

Minority Staff Report



Subcommittee on Oversight
Senate Environment and Public Works Committee
Senator John Barrasso, M.D.,
Ranking Member

March 3, 2010

The Status of Oversight A Year of Lost Oversight

**“The success of our environmental efforts depends on
earning and maintaining
the trust of the public we serve.”**

**- Lisa Jackson, Administrator,
Environmental Protection Agency (April 23rd, 2009)**

SUBCOMMITTEE ON OVERSIGHT

Democrats

*Sheldon Whitehouse, Chairman, Rhode Island
Tom Udall, New Mexico
Kirsten Gillibrand, New York*

Republicans

*John Barrasso, Ranking Member, Wyoming
David Vitter, Louisiana*

Jurisdiction:

Responsibility for oversight of agencies, departments, and programs within the jurisdiction of the full committee, and for conducting investigations within such jurisdiction – *Senate Environment and Public Works Committee website*

Rule XXV, of the Standing Rules of the Senate states that the issues which the Senate Environment and Public Works Committee has oversight over are as follows:

1. Air pollution.
2. Construction and maintenance of highways.
3. Environmental aspects of Outer Continental Shelf lands.
4. Environmental effects of toxic substances, other than pesticides.
5. Environmental policy.
6. Environmental research and development.
7. Fisheries and wildlife.
8. Flood control and improvements of rivers and harbors, including environmental aspects of deepwater ports.
9. Noise pollution.
10. Nonmilitary environmental regulation and control of nuclear energy.
11. Ocean dumping.
12. Public buildings and improved grounds of the United States generally, including Federal buildings in the District of Columbia.
13. Public works, bridges, and dams.
14. Regional economic development.
15. Solid waste disposal and recycling.
16. Water pollution.
17. Water resources.

Such committee shall also study and review, on a comprehensive basis, matters relating to environmental protection and resource utilization and conservation, and report thereon from time to time.

INTRODUCTION:

The Subcommittee on Oversight for the Senate Committee on Environment and Public Works was established by Committee Chairman Barbara Boxer in January 2009.

A number of agencies fall within the oversight jurisdiction of the Senate Environment and Public Works Committee:

- Environmental Protection Agency
- U.S. Fish and Wildlife Service
- U.S. Army Corps of Engineers
- Department of Transportation
- Economic Development Administration
- Nuclear Regulatory Commission.

The Committee also has oversight over additional agencies that oversee issues related to pollution and the cleanup of toxic substances, including the Department of Defense and the Department of Energy.

In 2009, the full Committee was particularly focused on environmental policy. This policy area cuts across many agencies including the Department of the Interior, the Department of Commerce, and the Department of Defense.

Upon being appointed as the head of the Subcommittee on Oversight, Chairman Whitehouse stated that he:

“plans to use the subcommittee to explore ways to restore scientific integrity at the EPA and other federal agencies focused on the environment, and to strengthen environmental protections by once again making the regulatory process more transparent.”

The Subcommittee on Oversight conducted two hearings in 2009:

- On June 9th, the Subcommittee held a joint hearing with the full committee entitled “Scientific Integrity and Transparency Reforms at the Environmental Protection Agency.”
- On July 8th, the Subcommittee held a hearing with the Subcommittee on Water and Wildlife entitled “Threats to Native Wildlife Species.”

Due to the full Committee’s focus in 2009 on climate change and environmental issues, the Minority was also focused on climate change and sound science. With only two hearings held, the Subcommittee did not play a significant role in that process.

The Minority has concerns with the pace of oversight in the Subcommittee. Over the last year, the Subcommittee lost the opportunity to investigate a number of key incidents that are important to maintaining transparency and openness in decisions by agencies under our jurisdiction. These are decisions that will cost millions of Americans their jobs.

This report details those incidents, the majority of which revolve around environmental policy. However, the Minority is committed to exercising our full jurisdiction over these issues. Minority members believe the subcommittee should hold oversight hearings regarding issues related to the U.S. Army Corps of Engineers, U.S. Highway Administration, U.S. Fish and Wildlife Service, and Nuclear Regulatory Commission. We also believe that the Committee should ensure that billions of taxpayer dollars spent through the American Recovery and Reinvestment Act are used to create jobs.

Findings and Recommendations:

- In 2009, the Senate Environment and Public Works Committee Majority chose not to conduct oversight over the relevant agencies within the executive branch. This abrogates Congresses' role as watchdog over federal agency activities.
- The lack of any oversight over the activities of the federal agencies weakens the system of checks and balances, and invites the potential for larger abuses.
- Immediate action must be taken to investigate all oversight issues of concern over the last year.
- Further coordination within the Committee regarding the oversight jurisdiction and responsibility is needed.

Issue 1: Obama Administration Attacks on Career Employees

On April 22, 2009, the Small Business Administration (SBA) Office of Advocacy wrote part of an internal Office of Management and Budget (OMB) memo about the impacts of EPA's recent finding that greenhouse gases pose an endangerment to public health and welfare.

The memo, written by a career SBA attorney, stated that the EPA had not taken into account the negative economic and logistical consequences of using the Clean Air Act to regulate climate change on small businesses as required by the Regulatory Flexibility Act.

Once this memo was released to the media, the Administration smeared Mrs. Shawn McGibbons, the career attorney, as a "Bush holdover." In an ABC News article entitled "In Inter-Agency Memo, 'Bush Holdover' Warns of Harm to Economy if Greenhouse Gases Regulated through Clean Air Act," the article stated that the memo was written "by a holdover from the Bush Administration, an Obama Administration official said today." Mrs. McGibbons was actually hired during the Clinton Administration in 1995. A similar *Greenwire* story on May 12, 2009 entitled "CLIMATE: Bush appointee's office wrote economic critique of EPA proposal – admin source," stated that an Administration official said the memo was submitted by the Small Business Office of Advocacy.

On October 23, 2009, a few months after her analysis was made public, President Obama replaced Mrs. McGibbons with Mrs. Susan Walthall, the new Acting Chief Counsel for Advocacy. On December 23rd, Mrs. Walthall wrote EPA Director Lisa Jackson and confirmed Mrs. McGibbons previous assessment about the impact of EPA greenhouse gas rules on small businesses. Mrs. Walthall stated:

"it is clear that EPA's Clean Air Act greenhouse gas rules will significantly impact a large number of small entities."

"EPA was therefore obligated under the Regulatory Flexibility Act to convene a Small Business Advocacy Review Panel (or Panels) prior to proposing these rules."

The statements by Walthall mirrored those by Mrs. McGibbons and confirmed again that EPA's proposed greenhouse gas rules would severely impact small businesses.

The EPA should start over, follow the Regulatory Flexibility Act, and conduct a thorough review. Without such a review, the Administration's actions appear to violate procedures spelled out in the law to protect small business owners. The procedures include establishing a Small Business Advocacy review panel or panels to consider the effects of EPA's regulatory actions on small businesses and other small entities and to minimize any undue disproportionate burden.

On May 13th, Subcommittee on Oversight Ranking Member John Barrasso sent a letter to the Office of Management and Budget (OMB) Director Peter Orszag and EPA Administrator Lisa Jackson. He asked who authorized the leak of the McGibbons' name to the press.

OMB Director Peter Orszag responded on July 31st and stated:

“OMB did release the name of the commenting agency to correct inaccurate and misleading reports” but that “OMB did not release or authorize the release of any individual’s name in connection with the comment.”

It is clear that the release of the individual’s name was done solely for political reasons and to smear her credibility. Rather than present a coherent argument as to why the comments were ignored by the EPA, Administration officials chose to publically discredit a career employee for doing her job.

Unanswered questions remain regarding the release of the career federal attorney’s name, and whether or not the EPA violated the law when preparing the proposed greenhouse gas rules.

Summary:

Selectively releasing the names of individuals for political purposes is unacceptable. Condoning such behavior by failing to correct such actions is equally egregious.

Senator Barrasso has requested that the EPW Committee and/or the EPW Subcommittee on Oversight conduct a hearing on this issue. The hearing would examine the treatment of the employee by Administration officials, as well as action taken by the Administration to prevent similar events in the future.

To date, the Subcommittee on Oversight, or the full Senate Environment and Public Works Committee has not held a hearing on this issue.

Issue 2: Obama Administration Silences a Whistleblower

Dr. Alan Carlin, a 39-year EPA veteran prepared a 98-page analysis with Mr. John Davidson of the EPA arguing the agency (EPA) should take another look at its scientific data behind the endangerment finding that carbon dioxide is a threat to public health. Their account raised serious questions about the process surrounding and substance of the EPA's proposed finding that greenhouse gases endanger public health and welfare.

The 98-page analysis included the following comments:

"EPA and others have tended to accept the findings reached by outside groups, particularly the IPCC [United National Intergovernmental Panel on Climate Change] and the CCSP [U.S. Climate Change Science Program], as being correct without a careful and critical examination of their conclusions and documentation."

"Not only is the science of the TSD [technical support document] out-of-date but there are a number of other disturbing inconsistencies between the temperate and other scientific data and the GHG/CO2 hypothesis that need to be carefully explored and explained if the draft TSD is to be credible."

"These inconsistencies are so important and sufficiently abstruse that in our view EPA needs to make an independent analysis of the science of global warming rather than adopting the conclusions of the IPCC and CCSP"

"Adopting the scientific conclusions of an outside group such as the IPCC or CCSP without thorough review by EPA is not in the EPA tradition anyway, and there seems to be little reason to change the tradition in this case."

It was reported by CBS News on June 26th in an article entitled "EPA May Have Suppressed Report Skeptical Of Global Warming" that a senior EPA official suppressed this detailed account of the most up-to-date science of climate change. The article stated:

"The Environmental Protection Agency may have suppressed an internal report that was skeptical of claims about global warming, including whether carbon dioxide must be strictly regulated by the federal government, according to a series of newly disclosed e-mail messages."

According to a series of emails obtained by the Competitive Enterprise Institute, the director of EPA's National Center for Environmental Economics (NCEE) refused to consider the report, and rejected a request to forward the report to agency officials tasked with analyzing the science behind the endangerment finding. Moreover, the director specifically barred one of the authors from disseminating or discussing the report's findings.

In a July 6th, 2009 *Wall Street Journal* article, Kim Strassel writes

"The response to Mr. Carlin was an e-mail from his boss, Al McGartland, forbidding him from 'any direct communication' with anyone outside of his office with regard to his analysis."

“When Mr. Carlin tried again to disseminate his analysis, Mr. McGartland decreed ‘The administrator and the administration have decided to move forward on endangerment, and your comments do not help the legal or policy case for this decision. . . I can only see one impact of your comments given where we are in the process, and that would be a very negative impact on our office.’”

The *Wall Street Journal* article also stated:

“Unable to defend EPA’s action, the climate-change crew --, led by anonymous EPA officials, is doing what it does best: trashing Mr. Carlin as a ‘denier.’”

Senator Barrasso wrote Subcommittee on Oversight Chairman Senator Sheldon Whitehouse on July 6th, 2009, about concerns the article raised. Senator Barrasso stated:

“As you know, this is not the first time that a career government agency employee has been attacked by this Administration for simply providing their best advice and counsel”

“In the coming weeks, given the seriousness of these events, I am requesting that the Subcommittee on Oversight launch an investigation and hold hearings to ensure EPA’s process governing the development of the endangerment finding is open and transparent—and that the Agency considers all view-points, and makes use of the best available, and most up-to-date, scientific data. This should include interviewing key EPA officials to get an understanding as to how science was used to make the endangerment finding. I would also ask that you join me in asking EPA for emails and any additional communications regarding the Dr. Carlin’s report.”

Chairman Whitehouse responded by letter dated July 21, 2009:

“Like you, I am committed to the idea that decision-making at EPA and other executive branch agencies should be transparent and faithful to the latest, soundest science. I believe that President Obama, too, is committed to this idea. I understand that Administrator Jackson has written to you in an effort to address your concerns about EPA. I also plan to discuss these issues with EPA. It is my hope, as I’m sure it is yours, that the Agency is now adhering, and will continue to adhere, to principles of transparency and sound science.”

Summary:

The Carlin incident raises serious questions about the Administration’s treatment of dissenting views, EPA’s commitment to its own scientific procedures, and the science behind EPA’s endangerment finding. The Administration has also established a clear record of mistreating career public servants who possess and express opposing views.

The Subcommittee on Oversight or the full Senate Environment and Public Works Committee should hold hearings and conduct a complete investigation into this issue. To date, neither has occurred despite repeated requests by the Minority.

Issue 3: Disclosure of compromised climate change data

On November 23, an article appeared in the *UK Daily Mail* entitled “Hackers 'expose global warming con': Skeptics claim that leaked emails reveal research center massaged temperature data,” that stated:

“One of the world’s leading climate change research centers has been accused of manipulating data on global warming after thousands of private emails and documents were leaked.”

“Hackers targeted the University of East Anglia’s Climatic Research Unit and published the files, including some personal messages, on the internet.”

The American and British scientists that comprise the CRU are major contributors to the United Nation’s Intergovernmental Panel on Climate Change. The data from their work provided the basis to create the United Nations Intergovernmental Panel on Climate Change reports. Institutions around the globe, including the U.S. Environmental Protection Agency, base their policies upon IPCC reports and CRU data.

On November 24th, in an editorial entitled “Global Warming with the Lid off,” the *Wall Street Journal* reported that in the e-mails:

“Scientists appear to urge each other to present a ‘unified’ view on the theory of man-made climate change while discussing the importance of the ‘common cause,’ to advise each other on how to smooth over data so as to not compromise the favored hypothesis; to discuss ways to keep opposing views out of leading journals; and to give tips on how to ‘hide the decline’ of temperature in certain inconvenient data.”

On November 29th, *The London Times* reported that CRU scientists:

“admitted throwing away much of the raw temperature data on which their predictions of global warming are based.”

On December 2, 2009, Ranking Member John Barrasso, in conjunction with House Oversight and Government Reform Committee Ranking Member Darrell Issa, House Select Committee on Energy Independence and Global Warming Ranking Member Sensenbrenner, and Senate Clean Air and Nuclear Safety Subcommittee Ranking Member Vitter, wrote Lisa Jackson asking that the EPA:

“withdraw the Proposed Endangerment Finding, as well as the Light Duty Vehicle Rule, and the Greenhouse Gas Tailoring Rule until the agency can demonstrate the science underlying these regulatory decisions has not been compromised.”

The letter also stated:

“In addition to its own investigation, we respectfully request that your agency turn over all documents and records related to the communications or other interactions with

Hadley CRU dating from March 2007 through December 1, 2009 to our respective committees.”

On December 2, 2009, Ranking Member John Barrasso wrote the Chairman of the Senate Subcommittee on Oversight Sheldon Whitehouse regarding climate gate:

“The actions by scientists and others to suppress data that contradicts their conclusions is unacceptable. Their conduct needs to be investigated. I am requesting that the Subcommittee on Oversight begin an immediate investigation into this matter, including taking the necessary steps to prevent any further loss of related documents, e-mails, and other records that would shed some light into this matter.”

The response the Minority received from Chairman Whitehouse was received on December 9th, 2009.

“I do not believe that our Subcommittee has any jurisdiction over this matter, which involves the theft by private individuals of emails stored in a British university’s computer system. Furthermore, to my knowledge, the government agencies over which the Oversight Subcommittee has jurisdiction were not involved in any of the exchanges contained in the stolen emails.”

Summary:

The EPA has relied heavily on the IPCC’s findings and conclusions in its development and justification for the proposed Endangerment Finding. The UN reports have also factored heavily in decisions made by federal agencies to move forward with a series of costly climate change regulations that will raise energy prices and cost millions of Americans jobs.

A cursory look at the EPA’s proposed endangerment finding provides the justification for further investigation. In citing justification for the EPA’s endangerment finding, the following statement is included within the federal register notice on December 15th, 2009:

“The Administrator [EPA] has determined that the body of scientific evidence compellingly supports this finding. The major assessments by the U.S. Global Climate Research Program (USGCRP), the Intergovernmental Panel on Climate Change (IPCC), and the National Research Council (NRC) serve as the primary scientific basis supporting the Administrator’s endangerment finding.”

The EPA’s endangerment finding refers to the UN IPCC reports numerous times for justification of its conclusions. The University of East Anglia’s CRU provides a significant amount of the data that comprises the UN IPCC reports. The scientific integrity of the data and authors in the report are in question. Conducting oversight and investigation into this matter is not only proper, but necessary.

Issue 4: Shadow Cabinet

On December 15, 2008, President-elect Barack Obama announced his decision to appoint Carol Browner as Assistant to the President for Energy and Climate Change. In this role, she has broad responsibility to coordinate climate and energy policy within the Administration. Mrs. Browner would join other individuals appointed by the President to form a “shadow cabinet.” Appointees are not subject to Senate confirmation. It is unclear if their actions are subject to Congressional oversight.

It became apparent early in the Administration that the power wielded by the President’s shadow cabinet will be substantial. In a February 19, 2009, *National Journal* article, Transportation Secretary Ray LaHood stated that he will take his leads from Carol Browner:

“Addressing the role that the department will play as Congress and the administration move forward on climate change legislation this year, LaHood said he would take his cues from Obama and White House energy and climate adviser Carol Browner. ‘We’re going to be in the room,’ LaHood said, adding, ‘I’m going to take my leads from Carol Browner. I’ll be a good, faithful soldier on this.’”

On May 20th, 2009, the *New York Times* reported that the Administration used a secretive process to develop a proposal for new fuel economy standards. As the *Times* wrote,

“Mary Nichols, head of the California Air Resources Board, and Carol Browner, quietly orchestrated private discussions from the White House with auto industry officials. To conceal information used to develop the fuel economy proposal, Nichols said that she and Browner ‘put nothing in writing, ever.’”

During EPW hearings in 2009, Ranking Member John Barrasso questioned EPA Administrator Lisa Jackson and Transportation Secretary Ray LaHood about the role energy and climate czar Carol Browner had played in the agency policy-making process. Both officials indicated that Carol Browner plays a major role in decisions that are the responsibility of individual agencies.

Senate Environment and Public Works Ranking Member James Inhofe, Subcommittee on Oversight Ranking Member John Barrasso, and Subcommittee on Clean Air and Nuclear Safety Ranking Member David Vitter, wrote separate letters to all the relevant Cabinet officials on October 7th, 2009 about the extent of their interactions with Mrs. Browner:

“It is our view, however, that such heavy reliance on policy czars, and the fact that such czars appear to have decision-making authority commensurate with Senate-confirmed, Cabinet level officials, raises questions about the Administration’s commitment to transparency and openness. For this reason, we are requesting specific information about White House Coordinator of Energy and Climate Policy Carol Browner, and how her office has exercised authority over the U.S. Department of _____.”

Letters were sent the U.S. Department of Energy Secretary Chu, White House Counsel on Environmental Quality Chair Nancy Sutley, EPA Administrator Lisa Jackson, U.S. Department

of Transportation Secretary Ray LaHood, and Office of Information and Regulatory Affairs Administrator Cass Sunstein. To date, several agencies have yet to respond.

Summary:

The Minority has never questioned a President's right to appoint his own advisors, or that such advisors can influence policy at federal agencies. However, such a heavy reliance on policy czars by this Administration does raise a number of issues regarding the authority and control the czars are exerting over agency heads and policies.

The Minority applauds the President for his commitment to create "an unprecedented level of openness in government." However, unless the public has a clear understanding of the responsibilities and roles being played by the various czars, the Administration's claims of transparency and openness ring hollow.

Members of the Senate should be concerned that policy Czars are exercising unprecedented power behind closed doors. When press reports that the energy and climate czar mandated that staff and cabinet officials "put nothing in writing, ever," in the interest of transparency and openness, the Subcommittee on Oversight should act to further investigate the matter. As more power is transferred to policy czars from officials confirmed by the Senate or elected by the people, transparency will continue to disappear and public faith in the federal government will continue to erode.

The Subcommittee on Oversight is ideally positioned to review and investigate the influence the Administration's czars have over regulatory policy-making at federal agencies, including the EPA.

Conclusion:

Over the last year, the Minority has witnessed a lack of interest by the Majority in conducting oversight over this Administration. The fact that the Subcommittee has held only two hearings proves that this past year was a lost opportunity to provide transparency and accountability over the actions of federal agencies under our jurisdiction. The lack of any oversight over the activities of the federal agencies under our jurisdiction weakens the system of checks and balances, and invites the potential for larger abuses.

The incidents raised in this report impact policy proposals that are still being debated today such as cap and trade legislation and EPA's endangerment finding. These are policies that will impact millions of jobs. Therefore, immediate action should be taken by the Senate Environment and Public Works Committee Subcommittee on Oversight, the Administration and relevant federal agency Inspectors General, to investigate the incidents covered in this report, as well as others that present serious impacts on jobs and the overall health of our struggling economy. This information will be essential to providing transparency for the public and certainty for policy makers.

Finally, further coordination within the Committee regarding the oversight jurisdiction and responsibility are also needed. The Majority needs to better articulate why they have chosen not to exercise their full oversight jurisdiction. Clearly there is a basic need for the public to have faith and trust in their government. When the Majority states they created the Subcommittee to "restore scientific integrity at the EPA and other federal agencies focused on the environment, and to strengthen environmental protections by once again making the regulatory process more transparent," the Minority took them at their word. Unfortunately, the actions by the Majority spelled out in this report demonstrate that the Majority has let a year go by where they failed to pursue their stated goals.