

U.S. House of Representatives
Committee on Natural Resources
Washington, DC 20515

November 7, 2022

The Honorable Gina Raimondo
Secretary
U.S. Department of Commerce
1401 Constitution Avenue, N.W.
Washington, D.C. 20230

Dear Secretary Raimondo:

I write to bring to your attention *West Virginia v. EPA*, a recent Supreme Court decision that clarified the limitations of certain agency action.¹ Although Article I, Section 1 of the United States Constitution vests “all legislative powers” in Congress,² the Biden administration has largely relied on executive action to advance its radical agenda. For example, in his first year, President Biden issued more executive orders³ and approved more major rules⁴ than any recent president. Such reliance on the administrative state undermines our system of government. Our founders provided Congress with legislative authority to ensure lawmaking is done by elected officials, not unaccountable bureaucrats. Given this administration’s track record, we are compelled to underscore the implications of *West Virginia v. EPA* and to remind you of the limitations on your authority.

In *West Virginia v. EPA*, the Court invoked the “major questions doctrine” to reject an attempt by the Environmental Protection Agency (EPA) to exceed its statutory authority.⁵ As the Court explained, “[p]recedent teaches that there are ‘extraordinary cases’ in which the ‘history and breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.’”⁶ Under this doctrine, an agency must point to “clear congressional authorization for the authority it claims.”⁷ However, the EPA could not point to such authorization. Rather, the EPA “discover[ed] an unheralded power representing a transformative expansion of its regulatory authority in the vague language of a long-extant, but

¹ *West Virginia v. Environmental Protection Agency*, 597 U.S. ___ (2022).

² U.S. Const. art. I, § 1.

³ Federal Register, *Executive Orders* (accessed Aug. 2022), available at <https://www.federalregister.gov/presidential-documents/executive-orders>

⁴ Deep Dive, *How Biden Has Made Policy With Short-Term, Costly Rules: Charts*, Bloomberg Law (May 2022), available at <https://news.bloomberglaw.com/environment-and-energy/how-biden-has-made-policy-with-short-term-costly-rules-charts>

⁵ *West Virginia*, 597 U.S. at 5-6.

⁶ *Id.* at 4 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 129, 159-160).

⁷ *West Virginia*, 597 at 4.

rarely used, statute designed as a gap filler.”⁸ Notably, such discovery “allowed [EPA] to adopt a regulatory program that Congress had conspicuously declined to enact itself.”⁹ As a result, the Court rejected the EPA’s attempt to so plainly exceed its statutory authority.

Unfortunately, EPA’s attempt to invent new authorities is not unusual for the Biden administration. Recently, the Court struck down the Centers for Disease Control and Prevention’s attempt to impose an eviction moratorium¹⁰ and the Occupational Safety and Health Administration’s attempt to impose a vaccine or testing mandate.¹¹ Thankfully, in *West Virginia v. EPA*, the Court made clear that such reliance on the administrative state will no longer be allowed. To be clear, “the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people’s representatives.”¹² In the United States, it is “the peculiar province of the legislature to prescribe general rules for the government of society.”¹³

The House Committee on Natural Resources (Committee) has jurisdiction over the Department of Commerce’s National Oceanic and Atmospheric Administration (NOAA).¹⁴ During the Biden administration, NOAA’s actions have raised significant concerns about the agency exceeding its authority. For example, NOAA Fisheries failed to conduct formal stakeholder engagement before proposing the North Atlantic Right Whale Vessel Strike Reduction rule.¹⁵ Under the guise of protecting right whales, the proposed rule would impose unworkable boating speed restrictions throughout our nation’s Atlantic coast.¹⁶ Thousands of recreational vessels would be impacted by the rule’s expansion of mandatory speed restrictions to include vessels 35 feet and larger, and broadening of seasonal speed restrictions.¹⁷ Many fishermen may forgo boating trips due to time, cost, and safety burdens imposed by the rule.¹⁸ Further, the rule’s speed restrictions threaten boating safety, as preventing boaters from utilizing increased speeds during thunderstorms or Gale force wind conditions could place boaters at

⁸ *Id.* at 5.

⁹ *Id.* at 5.

¹⁰ *Alabama Assn. of Relators v. Department of Health and Human Servs*, 594 U.S. ___ (2021).

¹¹ *National Federation of Independent Business v. Occupational Safety and Health Administration*, 595 U.S. ___ (2022).

¹² *West Virginia*, 597 at 56 (Gorsuch, J., concurring).

¹³ *Fletcher v. Peck*, 6 Cranch 87, 136 (1810).

¹⁴ See House Rule X(m)(1), (5), (15), (16).

¹⁵ See *Vessel Speed Restrictions Will Cripple Coastal Communities, Fail to Protect Right Whales*, AMERICAN SPORTFISHING ASSOCIATION, Oct. 4, 2022, <https://asafishing.org/advocacy/vessel-speed-restrictions-will-cripple-coastal-communities-fail-to-protect-right-whales/>

¹⁶ See *Id.*; *Rule to Amend the North Atlantic Right Whale Vessel Speed Regulations Open for Comment*, NOAA FISHERIES, July 29, 2022, <https://www.fisheries.noaa.gov/feature-story/rule-amend-north-atlantic-right-whale-vessel-speed-regulations-open-comment>.

¹⁷ *Supra* note 14.

¹⁸ *Id.*

extreme risk.¹⁹ Additionally, NOAA's use of questionable analyses²⁰ casts doubt on the agency's adherence to appropriate rulemaking processes.

At the beginning of this year, NOAA signed a Memorandum related to Endangered Species Act²¹ Section 7 consultations with the Department of the Army (Civil Works).²² The Memorandum addressed how the agencies evaluate the effects of projects involving existing structures on listed species and designated critical habitat.²³ In part, the agreement altered the definition of "environmental baseline."²⁴ As a result, in addition to maintenance action, compensatory mitigation for maintenance of existing permitted structures is now required. Despite having nation-wide implications, the agreement was reached without public stakeholder input. Ultimately, the Memorandum is a step backwards because it lengthens the formal Section 7 consultation process required for critical infrastructure projects.

The Biden administration directed NOAA to implement the policy of conserving 30 percent of lands and waters by 2030. Originally the "30 by 30" initiative, it later became known as the "America the Beautiful" initiative. Under this initiative, NOAA was directed to work with other federal agencies,²⁵ to develop an "American Conservation and Stewardship Atlas"²⁶ and to expand national marine sanctuaries and other programs to conserve and restore habitats.²⁷ Concerningly, however, the Biden administration is ignoring the consequences of pursuing this arbitrary goal. For example, NOAA has failed to acknowledge how the "America the Beautiful" initiative limits both recreational and commercial fishing access in federal waters.

As a committee of jurisdiction overseeing your agency, I assure you I will exercise our robust investigative and legislative powers to not only forcefully reassert our Article I responsibilities, but to ensure the Biden administration does not continue to exceed Congressional authorizations. Accordingly, to assist in this effort, please answer the following no later than November 21, 2022:

1. As it relates to your agency, please provide the following:

¹⁹ See Letter from Glenn Hughes, President, American Sportfishing Association, et al., to Ms. Janet Coit, Ass't Administrator for Fisheries, Nat'l Oceanic and Atmospheric Admin. (Oct. 3, 2022), *available at* <https://www.sportfishingpolicy.com/wp-content/uploads/2022/10/Right-Whale-Rec-Fishing-and-Boating-Comment-Letter-10.3.22.pdf>.

²⁰ *Supra* note 14.

²¹ 16 U.S.C. 1531 et seq.

²² MEMORANDUM BETWEEN THE DEP'T OF THE ARMY (CIVIL WORKS) AND THE NAT'L OCEANIC AND ATMOSPHERIC ADMINISTRATION, (Jan. 5, 2022), *available at* https://www.noaa.gov/sites/default/files/2022-01/NOAA%20and%20Army%20Civil%20Works%27%20joint%20memorandum%20to%20advance%20Endangere-d%20Species%20Act%20Consultations_0.pdf.

²³ *Id.*

²⁴ *Id.*

²⁵ See U.S. Dep't of the Interior, U.S. Dep't of Agriculture, U.S. Dep't of Commerce, & Council on Environmental Quality, *Conserving and Restoring America the Beautiful*, (2021), *available at* doi.gov/sites/doi.gov/files/report-conserving-and-restoring-america-the-beautiful-2021.pdf.

²⁶ *Id.* at 17.

²⁷ *Id.* at 20.

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- a. A list of all pending rulemakings and the specific Congressional authority for each rulemaking.
- b. A list of all expected rulemakings and the specific Congressional authority for each rulemaking.

Sincerely,



Bruce Westerman
Ranking Member
Committee on Natural Resources

cc: The Honorable Richard W. Spinrad, Ph.D., Administrator, National Oceanic and Atmospheric Administration