

Congress of the United States
House of Representatives
Washington, D.C. 20515

February 12, 2004

The Honorable Michael O. Leavitt
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Governor Leavitt:

We are writing regarding reports that portions of EPA's proposal to address mercury air pollution have been copied word-for-word from industry lobbying materials.

Specifically, it appears that EPA has proposed a regulatory approach to mercury air pollution that in part is copied word-for-word from memos prepared by the law firm Latham & Watkins, which represent some of the largest polluters in the country. This is particularly troubling because two key EPA officials who worked on the proposal were previously employed by Latham & Watkins.

On January 31, 2004, the *Washington Post* reported that an EPA proposal published on January 30, 2004, "is similar to recommendations from two memos sent to federal officials by" Latham & Watkins.¹ The article explains the remarkable connections between EPA's proposal and the Latham & Watkins' memos:

A side-by-side comparison of one of the three proposed rules and the memorandums prepared by Latham & Watkins — one of Washington's premier corporate environmental law firms — shows that at least a dozen paragraphs were lifted, sometimes verbatim, from the industry suggestions.²

It does not appear to be in dispute that EPA used the Latham & Watkins language to make the substantive proposals that Latham & Watkins advocated. The *Washington Post* quotes one Latham & Watkins representative who states that it is "gratifying" that the law firm's work had been "cut and paste[d]" into EPA's rulemaking. Additionally, Jeffrey Holmstead, EPA's Assistant Administrator for Air and Radiation, confirmed that the language had originated from

¹ *Proposed Mercury Rules Bear Industry Mark*, *Washington Post* (Jan. 31, 2004) (online at <http://www.washingtonpost.com/wp-dyn/articles/A64630-2004Jan30.html>).

² *Id.*

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outside of the agency. He stated, "That's not typically the way we do things, borrowing language from other people."³

However, it is unclear how the Latham & Watkins language entered EPA's rulemaking process. As you know, Mr. Holmstead and his chief counsel, Bill Wehrum, worked for Latham & Watkins before joining the EPA. Both Mr. Holmstead and Mr. Wehrum have had high profile roles in this rulemaking.

The Administration's public statements on this matter appear to be less than completely transparent. In the January 31, 2004, *Washington Post* article, Mr. Holmstead stated "it came to us through the interagency process." He also stated, "Neither Bill [Wehrum] nor I had any idea this language came from Latham & Watkins. . . . Our technical folks . . . used it." The *Post* reports:

According to Holmstead, the law firm's language was part of the public record and was passed along to the EPA by the White House budget office and the Energy Department.⁴

This appears to be at odds with press accounts of this rulemaking from just over a month ago. On December 30, 2003, the *Washington Post* reported that a senior White House adviser said: If you had to pick one person, it was Jeff Holmstead in EPA's air office who played the key role in development of the cap-and-trade approach to regulation of mercury emissions."⁵

We are deeply concerned that EPA's rulemaking process has been improperly influenced by industry at the potential cost of the health of future generations of children. Congress and the American people need to know how industry lobbyists came to write a significant portion of an EPA formal rulemaking proposal.

Therefore we request that you provide us with all communications (whether written, electronic, or oral) relating to mercury air pollution between EPA officials and the law firm Latham & Watkins, other industry law firms, electric utilities, and other outside parties since January 1, 2003. Additionally, please provide us with information on any meetings that took place since January 1, 2003, between EPA officials and representatives or employees of Latham & Watkins, including a list of the participants and the nature and purpose of the meeting.

³ *Id.*

⁴ *Id.*

⁵ *EPA Led Mercury Policy Shift; Agency Scuttled Task Force That Advised Tough Approach*, *Washington Post* (Dec. 30, 2003).

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Additionally, please explain if Latham & Watkins memos were docketed in the rulemaking process. If not, please explain why such influential documents that formed the basis for EPA's proposal were not docketed.

Please provide answers to each question and responsive documents no later than February 18, 2003. Thank you for your immediate attention to this issue.

Sincerely,


Henry A. Waxman
Member of Congress


Tom Allen
Member of Congress