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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

RYAN JACKSON, MAJORITY STAFF DIRECTOR
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March 8, 2016

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Dear Administrator McCarthy:

I am writing to inquire about the legal authority for Albert Stanley Meiburg to continue serving as Acting Deputy Administrator of the U.S. Environmental Protection Act (EPA) while his nomination for the permanent position is pending before the U.S. Senate.

Mr. Meiburg was a long-time EPA employee who retired in May 2014 after serving most recently as Deputy Regional Administrator for Region 4 in Atlanta.¹ When EPA's most recent Senate confirmed Deputy Administrator, Robert Perciasepe, retired in August 2014, the vacant Deputy Administrator position was initially filled on an acting basis by Lisa Feldt, the Associate Deputy Administrator at that time.² Mr. Meiburg left retirement and was rehired by EPA in October 2014 as Senior Advisor to the Administrator and Acting Deputy Administrator. President Obama nominated Mr. Meiburg to fill the Deputy Administrator position on January 27, 2015.³ It was not until December 18, 2015, that Mr. Meiburg submitted his completed nomination paperwork to the U.S. Senate Committee on Environment and Public Works (EPW).⁴ EPW Majority staff have requested potential dates when Mr. Meiburg would be available to testify at a hearing to consider his nomination, but no dates have yet been provided.

¹ "Agency veteran leaves retirement for deputy chief's post," by Robin Bravender, Energy & Environment News, Oct. 6, 2014; available at: www.eenews.net/eenewspm/stories/1060006973/.

² Upon Mr. Meiburg's hiring, Ms. Feldt returned to her permanent position of Associate Deputy Administrator. She resigned in December 2014 to lead the environmental department for Montgomery County, Maryland. See, www.eenews.net/greenwire/stories/1060010031/. According to online records, the Associate Deputy Administrator position is currently filled by Ben Scaggs. See, <https://lo.bvdep.com/OrgDocument.asp?OrgId=-1&LDIBookId=19&LDIOrgId=154769&LDISecId=201&FromRecent=0&Save=0&Position=1705223#P1705223>.

³ <https://www.congress.gov/nomination/114th-congress/127>.

⁴ Also on December 18, 2015, the Senate agreed by unanimous consent to keep Mr. Meiburg's nomination, among others, in status quo notwithstanding provisions of rule XXXI of the Standing Rules of the Senate. 161 Cong. Rec. S8913 (Dec. 18, 2015); available at: <https://www.congress.gov/crec/2015/12/18/CREC-2015-12-18-pt1-PgS8913-3.pdf>.

The Vacancies Reform Act⁵ establishes the procedures and requirements for temporarily filling senior executive branch positions that require Senate confirmation pursuant to Article II, Section 2 (Appointments Clause) of the Constitution. Generally under the Vacancies Reform Act, a vacant position requiring Senate confirmation may be filled on a temporary basis for only 210 days from the date when the vacancy arose and only by certain, qualified officials.⁶ The vacancy is to be filled temporarily by the first assistant to the office that is vacant, unless the President directs either another official who has been confirmed by the Senate or a senior official at the GS-15 level or above who has served at that agency for at least 90 days in the year before the vacancy arose to act in the vacant position.⁷ Any actions taken by any person who is not acting in accordance with the Vacancies Reform Act shall have no force or effect and may not be ratified.⁸

The Vacancies Reform Act also restricts certain officials from temporarily filling a vacancy in an acting capacity when they also have been nominated to permanently fill the vacancy.⁹ A recent decision by the U.S. Court of Appeals for the District of Columbia, finding the nominee for the position of General Counsel at the National Labor Relations Board had improperly filled the same position on an acting basis, has prompted scrutiny of officials who are currently acting in the positions to which they have been nominated.¹⁰

The recent U.S. Court of Appeals decision clarifies that the Vacancies Reform Act prohibits any person from serving as both the acting official and nominee at the same time, unless one of two limited exceptions applies.¹¹ The Vacancies Reform Act exception that appears potentially relevant here states “a person may not serve as an acting officer” if (A) the person did not serve in the first assistant position to the vacant office in the year prior to the vacancy arising or for less than 90 days and (B) “the President submits a nomination of such person to the Senate for appointment to such office.”¹² The Department of Justice had previously interpreted this provision to mean, “In other words, an individual who was not the first assistant during the 365-day period preceding the vacancy may not serve in an acting capacity if the President has also nominated that person to the Senate for appointment to the vacant position.”¹³

According to the Vacancies Reform Act and the recent U.S. Court of Appeals decision, it is unclear that Mr. Meiburg is eligible to serve as both the nominee for the Deputy Administrator position while also continuing to serve as Acting Deputy Administrator. The Deputy

⁵ 5 U.S.C. § 3345, *et seq.*

⁶ 5 U.S.C. §§ 3345, 3346.

⁷ 5 U.S.C. § 3345(a).

⁸ 5 U.S.C. § 3348(d).

⁹ 5 U.S.C. § 3345(b).

¹⁰ *SW General, Inc. v. National Labor Relations Board*, 796 F.3d 67, 74 (D.C. Cir. 2015), *reh'g & reh'g en banc denied* (Jan. 20, 2016).

¹¹ *SW General*, 796 F.3d at 74, 78.

¹² 5 U.S.C. § 3345(b)(1). The other exception permits a first assistant who has received Senate confirmation to serve as both the acting official and the nominee to permanently fill the vacancy. *Id.* § 3345(b)(2).

¹³ 25 OLC 177, 180 (2001).

Administrator is delegated numerous responsibilities and authorities on behalf of the Administrator, including the authority to approve certain advisory board actions, agency reorganizations, inter-agency agreements and memoranda of understanding, and personnel actions. Based on information available to the EPW Committee, it appears Mr. Meiburg was rehired with the title Senior Advisor to the Administrator and Acting Deputy Administrator, but it is unknown whether either of Mr. Meiburg's positions had previously been designated as the first assistant to the Deputy Administrator position, or whether the Associate Deputy Administrator serves that function. When the Deputy Administrator position became vacant, Ms. Feldt became Acting Deputy Administrator but returned to her permanent position as Associate Deputy Administrator upon Mr. Meiburg's rehiring.

Given the seriousness of the issues raised by the Vacancies Reform Act and the recent Court of Appeals decision, it is requested that EPA provide the following information: (1) a copy of Mr. Meiburg's position description, including job title, salary level, and summary of duties and responsibilities at the time of his rehiring and appointment as Acting Deputy Administrator and currently (if different); (2) a list of official actions Mr. Meiburg has taken in his capacity as Acting Deputy Administrator; (3) an explanation of whether EPA believes Mr. Meiburg is serving as Acting Deputy Administrator pursuant to section 3345(a)(1), (2), or (3) of the Vacancies Reform Act; (4) a written explanation of why EPA believes Mr. Meiburg is eligible to serve as Acting Deputy Administrator while his nomination for the Deputy Administrator position is being considered by the EPW Committee; and (5) a copy of the position description for the Associate Deputy Administrator position.

Please provide the requested information no later than March 22, 2016. Should your staff have questions about this letter, please have them contact Byron Brown of the EPW Majority staff at (202) 224-6176.

Sincerely,



JAMES M. INHOFE
Chairman,
U.S. Senate Committee
on Environment and Public Works

CC: The Honorable Arthur Elkins
Inspector General
U.S. Environmental Protection Agency