting agency identified in the statute- and to do so at any time. This is a stunning power for an agency to arrogate to itself when there is absolutely no mention of it in the statute.”*
    3. *“To explain how this would be accomplished in the absence of any statutory provision or even regulation that details the effect that EPA’s belated action would have on an existing permit, EPA resorts to magical thinking. It posits a scenario involving automatic self-destruction of a written permit issued by an entirely separate federal agency after years of study and consideration. Poof! Not only is this non-revocation logistically complicated, but the possibility that it could happen would leave permittees in the untenable position of being unable to rely upon the sole statutory authority touchstone for measuring their Clean Water Act compliance: the permit.”*
  - In an August 2012 decision vacating EPA’s disapproval of Texas’ “Flexible Permit Program,” in place since the Clinton Administration, the 5th Circuit Court of Appeals stated the following—
    1. *“[The EPA] cannot expand [its] congressional delegated power based on ad-hoc and general assertions of a state program’s complexity.”*
    2. *“It is clear that Congress had a specific vision when enacting the Clean Air Act: The Federal and State government were to work together, with assigned statutory duties and responsibilities, to achieve better air quality. The EPA’s final rule disapproving Texas’ Flexible Permit Program transgresses the CAA’s delineated boundaries of this cooperative relationship.”*

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- In the Luminant case from March of this year, the 5th Circuit also rejected EPA's attempts to disapprove another Texas permit program, stating the following—
  1. *"EPA had no legal basis on which to disapprove these regulations."*
  2. *"EPA overstepped the bounds of its narrow statutory role in the [State Implementation Plan] approval process."*
  3. *The EPA's disapproval was based on "purported nonconformity with three extra-statutory standards that the EPA created out of whole cloth."*
  
- In the Avenal case from May 2011, a Federal judge order EPA to issue a much delayed permit stating the following—
  1. *"In essence, the EPA contends that Congress's statutory mandate is subservient to EPA's regulatory review process, and as such this Court has no authority to require the Administrator to comply with this statutory requirement... How absurd!"*
  2. *"The EPA has labored mightily to convince this Court that the temporal requirement enacted by Congress is somehow ambiguous and, therefore, this Court should defer to its interpretation under Chevron... Horsefeathers! The EPA's self-serving misinterpretation of Congress's mandate is too clever by half and an obvious effort to protect its regulatory process at the expense of Congress's clear intention. Put simply, that dog won't hunt."*

These and many other examples reflect the action of a rogue agency that is making up authorities it does not legally possess in order to accomplish its policy goals. Although the job-creating industries affected by these decisions were eventually vindicated, irreversible economic damage has been inflicted. The chilling effect of EPA's initial actions discourages investment and hiring until a final decision is reached, and even afterwards there are legitimate concerns the agency will attempt to pursue the same agenda through other means. Meanwhile, America's industrial competitors around the world continue to move ahead unfettered by EPA's constraints. I urge you to follow through on your commitment from 2009 when you said, "transparency and the rule of law will be the touchstones of this presidency."

Sincerely,



Ed Whitfield  
Member of Congress