

Ten Questions the Senate Should Ask Lisa Jackson
In reviewing her nomination to serve as the Administrator of the U.S.
Environmental Protection Agency
January 6, 2009

1. Whistleblower Retaliation

In January 2007, the New Jersey Department of Environmental Protection (DEP) reassigned its top nuclear engineer for the past 15 years, Dennis Zannoni, to a cubicle without a phone or internet access. The basis for the action was a verbal complaint by an unnamed U.S. Nuclear Regulatory Commission staff member. The basis of the complaint was that Zannoni questioned the expertise and objectivity of a panel assembled by the NRC to advise on the re-licensing application for the troubled Oyster Creek nuclear power plant – which has been operating more than 37 years, longer than any other commercial plant.

DEP Commissioner Lisa Jackson authorized the reassignment. Zannoni was ultimately allowed to remain at DEP but may no longer work on nuclear issues.

Question:

Should EPA employees who blow the whistle on problems that trigger complaints expect handling by Ms. Jackson similar to that which Dennis Zannoni received?

2. Respect for Science and Scientists Delivering Unwelcome News

One of the first controversies Ms. Jackson confronted at DEP as Commissioner was a scandal about scientific fraud in setting state chromium cleanup standards, including a dissenting report filed by one of DEP's own scientists, Zoe Kelman, showing that individual cancer risks from continued presence of airborne exposure to chromium may be as high as 1 in 10 at some sites the state has declared to be clean.

In response, under Commissioner Jackson –

- Her top deputy issued a gag order directing employees to keep any “potentially sensitive information confidential” and refrain from disclosing agency data to any outside parties “until it is ready for public distribution”;
- Ms. Kelman was removed from chromium-related issues and denied meaningful work. Commissioner Jackson would not respond to a PEER request for clarification of Ms. Kelman's status. Ms. Kelman, a supervisory-level engineer at DEP for almost 20 years before leaving last August, said “I could no longer work under those conditions”; and
- After the DEP Division of Science, Research and Technology completed a health assessment confirming Ms. Kelman's work, finding heightened risks of lung cancer from exposure to airborne chromium in the Jersey suburbs of the New

York metropolitan area linked to scores of contaminated sites which DEP had declared clean, Ms. Jackson dismantled the Division, thus precluding any future scientific assessments of toxic clean-up effectiveness.

Question:

How can you assure scientists at EPA that they will not also be marginalized or punished for reporting conclusions that are at odds with your official agenda?

3. Untimely Public Health Warnings

In the infamous Kiddie Kollege case, in which a day care center was operating in a mercury-contaminated former thermometer factory, the DEP did not immediately warn the parents and workers about possible dangers for some period of time.

In an August 3, 2006 press release, Lisa Jackson stated:

“As soon as the DEP discovered that the formerly abandoned site was housing a day care center, inspectors moved in, took samples and shut it down...A day care center should be a safe haven -- not a room full of toxic mercury.”

[:http://www.nj.gov/oag/newsreleases06/pr20060803b.html](http://www.nj.gov/oag/newsreleases06/pr20060803b.html)

But, as the *New York Times* reported, Jackson knew that DEP failed to enforce a 1995 Clean-up Order and that DEP “discovered” the problem at the day-care center during the first week of April 2006. Instead of acting immediately upon discovery of the problem, DEP quietly negotiated a voluntary cleanup agreement with the owner **and waited more than 14 weeks before they sampled and notified parents on July 28, 2006.** According to the *New York Times* of 9/1/06:

“...the site remained contaminated, and as far as the department knew, unoccupied, until inspectors visited it in April and found that Kiddie Kollege, a day care center serving children as young as 8 months old, was operating in the building. Yet the center, which is in Franklin Township, was allowed to remain open for more than three months, until state environmental investigators determined in late July that the site was still contaminated.”

<http://www.nytimes.com/2006/09/01/nyregion/01mercury.html?scp=5&sq=Kiddie%20Kollege&st=cse>

Question:

Were you telling the whole truth when you stated that DEP acted “as soon as” it “discovered that the formerly abandoned site was housing a day care center” – or did the Times misreport the facts?

In the *New York Times* of August 19, 2006, you were quoted as saying: “I won’t run from the fact that D.E.P. played a role in this, but lots of other people did too. And lots of people are running to point fingers who need to be looked at really closely.”

<http://www.nytimes.com/2006/08/19/nyregion/19mercury.html?scp=1&sq=Kidde%20Kollege&st=cse>

What in your judgment did DEP under your watch do wrong; was it corrected; who else was to blame and were they held to account?

4. Inaction on Greenhouse Gases

On the very day that President-elect Obama officially named your selection to head EPA, New Jersey released its overdue “Draft Global Warming Response Act Recommendation Report” which contains the following statement:

“In November 2005, New Jersey adopted a new regulation under the authority of New Jersey’s Air Pollution Control Act to classify CO₂ as an air contaminant. This rule enables the State...to enact additional rules to reduce CO₂ emissions from other sectors as necessary. It also sends a powerful message in light of the federal government’s failure to regulate CO₂ under its existing Clean Air Act Authority. New Jersey also added CO₂ as an air pollutant in its emission statement program requirements. The emission statement program require the annual reporting of actual emissions of about 50 air contaminants by approximately 700 of the largest stationary sources of air pollution in New Jersey.” ([sic] Page 100)

Although New Jersey has had the legal authority since 2005 (several months before you were appointed) to directly regulate CO₂ and other GHG, it has used that authority solely for the purpose of compiling an inventory – rather than taking direct actions such as imposing fees or limiting new major emission sources.

Question:

Despite having the authority to act, why did you fail to take any regulatory action to directly control greenhouse gas emissions during your entire tenure at DEP?

5. Crippling Pollution Enforcement

In a June 2007 press release, DEP touted the filing of 120 lawsuits to recover “natural resources damages” (NRD) which “could result in hundreds of millions of dollars in compensation from polluters who have harmed New Jersey’s natural resources, including numerous manufacturers and marketers of the gasoline additive MTBE”.

http://www.nj.gov/dep/newsrel/2007/07_0037.htm

On August 24, 2007, a state Superior Court dismissed with prejudice an attempt by DEP to recover a natural resource damage claim involving benzene and toluene contamination of private wells in the Hillwood Lakes area of Ewing Township. (*N.J. Dept. of Env'tl. Prot. v. Exxon Mobil Corp.*, Docket No. MER-L-2933-02 (N.J. Superior Ct. Law Div. Aug. 24, 2007)). The Court found that DEP did not follow the rule-making process to establish, by regulation, a reliable formula for calculating natural resources damages. In the absence of regulations, the Court also found DEP lacked adequate scientific support to proceed on a case-by-case basis.

As a consequence of this regulatory breakdown, not only are all the 120 NRD suits in jeopardy but so are all future litigation and ongoing NRD settlement negotiations in an unknown number of groundwater pollution cases. Legal casualties include possible recovery from as many as 4,600 contaminated sites prioritized by DEP which may be forever foreclosed due to an inexplicable related lapse by the Corzine Administration in allowing the statute of limitations on these cases to expire on June 30, 2007, after it had been twice extended under previous administrations.

This regulatory train wreck appears to have been completely preventable, but DEP ignored repeated acknowledgements by state officials of the need to act:

- In 2002 “Vulnerability Assessments,” DEP estimated that as many as 4,600 cases may require NRD litigation which would necessitate both rule making and extending the statute of limitations. This data prompted former DEP Commissioner Bradley Campbell to say he was “astounded to find on taking office in [2002] that the [DEP] had not pursued, or left unsettled, thousands of cases against polluters responsible for a wide range of damages to New Jersey’s natural resources,” pledging to put the program “back on track”;
- In a 2004 settlement agreement of the case *New Jersey Society of Environmental & Economic Development v. Campbell* (N.J. Super. Law Div., Mercer County) DEP legally committed to propose formal natural resource damage regulations (but never did); and
- At a May 24, 2005 seminar at Rutgers’ Cook College, John Sacco, Chief of the DEP Office of Natural Resource Restoration pledged that natural resource damage regulations will “hopefully” be proposed in fall 2005. But since then, there has been no apparent activity to move rules forward.

Question:

What did you do to address the natural resource damages issue when you were at DEP? Why were these legal commitments to adopt NRD regulations not honored?

6. Retreat on Flood Hazard Controls

Ms. Jackson has referenced growing up in New Orleans Ninth Ward as a seminal experience. When New Jersey first proposed strict Flood Hazard regulations to prevent development in stream buffers and other vulnerable zones, she was a staunch defender, saying in March 24, 2008 statement:

“Building affordable housing there [in flood zones] would be morally wrong.”

Yet something happened between the proposal and the final product. This past June, DEP quietly admitted that it created large loopholes in the recently adopted Flood Hazard regulations and the highly touted buffer requirements for exceptional water quality streams. As a result, hundreds of projects are grandfathered from the protections of the new Flood Hazard rules and “Category One” or C1 requirements of 300-foot stream

buffers around sensitive rivers and lakes. Loopholes exempt hundreds of projects that had previously obtained DEP permits or local land use approvals, as well as pending projects. Moreover, the Flood Hazard grandfather loophole is far larger in scope because these rules apply statewide to all streams including urbanized watersheds, while the C1 buffers only apply to a very small subset of waterways.

In addition, new legislation called the Permit Extension Act, sponsored and negotiated by Jackson, also increased flood risks because it exempted permits granted under prior rules (which were weaker in some respects) from new Flood Hazard requirements. In the “compromise” final bill crafted by Ms. Jackson only environmentally sensitive Pinelands, Highlands and agricultural lands were left outside the Permit Extension Act but urban areas got no such consideration.

All told, these concessions will undoubtedly greatly worsen flooding and water quality problems that both Governor Corzine and DEP Commissioner Jackson pledged to combat.

Question:

Was this reversal of flood hazard protections your decision or were you following orders? If the latter, did you consider resigning rather than reversing on a matter of principle?

7. Failure to Protect Drinking Water – The Case of Perchlorate

In a November 10, 2008 comment letter to the U.S. EPA, Jeanne Herb, the New Jersey DEP Director of the Office of Policy and Planning criticized proposed EPA standards for perchlorate in drinking water:

“On October 7, 2005 the New Jersey Department of Environmental Protection (NJDEP) received from the New Jersey Drinking Water Quality Institute (NJDWQI), a legislatively created public advisory body, a recommendation to establish an MCL for perchlorate of 5 ug/L. The Department plans to propose such an MCL including monitoring and compliance determination requirements before the end of 2008 with adoption later in 2009. The NJDEP believes that having an MCL for perchlorate is good public health policy for both New Jersey and for the country as a whole.”

Despite having the scientific justification for imposing a perchlorate standard of 5 ug/L since 2005 (before your tenure at DEP began) DEP has still yet to propose any perchlorate standard.

Question:

Given your track record in New Jersey why would one reasonably expect timely promulgation of “good public health” regulations at EPA if you are confirmed?

8. Dereliction on Wildlife Protections

For more than 10 years, the U.S. EPA has consistently and repeatedly advised New Jersey of its failure to promulgate water quality standards which pass legal muster. In 2007, DEP proposed new Surface Water Quality Standards which were still deficient because they would leave bald eagle, peregrine falcon, freshwater mussels and other aquatic life vulnerable to the effects of mercury, the pesticide DDT and the toxic effects of PCB's.

In a July 23, 2007 letter to DEP, the U.S. Fish & Wildlife Service stated that –

- The “existing numeric State of New Jersey Quality Standards remain unprotective for mercury and DDT”;
- For “wildlife protection, attainment of New Jersey’s numeric PCB standard is stalled due to implementation issues that need clear and decisive resolution...”; and
- “The USEPA [Environmental Protection Agency] and the State continue to be in noncompliance with the Service’s [1996] Biological Opinion and may be vulnerable to legal challenges.”

Question:

Should EPA take enforcement action against New Jersey DEP for these violations? If not, how much longer should EPA wait?

Would you recuse yourself from EPA regulatory oversight decisions directed against New Jersey?

Given the performance of New Jersey DEP under your leadership, why would one expect you to enforce compliance with the Clean Water Act and the Endangered Species Act against other states?

9. Contracting Out Toxic Inspections

In a breakfast roundtable with a real estate group on April 3, 2008, DEP Commissioner Lisa Jackson said:

“Sometimes I feel our department is so overworked that we are not getting results, we’re just pushing paper. Therefore, I feel outsourcing the consultant program to the private sector will ease the workload and lower the wait time for all those involved in site remediation.”

In legislative testimony she called the privatization plan “transformational change”.

Less than six months earlier, however, Commissioner Jackson admitted “We realize that the state’s system that allows self-reporting for monitoring of these contaminated properties is broken.”

Question:

Can we expect you to embrace contracting out EPA functions, as well?

If relying on industry self-policing in New Jersey was such a disaster, why do you want to expand it?

How would contracting out toxic oversight duties to industry have prevented the long series of well publicized fiascos such as Encap, Kiddie Kollege and the Ford plant PCB clean-up that occurred just during your watch?

10. Massive Salary Inflation amid Attrition

During your tenure, state budget shortfalls reportedly prevented the DEP from replacing departing staff. DEP lost an estimated 300 positions during this period, nearly 10% of the entire agency workforce.

Yet the *Asbury Park Press* reported on August 10, 2008 that, based upon state records, DEP experienced among the highest growth in grade and salary inflation among high-level employees. During the period from April 2006 to April 2008 (while you served as Commissioner), the number of DEP employees earning more than \$100,000 jumped from 38 to 253.

Question:

Why, in the face of staff shortages, did you allow the ranks of top-paid six-figure employees to grow more than six-fold on your watch?

Would not this sharp growth of hyper-salaried positions help preclude filling line anti-pollution slots?

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