

March 10, 2014

The Honorable Patrick Leahy
Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Charles Grassley
Ranking Member
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Grassley:

Thank you again for giving me the opportunity to appear before the Committee on February 25, 2014. Enclosed please find my responses to the Questions for the Record that I received from Ranking Member Grassley and Senator Cornyn.

Sincerely,

A handwritten signature in black ink, appearing to read "John C. Cruden". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

John C. Cruden

Enclosure

Senator Chuck Grassley
Questions for the Record
John Charles Cruden, Nominee, Assistant Attorney General,
Environment and Natural Resources Division, United States Department of Justice

1. You have previously criticized the Clean Water Act’s statutory framework establishing a permit system for regulation of so-called “point sources” of pollution and suggested that moving from a point-source-based regulatory structure to a broader statutory grant is something “[t]hat ought to be on everybody’s wish list” in order to address more potential sources of water pollution.
 - a. Please describe the nature and scope of the regulatory framework that you envision as being preferable to the current point-source-based statutory grant.

Answer: If confirmed as Assistant Attorney General, Environment and Natural Resources Division (ENRD or “the Division”), I would be enforcing the law as enacted by Congress and interpreted by relevant courts. As I have served over two decades in ENRD, during the administrations of two Republican and two Democratic Presidents, I understand that ENRD is not a policy making entity, but dedicated to law enforcement. Proposals to change the Clean Water Act would come from Congress or other federal agencies charged with that responsibility.

- b. If confirmed, how do you plan to address sources of water pollution like runoff areas and streets, i.e., non-point-source pollution, using the current regulatory framework?

Answer: If confirmed as Assistant Attorney General, my responsibility would be to enforce existing law. I note that, in most enforcement cases, ENRD receives a referral from the responsible federal agency. If facts confirm that water pollution from runoff areas and streets violates the law, I would take appropriate action to enforce the law.

2. The Clean Water Act restricts federal regulatory jurisdiction to the “navigable waters” of the United States, a term which has been variously defined in *Rapanos* and *Carabell* as those waters that are “relatively permanent” and have a “continuous surface connection,” and also as waters that have a “significant nexus” to what was traditionally regarded as navigable waters. The EPA’s position regarding Clean Water Act regulatory jurisdiction is that the Act empowers regulation of the “waters of the United States.”
 - a. Do you agree with the EPA that “waters of the United States” is the proper extent of regulatory jurisdiction under the Act?

Answer: Various provisions of the Clean Water Act (CWA) define the jurisdictional scope of the CWA as “navigable waters.” Section 502(7) defines “navigable waters” as “the waters of the United States, including the territorial seas.” Agencies have then published regulations defining that term. Accordingly, “waters of the United States, including the territorial seas” as interpreted by federal courts and in regulations of federal agencies, is the proper extent of the jurisdiction of the Act.

- b. If so, will you advocate on behalf of the United States for regulatory jurisdiction over all “waters of the United States” under the Act?

Answer: If confirmed, I would be bound by applicable law. Specifically, the jurisdiction of the United States in applying the CWA is over “the waters of the United States, including the territorial seas,” as interpreted in applicable court decisions and federal regulations.

- c. If not, please describe what you believe to be the lawful extent of regulatory jurisdiction under the Act.

Please see answer to question 2.b. above.

3. You have stated that the Department of Justice must be prepared to demonstrate Clean Water Act jurisdiction under the Scalia-plurality standard and the Kennedy standard outlined in *Rapanos* and *Carabell* and that “significant additional litigation resources must be devoted to addressing the concepts” related to the definition of “navigable waters” used in those opinions.

- a. Please describe whether, if confirmed, you plan to devote “significant additional resources” to the litigation described above.

Answer: My statement about significant additional resources was intended to mean that because the standards articulated in the Scalia and Kennedy opinions may require detailed fact-finding by the courts in certain cases, it may be necessary to expend additional resources to litigate some of these jurisdictional issues. As I have not been involved in any of this litigation since 2011, I do not know the current dedication of resources to this type of litigation. If confirmed, I will learn about the dedication of resources to this important subject, as well as other areas of the Division’s responsibility.

- b. If so, please explain whether you anticipate taking resources from other areas of ENRD jurisdiction or whether reprioritizing ENRD’s litigation goals would be necessary, in your view, to accomplish this goal.

Answer: Since I am not at the Department now, I lack sufficient information to determine whether additional resources would be needed to handle CWA matters or other areas within the Division's responsibility.

4. In public statements you have routinely referred to the concept of "environmental justice." For example, in a 2008 interview you suggested that promotion of "environmental justice" was necessary due to the "disproportionately high and adverse human health or environmental effects" of polluters' "programs, policies, and activities on minority and low-income populations." You have also publically stated that "[p]eople of color and the poor" bear a "disproportionate share of environmental burdens."

Please explain what you mean by the concept of "environmental justice."

Answer: EPA defines the term as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies." I think the EPA definition fairly summarizes my own views of the term.

- a. Please describe how the concept of "environmental justice" will inform your decision-making if you are confirmed as Assistant Attorney General.

Answer: If confirmed as Assistant Attorney General, I would abide by the rule of law. In that regard, I would remain committed to ensuring that all Americans receive full protection under our environmental laws, regardless of their race, color, national origin or income.

- b. Please describe how the concept of "environmental justice" will inform the nature and scope of litigation you will undertake if confirmed as Assistant Attorney General.

Answer: If confirmed, I would abide by the rule of law, making certain that ENRD enforces the law as enacted by Congress, based on a fair assessment of facts. In that regard, I would remain committed to ensuring that all Americans receive full protection under our environmental laws, regardless of their race, color, national origin or income.

5. In a 2013 article you described the EPA's electronic reporting requirements imposed on states as "federalism, cooperative federalism at its best." Please explain this statement.

Answer: In February 2013, I moderated a panel discussion of three experts concerning "Key Legal Issues Facing the Administration in 2013: Environment, Energy and Natural Resources." After the experts spoke, I read questions given to

me by the audience. Specifically, I read this question: “Scott, I have a question for you from our listening audience. This comes from someone at GAO [U.S. Government Accountability Office]. How can EPA push down further on states given the budget climate? Haven’t states resisted efficiency measures such as electronic reporting requirements? This is federalism, cooperative federalism at its best.” The entire discussion, including this question, was printed verbatim in 43 Environmental Law Reporter 10395, with this particular question at page 10404.

Although I do support electronic reporting as a valuable concept, I do understand that all States may not agree. While electronic reporting on environmental matters is within the domain of EPA, I remain committed to working collaboratively with States, particularly State Attorneys General, in those areas in which ENRD is charged with primary responsibility.

6. Prior to your departure from ENRD in 2011, you had participated in the Deepwater Horizon Multidistrict Litigation that is currently underway in the Eastern District of Louisiana. If you are confirmed, please describe what role you anticipate ENRD will play in the litigation going forward and whether you plan to alter ENRD’s current litigation posture with respect to litigation strategy or potential settlement and discovery negotiations.

Answer: It is my understanding that the United States continues to be represented in the Deepwater Horizon Multidistrict Litigation by a joint trial team composed of experienced attorneys from both the Civil Division and ENRD. As the trial is ongoing, I anticipate that ENRD will continue to play the same role in the future that it has so far. If I am fortunate enough to be confirmed, I will confer with the trial team to determine whether there should be any changes to the current strategy.

7. You have previously criticized Congress for its “failure...to enact comprehensive climate change legislation,” which, you maintained, “cost the United States its leadership position on this critical issue.” You also stated that “it is imperative for this Administration to accomplish as much as it can through implementing the Clean Air Act.”
 - a. Please describe in detail the steps you believe to be imperative with respect to the Administration’s implementation of the Clean Air Act.

Answer: I firmly believe that the Administration should adhere to the language and requirements of the Clean Air Act, including relevant court decisions and regulations, in addressing this important issue. I note, however, ENRD is not a policy-making entity, and the implementation of the Clean Air Act is the responsibility of other federal agencies.

- b. Please describe how, if confirmed, you anticipate you will use Clean Air Act litigation to achieve the goals you described above.

Answer: If confirmed, then my mandate will be to carefully apply the law in an equal and fair manner. As ENRD is not a policy-making entity, it will be up to other agencies with that statutory responsibility to determine how best to implement the Clean Air Act to meet its statutory goals.

- c. Please describe how, if confirmed, you plan to demonstrate what you described as the United States' "leadership position" in your work as Assistant Attorney General and, specifically, through Clean Air Act litigation.

Answer: ENRD is not a policy-making entity. Accordingly, leadership on this important issue is the responsibility of other federal agencies. If confirmed, my "leadership" role would be to uphold the law. ENRD is responsible for representing EPA and other federal agencies in the courts. Consistent with its responsibility, ENRD would defend Clean Air Act rules issued by EPA and would enforce compliance with the Act and implementing regulations.

8. You have previously stated that there is "much more we can and should do" than merely maintain a commitment to reducing domestic greenhouse gas emissions ("GHG"). Please describe what, if confirmed, you plan to undertake in ENRD to contribute to reduction of GHG emissions.

Answer: The Assistant Attorney General for the Environment and Natural Resources Division does not make policy and is charged with upholding and enforcing the law. If confirmed, I will use my position to uphold existing law. Other federal agencies are charged with developing Administration policy on reducing GHG emissions.

9. You have described the D.C. Circuit's holding in *Coalition for Responsible Regulation v. EPA*, as "critical" and a "superb start" to the regulation of GHG emissions. Assuming that the EPA's actions are upheld by the Supreme Court, please describe what role enforcement of the EPA's endangerment finding, tailoring rule, and the so-called "tailpipe rule" will play in litigation involving the ENRD if you are confirmed at its Assistant Attorney General.

Answer: The unanimous decision by the Court of Appeals for the D.C. Circuit has now been appealed and argued before the Supreme Court, in a case now titled Utility Air Regulatory Group v. EPA. If the Supreme Court upholds EPA's regulations, enforcement of violations of those rules would then be governed by the normal process by which the Department of Justice makes all enforcement decisions. Enforcement decisions would be based on the law and the facts presented.

10. In a recent ELI report entitled “Climate Change and New York City,” you suggested that anthropogenic climate change was the likely cause – or at least a contributing cause – of Superstorm Sandy.

- a. Please explain what role, if any, you believe anthropogenic climate change and, specifically, GHG emissions, played in Superstorm Sandy.

Answer: The information in this question came from a one page column I wrote in January 2013. I began that column by honoring New York City for its response to Superstorm Sandy, stressing the importance of planning and preparation in advance of those serious events. I stated, “Even those who disagree with its cause cannot disagree that the results of Superstorm Sandy were monumental and that we should prepare for such devastation in the future. We can debate the cause and still work together in combating possible weather effects.” As I am not a scientist, I cannot – and have not – stated that Superstorm Sandy was the direct result of anthropogenic climate change or GHG emissions. Rather, I have used it as an example of a devastating impact that coastal communities should be prepared to address.

- b. Please explain what role, if any, you believe anthropogenic climate change plays in (1) the variation in worldwide sea levels; (2) Arctic and Antarctic snow/ice coverage; (3) global average temperatures; and (4) the recent drought in California’s Central Valley.

Answer: As I am not a scientist, I do not believe I am competent to discuss the impact of anthropogenic climate change in these important areas. Moreover, if confirmed, I will not be making policy or scientific judgments of this nature, but rather applying existing law to litigation under the purview of ENRD.

11. Please describe what alterations, if any, you would make to ENRD’s current litigation involving the Secure Border Initiative if you are confirmed.

Answer: I believe this question refers to work by ENRD on behalf of the Department of Homeland Security to secure our borders. I am not aware of what the Division is currently doing in that regard and lack sufficient information to determine whether there should be any alterations.

12. Please describe what alterations, if any, you would make to ENRD’s current litigation involving so-called R.S. 2477 litigation if you are confirmed.

Answer: I am aware that there has been litigation concerning the application of R.S. 2477, which granted a right of way across public lands in some circumstances. If confirmed, I would seek to learn about the nature of any current litigation. I lack

sufficient information to determine whether there should be alterations in the current litigation.

13. Please describe what alterations, if any, you would make to ENRD's current litigation involving tribal-trust issues if you are confirmed.

Answer: I am aware that there has been litigation concerning trust issues with some Native American tribes. I do not, however, have any current information. If confirmed, I would seek to learn about the nature of any current litigation. I lack sufficient information to determine whether there should be alterations in the current litigation.

14. Please describe with particularity the process by which these questions were answered.

Answer: I reviewed your questions and personally prepared my responses. I had conversations with representatives at the Department of Justice who are familiar with this process, and I asked a friend to review my draft to identify grammatical errors. I sent my responses to the Department of Justice for submission to you.

15. Do these answers reflect your true and personal views?

Answer: Yes.

Questions for John Cruden (AAG for Environment and Natural Resources Division)

Senator Cornyn:

- 1) The major environmental statutes (Air, Water, Waste, Endangered Species and others) have citizen suit provisions that allow environmental groups to bring suit against both the federal agency and private parties for failure to comply with statutory or regulatory provisions.

- a. In the last five years, how many citizen suits have been filed against the federal government?

Answer: I am not currently at the Department; therefore I am not in a position to respond to this question.

- b. In the last five years how many citizen suits have been filed by environmental groups against private parties for alleged violations of any permit condition or emissions limitation?

Answer: I am not currently at the Department; therefore I am not in a position to respond to this question.

- c. In the last five years, how many citizen suits has the DOJ settled with outside organizations?

Answer: I am not currently at the Department; therefore I am not in a position to respond to this question.

- d. In the last five years, how many have resulted in the payment of attorneys' fees?

Answer: I am not currently at the Department; therefore I am not in a position to respond to this question.

- e. When the DOJ or the agency you represent pays attorneys' fees, what is the source of appropriated funds for the payment of these awards?

Answer: Some statutes, like the Clean Air Act and Clean Water Act, contain provisions authorizing payment of attorney's fees to a prevailing party. In those instances, attorney's fees are generally paid from the Judgment Fund. If the relevant statute does not contain an attorney's fees provision, a litigant may seek fees under the Equal Access to Justice Act. In those instances, it is my understanding that any award of fees is typically payable from the appropriations of the agency involved.

- f. If confirmed, will you provide me a list of all citizen suit cases in which the U.S. paid attorneys' fees and the amount of each payment?

Answer: If confirmed, I will work with the Committee to accommodate its oversight needs, consistent with law and the Department's responsibilities.

- 2) In 2011, two environmental groups settled a multi-district litigation with the Fish and Wildlife Service that resulted in a "work plan" for the agency to make endangered species list determinations for hundreds of species and the payment of expensive litigation fees to the plaintiffs. While the determinations may impact numerous states, communities, businesses and citizens, the settlement involved just one federal agency and two environmental groups willing to drown it in litigation. As head of ENRD, would you support efforts to improve the transparency of the settlement process and allow affected stakeholders to participate?
- Would you commit to the DOJ posting on its website copies of all complaints
 - Would you commit to DOJ posting on its website copies of all proposed consent decrees 30 days before submitting them to a court of law, to give stakeholders notice?
 - Would you commit to meeting with local officials when a settlement agreement is being worked out if a substantial part of their jurisdiction will be impacted?

Answer to Questions 2a, 2b, and 2c: I was not at the Department of Justice at the time that the settlement you describe in this question was prepared or completed. However, I strongly support transparency and public participation in government decision-making. Congress has enacted somewhat different processes for settlements involving particular statutes and agencies, so the details of public participation will vary among situations. In all cases, I will act in accordance with law. However, in my experience, complaints and settlement agreements are public documents and available to the public. And, where the settlement results in a deadline for the future issuance of agency rulemakings, then that proposed rule would be subject to notice and comment, thereby allowing the public an opportunity for participation. If confirmed, however, I will be briefed on the current policy of the Department on these issues, current agency practices, and applicable legal requirements. In addition, I would be willing to meet with local or state officials in appropriate cases.

- 3) What would you do to ensure that the agency does not agree to deadlines through settlements that do not provide sufficient time for EPA or DOI to meet its obligations under the Administrative Procedure Act, the Regulatory Flexibility Act, the Small Business Regulatory Enforcement Fairness Act, OMB Circular A-4, and other requirements that apply to EPA or DOI?

Answer: If confirmed, it will be my responsibility to assure that agreements reached by the Department of Justice on behalf of any federal agency are consistent with the law, and meet the needs of the federal agency involved.

- 4) In a recent denial of several environmental groups' petition for a rulemaking under the Clean Air Act, Acting Administrator Robert Perciasepe stated that, "[e]ven under the best circumstances, the EPA cannot undertake simultaneously all actions related to clearly determined priorities as well as those requested by the public, and so the agency must afford precedence to certain actions while deferring others.... The EPA must prioritize its undertakings to efficiently use its remaining resources."
- a. How should DOJ prioritize the rulemakings that EPA or DOI decide to pursue through the use of Consent Decrees?

Answer: If confirmed, I would need to meet with federal agencies, including the EPA, to understand their priorities. If a consent decree were to be negotiated, that should be done in close collaboration with the agency involved to assure that it meets their priorities, that they are capable of meeting the terms of the agreement, and that any term of the agreement is in accordance with applicable law.

- b. Would you agree that the new commitments that EPA or DOI agree to in "sue and settle" agreements with environmental groups, including timetables for rulemakings or the listing of species, have an impact on EPA's or DOI's priorities as to the rulemakings or listings that it undertakes?

Answer: As I am not in the government, I do not have any current information about commitments that DOI or EPA may be making in settlement agreements with environmental groups, or other petitioners. If I am confirmed that is an area I would want to understand better to assure that all actions taken by the ENRD are in compliance with the law.

Would you agree that the new commitments that EPA or DOI agree to in "sue and settle" agreements with environmental groups, including timetables for rulemakings, have an impact on EPA's or DOI's budgetary resources?

Answer: As I am not in the government, I do not have any current information about commitments that DOI or EPA may be making in settlement agreements with environmental groups, or other petitioners, or the impact of such commitments on agency budgets. If I am confirmed, I would want to be briefed on current practices to assure that all ENRD actions are in compliance with the law, and meet the needs of the federal agencies ENRD is representing.

- 5) Out of all of the rules for which EPA has deadlines, how many of them have been met? And, how many of those deadlines have been missed?

Answer: As I am not in the government, I lack sufficient information to respond to this question.

- 6) Once an agency submits to a Consent Decree it is under the jurisdiction of the federal court and subject to contempt should it not comply with the Consent Decree. Since EPA issues between 300 – 400 regulations a year while entering into an average of 15 Sue and Settle Consent Decrees, it appears that those 15 Sue and Settle Consent Decrees under court supervision become the agency's priority rules for implementation. Isn't it correct that under Sue and Settle private parties are setting priorities for EPA and DOI?

Answer: As I am not in the federal government, I do not know how many regulations EPA or DOI is issuing or the number of consent decrees that the Department is negotiating on either agency's behalf. Accordingly, I lack sufficient information to respond to this question.

- 7) Since, according to a CEI study, EPA cannot meet over 90% of all its statutory deadlines, the agency could theoretically be subject to a lawsuit on several hundred more regulations a year. How would you address this dilemma? Should we restrict citizens' suits or should we legislate longer time periods for agency regulatory actions?

Answer: I am not aware of the CEI study or the number of times that EPA cannot meet its statutory deadlines. If confirmed, I will work with federal agencies to determine the best and most efficient way for them to meet congressionally-mandated requirements.

- 8) Senator Vitter sent the Department of Justice a letter in October 2013 raising serious concerns about an armed raid conducted by EPA agents of a mine in Alaska.
- a. Are you aware of this letter?
 - b. Would you commit the Department to answering Senator Vitter's letter?

Answer to 8a and 8b: As I am not in the Department and have no knowledge of this letter, I am not in a position to respond to this question pertaining to activities of the EPA.