

Abbe David Lowell
direct tel +1 202 974 5605
adlowell@chadbourne.com

June 1, 2016

VIA HAND DELIVERY

The Hon. Lamar S. Smith
Chairman
Committee of Science, Space and Technology
U.S. House of Representatives
2321 Rayburn House Office Building
Washington, D.C. 20515-6301

Re: May 18, 2016 Letter

Dear Chairman Smith:

We represent Greenpeace USA and respond to the Committee's May 18, 2016 letter. Greenpeace received your letter and has a number of preliminary questions and concerns. For one, just the sheer breadth of the requests would require more time than the June 1, 2016 date proposed in your letter for a full response. In addition, your letter raises a number of troubling legal issues. Greenpeace is proud of its work and has nothing to hide in its efforts to address climate change. Nevertheless, we have to ensure that the Committee (as any entity) is operating properly before undertaking to respond to any request for information.

As you know, Greenpeace is an organization that welcomes any public airing of the issues on which it is committed, including the now certain evidence of climate change. To the extent the Committee is engaging in serious review of the need to address this critical issue, Greenpeace could not be more willing to participate. Let me start with some background on Greenpeace's commitment to the environment and its work on the subject of climate change.

For more than a decade, Greenpeace has worked to reduce the emissions that cause climate change, advocated for corporate and government policies that address climate change, and exposed the corporations, lobbyists, and front groups that deny the existence of climate change and its causes. This work has always been and will always be informed by the underlying science that confirms that climate change is real, and is caused by man-made emissions (<http://www.theguardian.com/environment/climate-consensus-97-percent/2016/apr/19/study-humans-have-caused-all-the-global-warming-since-1950>). Greenpeace's activism on climate change ranges from opposing drilling in the Arctic, to helping technology giants power their data centers with renewable energy, to exposing the funding from the fossil fuel industry to politicians, scientists, and lobby groups who deny climate change and block necessary action to address it. Greenpeace's long-running commitment to finding solutions for climate change is based on the scientific consensus that action cannot be delayed by politics or false debate.

As I understand it, the Committee is looking to determine whether state attorneys general and non-profit, non-governmental, or other groups committed to protecting the earth and its environment have somehow colluded to stifle first amendment protected speech of one or more of the most powerful and wealthiest companies in the world. I am sure that you, your colleagues, and your staff could not help but notice the irony in your inquiry. In the name of protecting the free speech of these companies, you are looking to examine the very free speech activity of groups actively trying to advance public discussion on such a vital topic. In doing so, your inquiry attacks some of the most basic rights upon which this country was founded – “speech on public issues,” *Snyder v. Phelps*, 562 U.S. 443, 452 (2011); “the ability of like-minded individuals to associate” to express commonly held views, *Knox v. Serv. Employees Int’l Union Local 1000*, 132 S. Ct. 2277, 2288 (2012); and the right to petition the government. *United Mine Workers v. Ill. State Bar Ass’n*, 389 U.S. 217, 222 (1967) (holding the right to petition government is “among the most precious of the liberties safeguarded by the Bill of Rights”). Congress is not outside the protections afforded to Greenpeace and others to enjoy these constitutional rights. *Watkins v. United States*, 354 U.S. 178 (1957).

In addition, the articles written about the efforts of state attorneys general indicate that their activity is directed at determining whether at least one fossil fuel company – ExxonMobil – broke securities and consumer fraud laws by making false statements about their activities and the known scientific and market risks of those activities with regard to climate change. These alleged false statements occurred in public and were made to affect the behavior of consumers and investors. In other words, while Greenpeace’s work on climate change has been to follow the science, the fossil fuel industry is being investigated for trying to cover up that science. As you surely know, the law does not protect the dissemination of false statements, especially if they are part of fraudulently misleading consumers and investors. See *United States v. Phillip Morris USA Inc.*, 566 F. 3d 1095, 1123 (D.C. Cir. 2009) (holding tobacco industry’s public statements were not protected speech because “it is well settled that the First Amendment does not protect fraud”). Is the Committee investigating these possible false statements or those trying to determine whether false statements were made?

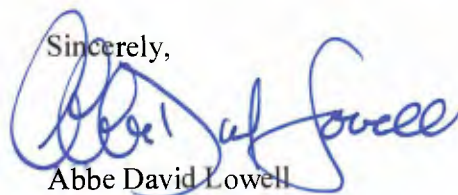
Also, if the Committee is truly engaged in oversight activity, it appears it already has reached its conclusions. For example, just seven lines into your letter you conclude that the activities of the state attorneys general “were efforts to silence speech.” The letter then goes on for three full pages filled with similar conclusions (e.g., “The strategy decided upon by workshop participants appears clear: to act under the color of law to persuade attorneys general to use their prosecutorial power to stifle scientific discourse, intimidate private entities and individuals, and deprive them of their First Amendment rights and freedoms.”). If the Committee has already reached these conclusions, then what is the real purpose of the inquiry? I also noticed that the letter is signed only by some Republican members of the Committee. That fact alone would cause many observers to question whether this is merely a partisan effort to protect fossil fuel companies.

We recognize that Congress and your Committee have broad authority to conduct legislative research and various oversight activities. Even still, as you know, this authority is not unlimited. The Committee must operate under the House and its own rules, must have jurisdiction to inquire into specific areas, must have authority to conduct its activity, and must comply with legal requirements for seeking information. Your letter cites some of the rules, but a number of questions are raised by your letter:

1. House Rule X defines the power of the committees, including yours. While the Committee surely could investigate the fossil fuel companies at the heart of the issue of climate change, how does Rule X(p) extend to review the work and especially the law enforcement activities of state attorneys general? Putting aside issues of federalism, states' rights, and the Tenth Amendment to the Constitution, it would appear this type of oversight is assigned to the Committee on the Judiciary under House Rule X(l).
2. The Committee's rules, for example Rule II, define the Committee's requirements on meetings and quorums and other procedures. Can you provide us any indication that the underlying actions behind this letter and the letter requests themselves were taken in compliance with these rules? We think you would agree that ensuring regularity and compliance are things we have to confirm on our client's behalf.
3. Committee Rule VIII defines the Committee's oversight authority. That rule and all of its related provisions seem to suggest that the Committee looks to determine if federal laws are being followed or need adjustment by reviewing the actions or inactions of federal agencies over which Congress has jurisdiction. How does the general thrust of oversight apply to this attempt to regulate the activity of state agencies?
4. The two actual requests in the letter are vague and overbroad and likely would be declared so if issued by an executive branch agency or private litigant. For example, the word "all" qualifying documents and communications can be sweeping if left undefined. Similarly, the phrase "relating to" leaves so much to interpretation (as opposed to the phrase "referring to") that it is impossible to understand how to apply it.
5. Depending on whether any communications of any kind actually exist, they might also implicate privileges (e.g., attorney-client, common interest) that are recognized in every forum in the United States. We assume the Committee does not intend any recipient of a request (let alone a letter request) to disobey such privileges.
6. Finally, the period of time included – four and a half years – is a very long one. This in itself requires time to consider where any information might be located.

To be clear, Greenpeace will always cooperate with any authorized and legitimate inquiry of Congress or anyone else into one of the most pressing issues of our time – one that will affect our children and their children for generations to come. At this point, the issues raised by your letter, outlined above, prevent Greenpeace from providing the information requested. We are willing to meet with you and/or Committee staff to further discuss our questions and concerns. Thank you for your consideration.

Sincerely,

A handwritten signature in blue ink, appearing to read "Abbe David Lowell". The signature is fluid and cursive, with the first name "Abbe" being particularly prominent.

Abbe David Lowell

cc: Ranking Member Eddie Bernice Johnson