United States Senate

WASHINGTON, DC 20510

April 12, 2004

The Honorable Nikki L. Tinsley
Inspector General
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Dear Inspector General Tinsley:

We write to respectfully request that you conduct an investigation into the apparent serious irregularities in the process that the U.S. Environmental Protection Agency used to develop its proposed alternatives for emissions standards for mercury emitted by electric utility plants – the so-called Utility MACT (maximum achievable control technology) and trading rule. We believe that any of EPA's proposals, if finalized, would violate the spirit and the letter of the Clean Air Act because they fail to require mercury emissions limits for these plants that reflect the maximum achievable reductions from this industry.

But, perhaps more importantly, the deeply flawed process by which this proposal was developed, as detailed below, threatens to undermine the integrity of the regulatory process of setting MACT standards generally under the Clean Air Act. EPA seemingly ignored the requirements of the statute, executive orders, and EPA's own guidance, and instead proposed mercury emissions limits and alternative trading budgets targets based on the Administration's proposed "Clear Skies" legislation, and then performed a post-hoc justification of those numbers. There is strong evidence that EPA career staff members were directed by political appointees not to follow the normal regulatory development procedures, and that the affected industry had an undue influence over the entire process. Finally, it appears that White House officials systematically went through the proposed rule and edited it to weaken scientific evidence demonstrating the health risks of mercury exposure.

EPA currently is required by a court-approved settlement to issue a final rule by December 2004. If EPA is to have an opportunity to take fully into account your final report and recommendations in this matter and take whatever corrective action is necessary in finalizing the rule, it is crucial that this investigation be completed and the report and recommendations issued by that time. We ask that you set a date that is sufficiently prior to December 2004 that EPA will have an opportunity to consider and incorporate your report's findings and recommendations.

Some of the specific irregularities that warrant investigation include the following:

- Setting a MACT standard involves setting a technology "floor" based on the actual reductions achieved by the best-performing units in the industry. The floor is the minimum amount of reductions that can be required. Once a floor is established, the standard is then developed based on assessments of control technologies, precombustion techniques, design, equipment or workplace standards for emissions reductions, among

other methods, systems, or techniques, to evaluate whether a standard that is more stringent or "beyond the floor" is justified on a feasibility, cost-effectiveness, or other societal evaluation basis. A standing executive order requires EPA to identify and evaluate regulatory alternatives, select from among them, and explain why its proposed option is justified. The proposal and docket reveal no effort to comply with this requirement. A recent press account of conversations with at least five current EPA staff members indicates that they were directed not to undertake the normal scientific and economic studies that should have been used to evaluate the proposed MACT alternatives, and to evaluate the MACT alternative against the proposed cap and trading options. See Appendix A. We would like you to determine whether this allegation is accurate, who made the decision, and how it was communicated to staff.

- In August 2001, EPA formed an advisory group for the MACT proposal known as the Utility MACT Working Group constituted under the Federal Advisory Committee Act (FACA). The group consisted of industry, state, and environmental community representatives, and was charged with "provid[ing] input to the EPA regarding Federal MACT regulations" for the listed industry coal- and oil-fired electric utility steam generating units. The Working Group held 14 meetings over a period of 18 months. In March 2003, EPA scheduled an April 2003 meeting. The April meeting was abruptly cancelled and was never rescheduled. In fact, although the purpose of the group was to advise EPA as it formulated its proposal, the group never met again prior to the EPA Administrator signing the proposed rule in December 2003. To date, there has been no explanation for the dissolution of the working group.

- Our concerns that EPA's regulatory development process failed to follow even the most routine procedures are heightened by the discovery that the proposal contains entire sections of text that appear to have been lifted verbatim from memos prepared by firms representing industry participants, and which were not presented to the Working Group, but were provided to the Agency quite late in the regulatory development process.

- A standing executive order requires EPA to evaluate the environmental and safety effects of a proposed regulation on the nation's children. A December 2003 EPA draft of the proposal circulated for interagency review describes the rationale why this executive order does not apply to the proposal. In comments received by EPA from the Office of Management and Budget of the White House, OMB deleted this rationale and replaced it with language asserting that the evaluation requirement had been satisfied. A search of the proposal and docket reveals no indication that any such evaluation was ever performed.

- Documents indicate that a significant number of changes were made to the proposed rule package to weaken the language and scientific understanding of health effects of mercury exposure to sensitive populations, such as women of childbearing age, fetuses, and infants. In other places, edits appear to have been made to argue that the proposed strategies are preferable to other alternatives instead of original language stating that Executive Order 13045 on protecting children from environmental health risks and safety risks did not apply.

- Recent press accounts indicate that two senior career staff may have been demoted from leadership roles in recent weeks for allowing EPA's Children's Health Protection Advisory Committee to publicly criticize the Administration's utility rule. See Appendix N. We would like you to determine whether this allegation is accurate, who made the decision, and how it was communicated to committee members.

The record reflects a pattern of pressure to develop a rule package that subverts the Act's requirements in favor of industry arguments and outcomes driven by the Administration's Clear Skies legislative proposals. For example: (1) EPA staffers were directed not to follow statutory and executive order requirements; (2) federal advisory committee activities were abruptly curtailed without explanation; (3) results-oriented analyses were undertaken, apparently beginning with the conclusion that "Clear Skies" dates and caps had to be replicated in the standard; (4) claims appeared on the record that required analysis had been satisfied when it had not; (5) EPA lifted large portions of the regulatory proposal from memos written by lawyers representing the regulated industry and outside the established federal advisory committee proposal; and, (6) the White House edited the proposed rule package to weaken scientific information on the health effects of mercury exposure. If true, these are sure signs of a regulatory process gone awry. The facts as they appear today suggest fundamental problems with the way EPA has conducted its business with respect to these rule proposals. In order to gain a better understanding of the extent of the procedural irregularities that occurred during the rule development process, we have prepared a list of questions (with relevant attachments) that we believe should form the core of your investigation.

In accordance with your responsibility to keep the Administrator and Congress fully informed concerning problems, abuses and deficiencies relating to the administration of EPA's programs, please provide us with a report of your findings and recommendations by a date appropriately in advance of the December 2004 date for the finalization of the mercury rule. Thank you for your attention to this matter.

Sincerely,

James M. Jeffords

Patrick J. Leahy

Joseph I. Lieberman

Hillary Rodham Clinton

Barbara Boxer

Tom Carper

Ron Wyden

Attachments