



April 11, 2013

## Questions for EPA Nominee Gina McCarthy

Gina McCarthy is Assistant Administrator for the Environmental Protection Agency's (EPA) Office of Air and Radiation (OAR). On March 4, President Obama nominated her to be Administrator of the EPA. This agency is armed with an [\\$8.5 billion](#) budget and more than 17,000 employees to regulate America's air, water, and land. Its regulations cost a total of [\\$353 billion](#) per year. The Senate Environment and Public Works Committee will consider McCarthy's nomination on April 11. Here are some questions to help explore how McCarthy, as EPA Administrator, might advise the President on environmental policies.

### War on Coal and Other Fossil Fuels

During the past four years, McCarthy facilitated the President's [War on Coal](#). She played a central role in authoring environmental regulations that could effectively ban the use of coal as an energy source. She helped set standards so severe that as much as 20 percent of existing coal-fired power plants will have to retire, and new coal-fired power plants will not be built. To comply, industry could pay up to \$130 billion to retrofit existing coal-fired power plants with emissions control equipment that, in some cases, is not commercially viable or does not even exist. Energy consumers will bear these additional costs through higher electricity rates, and see decreased electric reliability as EPA's rules force utilities to substitute coal with more expensive, less dependable fuel sources.

- In January 2008, then-presidential candidate Obama said coal-fired power plants would go "bankrupt" and "electricity rates would necessarily skyrocket" under his plan to tax greenhouse gas emissions through a cap-and-trade system. After Congress rejected that policy, President Obama defiantly announced there were other ways of "skinning the cat." In his State of the Union address this year, he promised to "come up with executive actions" if Congress does not pursue legislation to "speed the transition" from coal and other fossil fuels to "more sustainable" sources of energy. Do you believe the President should unilaterally impose a policy of prohibiting coal-fired power that the American people, through their representatives in Congress, have rejected?
- More than 7,000 jobs have already been lost in Virginia, West Virginia, Ohio, Pennsylvania, Texas, and Georgia as coal mines shutter, coal-fired power plants close, and plans to build them are abandoned in response to EPA regulations. A coalition of 15

major unions representing 3.2 million workers believes 433 coal-fired electric generating units and [more than 250,000 jobs](#) are “at risk.” Do you concede that EPA regulations are playing a primary role in eliminating thousands of coal-related jobs?

Then-EPA Administrator Lisa Jackson stated that her agency’s mission was to [“level the playing field”](#) against fossil fuels. Her governing philosophy penetrated throughout the agency’s ranks. EPA Region 9 Administrator Jared Blumenfeld said the EPA was tasked with creating “transition pathways away from a fossil fuel economy.” EPA Region 2 Administrator Judith Enck argued that the agency’s role was to force power plants, manufacturers, and transportation to [“make a really substantial shift away from fossil fuels.”](#) EPA Region 1 Administrator Curt Spalding admitted that, under greenhouse gas regulations for new power plants authored by McCarthy and other EPA officials, “if you want to build a coal plant you got a big problem.” EPA Region 6 Administrator Al Armendariz revealed that EPA’s “general philosophy” is to “make examples” of oil and gas companies, and claimed one of the “really neat moments” of his tenure was to show top EPA officials the anti-hydraulic fracturing and anti-natural gas movie *Gasland*.

- The President claims he supports an “all of the above” approach to fulfilling the nation’s energy demands. Yet you and other top EPA officials have aggressively pursued policies to fulfill the agency’s self-described mission of eliminating fossil fuels from our nation’s energy mix. Do you believe these agendas are cohesive or contradictory?
- Do you interpret the President’s “all of the above” energy strategy to include or exclude coal, oil, and gas?
- As Administrator, would you continue to use EPA’s regulatory powers to shape the marketplace to the disadvantage of affordable, reliable energy derived from coal, oil, and gas in favor of expensive, unreliable energy derived from alternative energy sources?

## **Above-the-Law Regulation**

EPA Region 6 Administrator Al Armendariz resigned his position in April 2012 after being caught on video analogizing EPA’s enforcement philosophy against oil and gas companies: “It was kind of like how the Romans used to conquer little villages in the Mediterranean. They’d go into a little Turkish town somewhere, they’d find the first five guys they saw and they would crucify them. And then you know that town was really easy to manage for the next few years.”

- As Administrator, would you continue to deploy EPA assets to “crucify” oil and gas companies as a primary tactic in regulating them?
- On March 30, 2012, Armendariz emailed to top EPA officials: “We have set things in motion, including empowering and shaming the states, to clean up the oil/gas sector. Further progress is inevitable. I am extremely proud of the work that we have done collectively. Gina’s new air rules will soon be the icing on the cake, on an issue I worked on years before my current job.” Do you share Armendariz’s pride in your greenhouse

gas regulations for new power plants being the “icing on the cake” in EPA’s crusade against oil and gas companies?

The U.S. Court of Appeals for the D.C. Circuit [struck down](#) the Cross-State Air Pollution Rule (CSAPR) because it “exceeds the agency’s statutory authority” and “violates federal law.” The court found that CSAPR was so flawed that it “stands on an unsound foundation” and relied on “rickety statutory logic” that would trample on state’s rights. The rule misused a provision of the Clean Air Act to “impose massive emissions reduction requirements on upwind states without regard to the limits imposed by statutory text.”

- As head of the OAR, you were intimately involved in the drafting of CSAPR. Do you agree with the court’s ruling that CSAPR was a fatally flawed rule whose promulgation exceeded EPA authority?
- As Administrator, would you commit to respecting the statutory limits imposed on the EPA’s authority by Congress, or would you continue to participate in the promulgation of rules exceeding those limits, placing the EPA’s anti-fossil fuel agenda above the law?

Federal courts have struck down numerous other rules and actions by the EPA during McCarthy’s tenure. In *Sackett v. EPA*, the Supreme Court unanimously rejected EPA’s assertion that citizens cannot challenge Clean Water Act enforcement orders. It noted that the agency’s position “would have put the property rights of ordinary Americans entirely at the mercy of the Environmental Protection Agency,” subjecting them to “unthinkable” treatment in a nation that values due process and private property. In *Luminant v. EPA*, the Fifth Circuit Court of Appeals found that EPA disapproval of a Texas permit program was based on “purported nonconformity with three extra-statutory standards that the EPA had created out of whole cloth.” In *Spruce Mine v. EPA*, the D.C. District Court found that EPA resorted to “magical thinking” and created “a stunning power for an agency to aggregate to itself” when it unilaterally revoked a valid fill permit issued by the U.S. Army Corps of Engineers two years earlier. In *VDOT v. EPA*, a federal district court in Virginia found that the Clean Water Act “simply does not grant EPA the authority it claims” and that the “EPA cannot be allowed to exceed its clearly limited statutory authority.”

- Do you believe the statutory limits placed on EPA’s authority by Congress are important and should be respected when EPA promulgates rules and takes other actions?
- As Administrator, will you continue to permit the promulgation of rules and the taking of actions that are outside the scope of EPA’s statutory authority, or will you only allow such activities to be taken within the confines of authority delegated to EPA by Congress and, by extension, the American people?

## **Misleading Congress and the American People**

As Assistant Administrator for OAR, McCarthy has direct responsibility for promulgating the Mercury and Air Toxics Standards (MATS) for power plants. Among other duties, she is

supposed to provide Congress, the energy industry, environmental groups, other stakeholders, and the American people with impartial, well-researched, accurate projections of the rule's impacts on electric generating capacity, electricity rates, and other costs and benefits.

Last year, McCarthy [testified](#) before Congress that “only a modest amount of generating capacity” -- 4,700 megawatts -- will become uneconomic to operate under MATS. In fact, this rule will cause [35,000 MW](#) to retire, according to the Institute for Energy Research.

- Do you stand by your testimony that “only a modest amount” of coal-fired generating capacity will be forced to retire by EPA regulations? Or would you reconsider your testimony in light of more recent analyses and already announced retirements that show your projections to be off by more than 600 percent?

Similarly, McCarthy told Congress that MATS would have a “very small” impact on electricity rates, yet they have [soared](#) by 23 percent in the Mid-Atlantic region and 183 percent in the northern Ohio region from the 2014/2015 delivery year to the 2015/2016 delivery year. This is due to “an unprecedented amount of planned generation retirements (more than 14,000 MW) driven largely by environmental regulations, which drove prices higher than last year's auction.”

- Do you stand by your testimony that MATS will have a “very small” impact on electricity rates? Or would you reconsider your testimony in light of market evidence that electricity rates have increased by up to 183 percent in response to EPA regulations?

According to EPA, the “[great majority](#)” of benefits from MATS will come from reductions in particulate matter, not mercury or air toxics. “The benefits of controlling mercury and air toxics comprise less than one ten-thousandth of the total benefits reported for the mercury and air toxics rule,” according to one expert's [testimony](#) last year. “Ninety-nine percent of the benefits attributed to the MATS rule were derived by assigning high dollar values to reductions in emissions of fine particles (PM<sub>2.5</sub>), which are not the focus of this regulation and which are regulated elsewhere.”

- You and other EPA officials decided to refer to this rule “[in short as the Mercury and Air Toxics Standards \(MATS\).](#)” But this rule really targets particulate matter emissions, not mercury and air toxics. Why did your team decide to mislead the American people by labeling this rule as something it is not?
- You and other EPA officials decided to calculate almost all of this rule's monetary benefits “from PM<sub>2.5</sub> reductions [well below](#) the levels it has already determined are ‘protective of public health with an adequate margin of safety, taking into consideration effects on susceptible populations.’ Using a linear, no-threshold assumption and attributing effects from small reductions in PM<sub>2.5</sub> at levels that are just measurable with modern techniques, the MATS RIA models thousands of premature mortalities from exposures to PM<sub>2.5</sub> concentrations it has determined to be protective.” Why did your team decide to claim benefits from particulate matter reductions occurring *well below* levels deemed by EPA to be sufficiently protective of public health?

- You and other EPA officials have repeatedly ignored congressional requests to make publicly available the taxpayer-financed databases used to conduct the cost-benefit analysis for MATS. Do you believe Congress, stakeholders, and the American people can adequately review EPA's cost-benefit analysis for MATS and other rules without access to the actual data upon which it rests?

## Hiding from Congress and the American People

EPA policy instructs employees to “not use any outside e-mail account to conduct official agency business.” Yet EPA officials have used secret e-mail accounts to avoid transparency and pull the wool over the eyes of Congress and the American people. Most notably, then-Administrator Lisa Jackson conducted the public's business on a secret email account under the pseudonym “Richard Windsor” in order to keep Congress and the American people in the dark.

- As Assistant Administrator of EPA's OAR, you worked very closely on a daily basis with then-Administrator Jackson for several years. During your tenure, did you:
  - Receive any emails from Jackson sent from any secret email account, including her “Richard Windsor” account, on any matter, public or private, at any time?
  - Send any emails to any secret email account of Jackson's, including her “Richard Windsor” account, on any matter, public or private, at any time?
  - Communicate with the secret email accounts of any other EPA colleague or any other government official?
- Do you think Jackson's conduct of official business on a secret email account under the pseudonym “Richard Windsor” was inappropriate or in any way troubling? How about the use of secret email accounts by other EPA officials to conduct public business that you may know about?
- Based on your close working relationships with Jackson and other EPA officials, as well as your extensive experience as a government official in other regulatory agencies, how do you explain the use of secret email accounts and pseudonyms by Jackson and other EPA officials that you may know about to conduct the public's business?
- As Administrator, would you maintain EPA's policy prohibiting employees from using “any outside e-mail account to conduct official agency business”?
- During your tenure as Assistant Administrator for EPA's OAR:
  - Did you maintain any secret email accounts at any time?
  - Did you communicate with any government official, government entity, environmental organization, or business -- or any individual representative of any such entity -- on any matter at any time using a secret email account, whether yours or someone else's?
  - Did you communicate with any individual in any capacity on any matter at any time related to any federal agency activities, Administration policy discussions, or other public business using a secret email account, whether yours or someone else's?

- Did you communicate with any individual in any capacity on any matter at any time related to a carbon tax using a secret email account, whether yours or someone else's?
- In response to congressional investigations and private Freedom of Information Act (FOIA) requests, EPA has produced emails sent from Jackson's secret email account. The produced emails are almost completely redacted.
  - Were you a party to or did you in any other way participate in any communications that occurred in these produced emails, including any portions that have been redacted?
  - If so, explain the nature of the communications in which you participated in as much detail as possible.
  - As Administrator, would you immediately produce all emails the EPA has agreed to produce (whether or not they have already been produced) *without any redactions* in order to bring the agency into full compliance with all congressional investigations and private FOIA requests?

## Miscellaneous Questions

In March, the Senate voted 62 to 37 to approve construction of the Keystone XL pipeline, including [17 Democrats](#) who voted "yes." A majority in the House and [70 percent](#) of the American people support the project. So do [major unions](#) and every state along its route. For the past year, TransCanada worked diligently with Nebraska to re-route the pipeline in response to environmental concerns. It further improved its development plan, which, according to the State Department's latest [environmental review](#), will [not](#) accelerate greenhouse gas emissions or significantly impact the environment.

- As Administrator, will you advise the State Department and other Administration officials what four successive environmental reviews have concluded: that construction of the Keystone XL pipeline will result in no significant environmental impacts?
- As Administrator, will you support the Keystone XL pipeline project, will you oppose it outright, or will you promote its death by a thousand cuts by pushing for yet another round of environmental review?

The President plans to require all federal agencies to consider greenhouse gas emissions when making permitting and other decisions. It is expected that his Council on Environmental Quality will require agencies to consider greenhouse gas emissions produced by exports after those exports leave the United States. The National Association of Manufacturers has said such a requirement would create a very dangerous precedent that could be used to block exports of all types, including automobiles, civilian aircraft, and heavy equipment like tractors. In March, the Senate passed an amendment expressing its view that the federal government should be prohibited from considering, under the National Environmental Policy Act (NEPA), greenhouse gas emissions produced outside the United States by any good exported from the United States. Democratic Senator Patty Murray accepted this amendment on behalf of her Democratic colleagues, stating: "We believe this is current law."

- As Administrator, would you advocate for requiring the federal government and/or other parties to consider, under NEPA or any other environmental law, greenhouse gas emissions produced outside the United States by any good exported from the United States?

On September 8, 2011 in a hearing before the House Committee on Energy and Commerce, McCarthy [said](#): “I certainly don’t want to give the impression that EPA is in the business to create jobs.”

- Do you believe jobs -- their creation, destruction, or maintenance -- have any role at all in EPA’s activities?