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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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November 20, 2015

President Barack Obama
The White House
1600 Pennsylvania Ave., NW
Washington, D.C. 20500

Dear President Obama:

This letter is being sent to inform you that the U.S. Senate Committee on Environment and Public Works (EPW) is investigating the management, activities, and operation of the White House Council on Environmental Quality (CEQ or Council). CEQ has been without a Senate confirmed Chairman since February 2014, and no nominee has yet to be submitted to the Senate in the year and a half since the vacancy arose. It appears that no one currently has the legal authority to lead or act on behalf of the Council due to the extended vacancy of a Senate confirmed Chairman and that certain actions taken by CEQ officials during this vacancy period are not legally valid.

Background

Congress established the Council as part of the National Environmental Policy Act of 1969 (NEPA) to provide expert advice to the President on environmental policy matters, to recommend improvements in federal programs, and to assist with the study of the nation's environmental problems among other duties.¹ As originally enacted by Congress, the Council was to be composed of three members who were appointed by the President with the advice and consent of the Senate.² As explained at the time, members of Congress felt the President needed a cadre of independent environmental policy experts and science advisors who were separate from the existing Cabinet-level agencies and executive branch programs handling environmental matters.³ The members of CEQ were intended to have a broad range of experience and educational training, and their "recommendations to the President are for his use alone, and his actions on their recommendations will depend on the confidence he places in the judgment of the persons he nominates to membership."⁴ Under NEPA, the President is authorized to designate

¹ 42 U.S.C. § 4342.

² 42 U.S.C. § 4342.

³ See, House of Representatives Committee on Merchant Marines and Fisheries, Report on the Council on Environmental Quality accompanying H.R. 12549, 91st Congress, 1st Session, H. Report No. 91-378, at 8.

⁴ Senate Committee on Interior and Insular Affairs, Report on the National Environmental Policy Act of 1969 accompanying S. 1075, 91st Congress, 1st Session, S. Report 91-296, at 25.

one of the Council members as Chairman,⁵ and “the Council may employ such officers and employees as may be necessary to carry out its functions.”⁶

In the months following CEQ’s establishment, Congress enacted the Environmental Quality Improvement Act (EQIA), which established an Office of Environmental Quality within the Executive Office of the President to “provide the professional and administrative staff for the Council.”⁷ The CEQ Chairman was further designated as Director of the Office of Environmental Quality, and the EQIA established a Deputy Director position, also subject to Presidential appointment and Senate confirmation.⁸ The EQIA authorizes the Director “to employ such officer and employees (including experts and consultants) as may be necessary to enable the Office to carry out its functions under the [EQIA and NEPA].”⁹ The EQIA further states that “the Director shall assist and advise the President on policies and programs of the Federal Government affecting environmental quality” by performing seven enumerated functions, including “providing the professional and administrative staff and support for the Council.”¹⁰ Further, the Director is authorized to enter into contracts to carry out the duties of the position.¹¹

Over the years, Congress altered the composition of the Council and responsibilities of the Chairman, making clear that the Council “shall consist of one member, appointed by the President, by and with the advice and consent of the Senate, serving as chairman and exercising all powers, functions, and duties of the Council.”¹² Accordingly, only a Senate confirmed Chairman, or a person acting in accordance with the Federal Vacancies Reform Act, may perform the duties of the Chairman or take action on behalf of CEQ pursuant to NEPA and other relevant legal authorities.

Vacancies Reform Act

Pursuant to Article II, Section 2 of the Constitution, the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” Further, the “President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”

⁵ 42 U.S.C. § 4342.

⁶ 42 U.S.C. § 4343(a). NEPA states that the members shall be full-time appointments, without reference to a specific time-limit or term, and sets the compensation for the Chairman and other members. 42 U.S.C. § 4346.

⁷ 42 U.S.C. § 4371(c)(2).

⁸ 42 U.S.C. § 4372(a). The Deputy Director position has been vacant since January 4, 2014, when the Senate confirmed Deputy Director, Gary Guzy, resigned.

⁹ 42 U.S.C. § 4372(c).

¹⁰ 42 U.S.C. § 4372(d).

¹¹ 42 U.S.C. § 4372(e).

¹² See, P.L. 113-235, Division F, Title III of Department of the Interior, Environment, and Related Agencies Appropriations Act of 2015. In recent years, Congress has appropriated \$3 million to CEQ for salaries and operating expenses and authorized a staffing level of 24 full-time equivalent positions.

Congress enacted the Vacancies Reform Act in 1998 to clarify the process for filling senior executive branch vacancies on a temporary basis and to address concerns that the President was filling vacant positions that required Senate confirmation on an indefinite basis in violation of the Article II, Section 2 Appointments Clause.¹³

Generally under the Vacancies Reform Act, until a replacement is nominated by the President, a vacant Senate confirmed position may be filled on a temporary basis for only 210 days from the date when the vacancy first arose and only by certain, qualified officials.¹⁴ The vacancy may be filled temporarily during the 210-day time period by the first assistant to the office, 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.¹⁵

To address the concerns about Article II, Section 2 positions being filled indefinitely by officials who have not been confirmed by the Senate, Congress imposed a significant enforcement mechanism to limit the authority of those officials filling vacancies beyond 210 days and to encourage the President to submit timely nominations for replacements. According to the Vacancies Reform Act, at the conclusion of the 210 days, a position requiring Senate confirmation must remain vacant, and no one (other than an agency head, if applicable) may perform the “functions and duties” of the vacant position, until such time as the President nominates a replacement.¹⁶ 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 or endorsed.¹⁷ The authors of the Vacancies Reform Act did not contemplate an agency head position requiring Senate confirmation to be left vacant with no replacement even being nominated for such an extended period of time as has been allowed to occur with CEQ.¹⁸

Oversight of CEQ

In 2008, President George W. Bush issued an order of succession for CEQ, designating the Chief of Staff position as next in line to act as and perform the functions and duties of the office of the Chairman when the Senate confirmed Chairman has resigned or died, subject to the restrictions of the Vacancies Reform Act.¹⁹ This succession order appears to have been in effect when the previous Senate confirmed Chairman, Nancy Sutley, resigned on February 22, 2014. CEQ’s Chief of Staff at the time, Michael Boots, thereby became Acting Chairman when the vacancy began. According to the Vacancies Reform Act, the Government Accountability Office (GAO) must be informed “immediately upon the occurrence of the vacancy.” According to

¹³ See, Senate Committee on Government Affairs, Report on the Federal Vacancies Reform Act of 1998, 105th Congress, 2d Session, S. Report 105-250. , at 3-9.

¹⁴ 5 U.S.C. §§ 3345, 3346.

¹⁵ 5 U.S.C. § 3345(a).

¹⁶ 5 U.S.C. § 3348.

¹⁷ 5 U.S.C. § 3348(d).

¹⁸ See, Senate Committee on Government Affairs, Report on the Federal Vacancies Reform Act of 1998, 105th Congress, 2d Session, S. Report 105-250. , at 3-9; see also, 144 Cong. Rec. S12,824 (Statement of Sen. Thompson) (Oct. 21, 1998).

¹⁹ 73 FR 54487 (Sept. 22, 2008).

GAO, the 210-day period for which Mr. Boots was allowed to serve as Acting Chairman ended on September 21, 2014.²⁰ No one was nominated to serve as Deputy Director when that position became vacant and no eligible person was appointed to serve in an acting capacity. GAO, however, was not informed of the vacancies for the CEQ Chairman and Deputy Director positions until March 15, 2015, more than a year after the vacancies first arose and contrary to the requirements of the Vacancies Reform Act.²¹

The extended Chairman vacancy raises significant questions regarding whether the Council itself, or any official leading CEQ since September 21, 2014, is operating in accordance with the law. Given the unique statutory framework governing CEQ, the Council is to consist of only a single Senate confirmed Council member who shall serve as the Chairman and who shall exercise all powers, functions, and duties of the Council. As the head of CEQ is the position subject to the vacancy, the Vacancies Reform Act prohibits anyone from continuing to perform the functions and duties of Chairman or to act on behalf of CEQ after September 21, 2014. The position of CEQ Chairman is vacant and, pursuant to the Vacancies Reform Act, no one may perform those functions assigned by law or regulation to the Council until an eligible official is nominated.

It appears that Mr. Boots continued to lead the Council after September 21, 2014, in apparent violation of the Vacancies Reform Act. For example, four days after Mr. Boots' acting stint was required to end, Mr. Boots spoke at a climate change conference in New York City and was identified as "Acting Chair" in the program agenda for the event.²² In a news article about the speech, Mr. Boots is quoted as saying he will continue to lead CEQ and that, "Nobody inside [the White House] is concerned whether it's 'acting' or not." It is troubling that your senior administration officials would be so cavalier in their failure to follow the law.

Indeed, through the fall of 2014 and into early 2015, Mr. Boots continued to lead CEQ,²³ and news articles continued to refer to him as "Acting Chairman,"²⁴ but it is unclear what that meant in terms of the day-to-day operations and activities of CEQ. For example, on December 18, 2014, CEQ purported to issue final guidance for programmatic NEPA reviews and revised

²⁰ See, http://www.gao.gov/legal/federal-vacancies-act/about?vacancyTitle=&vacancyActing=&vacancyNominee=&admin=all&agency=57500&subagency=57519&status=all&rpp=10&o=0&ssearched=1&order_by=date&Submit=Search#fed-vac-form.

²¹ See, http://www.gao.gov/legal/federal-vacancies-act/about?vacancyTitle=&vacancyActing=&vacancyNominee=&admin=all&agency=57500&subagency=57519&status=all&rpp=10&o=0&ssearched=1&order_by=date&Submit=Search#fed-vac-form.

²² See, <http://www.risingseasummit.org/agenda-2014.html>; see also, <http://www.risingseasummit.org/bios-2014.html>.

²³ Council on Environmental Quality Press Release, "Obama Administration Releases Federal Agency Climate Plans on Fifth Anniversary of Presidential Sustainability Initiative," issued October 31, 2014; available at: https://www.whitehouse.gov/administration/eop/ceq/Press_Releases/October_31_2014; Council on Environmental Quality Press Release, "Obama Administration Releases Final Principles, Requirements and Guidelines for Federal Water Investments in Water Resources," issued December 17, 2014; available at: .

²⁴ See, "Admin finalizes long-awaited guidelines for federal investments," Energy & Environment News, December 17, 2014; available at: <http://www.eenews.net/eenewspm/stories/1060010745/>; "Staffers on deck for Obama's 2015 executive push," Energy & Environment News, December 2, 2014; available at: www.eenews.net/greenwire/stories/1060009755.

draft guidance for considering greenhouse gas emissions and climate change in NEPA reviews.²⁵ It is unknown the extent to which Mr. Boots was involved in developing or approving these documents,²⁶ and it is unclear if any CEQ employees other than the Chairman had the legal authority to approve and issue these documents on behalf of the Council.

On January 13, 2015, Mr. Boots announced his intention to resign in March 2015, prompting speculation that a nominee to serve as Chairman would soon be announced.²⁷ Instead, a Deputy Director of the National Park Service, Christy Goldfuss, joined CEQ as a senior advisor in February 2015, apparently with the intent to eventually replace Mr. Boots as head of CEQ.²⁸ Upon Mr. Boots' departure, Ms. Goldfuss was named Managing Director, which appears to be a new position within CEQ. On March 13, 2015, you revised the order of succession for CEQ to install the Managing Director as first in line to serve as acting Chairman, to the extent the individual is eligible to act under the Vacancies Reform Act.²⁹

However, the change to CEQ's order of succession does not confer special status for the Managing Director position to operate the Council or to act on its behalf while the Chairman position is vacant. It does not make the person filling this position eligible to serve in an acting capacity under the Vacancies Reform Act. It does not change the fact that, given the failure to timely nominate a Chairman within the time frame set forth in the Vacancies Reform Act, as a matter of law, the position of CEQ Chairman must remain vacant and no one may perform those duties until the President formally nominates a replacement and an eligible person is found to serve as the acting officer.

Accordingly, it is unclear what, if any, legal authority the Council has to operate, or what authority the Managing Director has to lead or act on behalf of the Council, while the Chairman position remains vacant. For example, on March 19, 2015, you issued Executive Order 13,693 directing the Chairman of CEQ, among officials with other agencies, to take certain actions to reduce greenhouse gas emissions of the federal government by 40 percent within a decade.³⁰ This Executive Order has been touted as one of the ways the United States plans to meet its intended nationally determined contribution toward the 26-28 percent reduction of U.S. greenhouse gas emissions.³¹ Even though the Executive Order was directed, in relevant part, to the Chairman of CEQ, it was Ms. Goldfuss serving as Managing Director who issued the instructions to federal agencies on June 10, 2015 pursuant to the Executive Order.³²

²⁵ See, <https://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa>; see also, 79 FR 76989 (Dec. 23, 2014) and 79 FR 77802 (Dec. 24, 2014).

²⁶ The Federal Register notices for these documents were signed by Brenda Mallory, the CEQ General Counsel.

²⁷ "CEQ chief's departure adds to energy exodus," Energy & Environment News, January 13, 2015; available at: <http://www.eenews.net/eenewspm/stories/1060011610/>.

²⁸ "National Park Service official expected to take reins at CEQ," Energy & Environment Report, January 23, 2015; available at: <http://www.eenews.net/greenwire/stories/1060012199/>.

²⁹ 80 FR 14289 (March 18, 2015).

³⁰ 80 FR 15871 (March 25, 2015).

³¹ See,

<http://www4.unfccc.int/submissions/INDC/Published%20Documents/United%20States%20of%20America/1/U.S.%20Cover%20Note%20INDC%20and%20Accompanying%20Information.pdf>.

³² 80 FR 34149 (June 15, 2015).

President Obama
November 20, 2015

It is requested that you promptly take action to withdraw, and to publish in the Federal Register notice of such withdrawal, the following documents that have been improperly issued on behalf of or in coordination with CEQ since September 24, 2014:

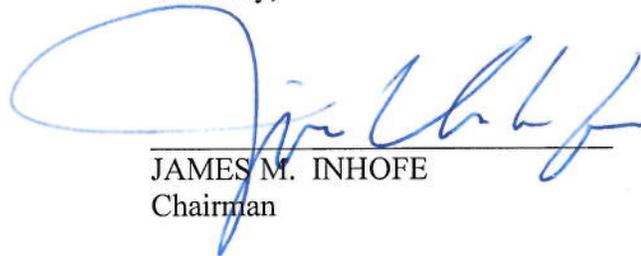
- a) Final Guidance for Effective Use of Programmatic NEPA Reviews;
- b) Revised Draft Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews;
- c) Notice of Extension of Comment Period for Revised Draft Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews;
- d) Implementing Instructions for Planning for Federal Sustainability in the Next Decade;
- e) Final Interagency Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies;
- f) Federal Flood Risk Management Standard and Draft Implementation Guidelines;
and
- g) Memorandum on Incorporating Ecosystem Services into Federal Decision Making.

Your reliance on lower-level staff to function as the Council indefinitely, without any apparent intention to nominate a Chairman, is contrary to your constitutional duty to ensure that the Vacancies Reform Act and NEPA are faithfully executed. The result of this failure is the fact that CEQ is no longer a lawfully functioning government agency and any actions purporting to have been taken on behalf of the Council during this vacancy period are *ultra vires*.

Given the concerns outlined in this letter, a separate oversight letter is being directed to Ms. Goldfuss for response in order for Congress to better understand the actions of CEQ staff during this period when the Chairman position has been vacant.

I appreciate your attention to this important matter and look forward to your response. The Senate Committee on Appropriations and the Government Accountability Office are being copied on this letter and the letter to Ms. Goldfuss.

Sincerely,



JAMES M. INHOFE
Chairman

President Obama
November 20, 2015

cc: The Honorable Lisa Murkowski,
Chairman, Subcommittee on Interior, Environment, and Related Agencies
U.S. Senate Committee on Appropriations

The Honorable Gene Dodaro,
Comptroller General
U.S. Government Accountability Office