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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

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December 18, 2015

Christy Goldfuss
Managing Director
Council on Environmental Quality
722 Jackson Place, NW
Washington, DC 20503

Dear Ms. Goldfuss:

I am writing in response your letter dated December 14, 2015, concerning the U.S. Senate Committee on Environment and Public Works' (EPW) ongoing oversight investigation into the management, activities, and operation of the White House Council on Environmental Quality (CEQ or Council). On November 20, 2015, I wrote to President Obama regarding my concerns that CEQ currently lacks legal authority to operate due to the extended vacancy of a Senate-confirmed Chairman and that certain actions taken by you and others during this vacancy period are not legally valid. By a separate letter, also sent to you on November 20, 2015, I requested 12 categories of documents be provided by 12 noon on December 7, 2015.

To be clear, the EPW Committee is the principal Senate Committee with oversight jurisdiction over CEQ, which was established by the National Environmental Policy Act of 1969 (NEPA). Your terse, nine-sentence response letter fails to resolve the significant questions about your legal authority to operate and act on behalf of CEQ that were raised in my original correspondence and provides none of the requested documents. As the letters to President Obama and you explained, the position of CEQ Chairman may be filled temporarily on an acting basis by certain qualified officials for only 210 days after the vacancy first arose under the Vacancies Reform Act. The position must remain vacant, and no one may perform the duties and functions of the position at the expiration of the 210-day period, unless the President nominates a replacement. Any actions purportedly taken on behalf of CEQ after this 210-day period expires will have no legal effect. As you know, the previous Senate-confirmed Chairman, Nancy Sutley, resigned on February 22, 2014, and the position has been required to remain vacant since September 21, 2014.

Your refusal to provide any documents about CEQ's organization, operations, and expenditures during this vacancy period is especially troubling considering the commitment made to then EPW Committee Chairman Barbara Boxer by Ms. Sutley at her January 14, 2009, confirmation hearing before the EPW Committee:

Senator Boxer. *** Very last question. What I really want to see, and a lot of us do, is an openness. And we are going to probably be asking you for your opinions and papers and so on. Could we count on that, that you will work with us? Because we are all on the same team here. Our job is to make sure that we protect the public. And your job is to make sure that the White House does the same.

So could we make sure that we have this open relationship where we can really talk to you at a moment's notice and sit down and not have between us the fact that, well, you are in the Executive, we are in the Legislative? It goes to what Senator Voinovich said, the need to really cooperate. Can we get that assurance that you will be there for us?

Ms. Sutley. Absolutely, Madam Chair. I believe that as the President-elect does that openness and transparency in our decision-making leads to better decision-making, and that we have an important relationship between, there is an important relationship between the Executive Branch and the Legislative Branch and that we need to work together. I have in my career in State government and local government, we found very helpful and useful ways to work together between the executive branch and the legislative branch.

Senator Boxer. Well, thank you very much.¹ (Emphasis added)

As former Chairman Boxer articulated, and former CEQ Chairman Sutley committed, there is an expectation that CEQ officials will cooperate with the EPW Committee's oversight and provide witnesses and documents as requested. Your response falls far short of Ms. Sutley's commitment and my expectation now as Chairman of the EPW Committee.

The documents that have been requested are necessary for the EPW Committee to fulfill its constitutional oversight function to ensure that the laws, as authored by Congress, are being faithfully executed by the President. The documents being sought relate to the core functions and activities of CEQ, including copies of internal delegations of authority and operations manuals, calendar entries, travel authorizations, and position descriptions for certain senior employees, as well as information about CEQ's compliance with the Vacancies Reform Act, all inter-agency council, workgroup, and commission meetings organized or attended by CEQ, and employees, contractors, and consultants hired by CEQ. In addition, the request sought documents related to the review, approval, and concurrence of certain guidance documents and memoranda that have been issued to the public. The vast majority if not all of the requested

¹ Transcript, Hearing on the Nominations of Lisa P. Jackson to be Administrator of the U.S. Environmental Protection Agency and Nancy Helen Sutley to be Chairman of the Council on Environmental Quality, U.S. Senate Committee on Environment and Public Works, January 14, 2009.

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documents would be available to the public pursuant to the Freedom of Information Act,² let alone to Congress pursuant to an oversight request. Indeed, no legal basis has been articulated by the President or you to justify the continued withholding of this information from the EPW Committee.

This is not the first time you have failed to cooperate with the EPW Committee's oversight of CEQ. On October 15, 2015, I wrote to invite you and other Obama Administration officials to testify before the EPW Committee about international climate negotiations and the role that domestic environmental policies will play in any final agreement.³ I also requested that you provide information about CEQ staff who planned to attend the COP-21 in Paris and who have attended other international meetings related to the United Nation's Framework Convention on Climate Change. When this hearing was postponed to accommodate another Senate committee's hearing schedule, I reiterated my request for information about CEQ staff's involvement in international climate meetings.⁴ Although I now know you attended COP-21,⁵ the requested information about CEQ's involvement in that and other international climate meetings has never been provided.

It is troubling that you are unwilling to provide Congress such basic information about CEQ's activities, despite President Obama's commitment to create "an unprecedented level of transparency."⁶ As President Obama stated in a 2009 memorandum to the heads of executive branch departments and agencies, "Transparency promotes accountability and provides information for citizens about what their Government is doing." A copy of that memorandum is attached for your information.

Your December 14 letter seeks to justify your lack of accountability and transparency by arguing, "We have taken steps to comply with all applicable requirements."⁷ However, your response fails to account for why the Obama Administration did not comply even with the basic requirement under Vacancies Reform Act to "immediately" notify Congress and the Comptroller General when a vacancy arises.⁸ More than a year passed before the Government Accountability Office was informed of the Chairman vacancy.

² 5 U.S.C. § 552.

³ Letter from James M. Inhofe, Chairman, U.S. Senate Committee on Environment and Public Works, to Christy Goldfuss, Managing Director, Council on Environmental Quality, October 15, 2015; available at: http://www.epw.senate.gov/public/_cache/files/d4e0948f-4488-497f-b4b4-686f593fc83d/epw-ceq-invitation-102015.pdf.

⁴ Letter from James M. Inhofe, Chairman, U.S. Senate Committee on Environment and Public Works, to Christy Goldfuss, Managing Director, Council on Environmental Quality, October 15, 2015; available at: http://www.epw.senate.gov/public/_cache/files/b76a9976-101e-4dba-87a5-ea60c0ece532/goldfuss-postponement.pdf.

⁵ See, <http://www.epw.senate.gov/public/index.cfm/press-releases-republican?ID=022EB11A-2409-44ED-8FB0-4BB81EB2CAC1>.

⁶ President Obama, Memorandum for the Heads of Executive Departments and Agencies, re: Transparency and Open Government. Available at: https://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment.

⁷ Letter from Christy Goldfuss, Managing Director, Council on Environmental Quality, to James Inhofe, Chairman, U.S. Senate Committee on Environment and Public Works, December 14, 2015.

⁸ 5 U.S.C. § 3349(a).

In addition, your letter seemingly argues that CEQ may continue to operate and that a lower-level official such as yourself may continue to act on behalf of CEQ during this vacancy period because, under NEPA section 203, “[t]he Council may employ such officers and employees as may be necessary to carry out its functions under th[e] Act (sic).”⁹ (Emphasis added) However, your letter fails to recognize that in establishing CEQ, Congress originally designed “the Council” to be composed of three members subject to the advice and consent of the Senate, one of whom would be designated by the President to serve as Chairman of the Council. NEPA articulates several duties and functions for “the Council,”¹⁰ and authorizes the “Council” to make expenditures for international travel¹¹ and to accept reimbursement from certain entities for “reasonable travel expenses” for the travel of CEQ employees in connection with the employees’ attendance at a conference, seminar, or other meeting conducted for the benefit of the “Council.”¹²

In addition, shortly after CEQ’s establishment, Congress enacted the Environmental Quality Improvement Act (EQIA) to establish the Office of Environmental Quality within the Executive Office of the President to “provide the professional and administrative staff for the Council.”¹³ Congress designated the CEQ Chairman to serve as Director of the Office of Environmental Quality.¹⁴ In outlining additional duties and functions, EQIA states “the Director shall assist and advise the President on programs and policies and programs of the Federal Government affecting environmental quality.”¹⁵ The Chairman/Director is authorized under EQIA to enter into contracts to carry out “his functions.”¹⁶

Over the years, Congress altered the composition of the Council so that it “shall consist of one member, appointed by the President, by and with the advice and consent of the Senate, serving as chairman.”¹⁷ Congress also clarified that the Chairman shall “exercise[e] all powers, functions, and duties of the Council.” Accordingly, only a Senate-confirmed Chairman, or a person acting as Chairman in accordance with the Federal Vacancies Reform Act, may take action on behalf of CEQ or perform the duties of the Chairman pursuant to NEPA and other relevant legal authorities.

As the “Council” consists only of a “Chairman,” and only the “Chairman” has the authority to “exercis[e] all powers, functions and duties of the Council,” as a matter of law there is no functioning “Council” for which you and other lower-level employees may carry out

⁹ 42 U.S.C. §4342.

¹⁰ 42 U.S.C. § 4344.

¹¹ 42 U.S.C. § 4346b.

¹² 42 U.S.C. § 4346a.

¹³ 42 U.S.C. § 4371(c)(2).

¹⁴ 42 U.S.C. § 4372(a). EQIA also established a Deputy Director position, also subject to Presidential appointment and Senate confirmation. The Deputy Director position has been vacant since January 4, 2014, when the Senate confirmed Deputy Director, Gary Guzy, resigned. The Obama Administration also waited more than a year to provide notice of this vacancy, in violation of the Vacancies Reform Act.

¹⁵ 42 U.S.C. § 4372(b).

¹⁶ 42 U.S.C. § 4372(e).

¹⁷ 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.

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functions assigned to the “Council” under NEPA and other authorities while the Chairman position is vacant.

Given the vacancy of the Chairman/Director position, the requested information will also be used to inform Congress whether any lower-level officials may have expended government funds in violation of the Antideficiency Act, which prohibits government officers and employees from making or authorizing the expenditure of government funds without appropriation or authorization.¹⁸ Employees who violate the Antideficiency Act may be subject to discipline including suspension and removal,¹⁹ as well as criminal penalties.²⁰

Your letter also states, without support, that “[a]ll documents referenced in [my November 20] letter have been properly issued on behalf of, or in coordination with, CEQ.” The seven documents referenced in Item I of my request were issued since Ms. Sutley resigned as CEQ Chairman.

For example, the Revised Draft Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews was issued apparently by the CEQ General Counsel on December 18, 2014 – three months after the Chairman position became vacant.²¹ Similarly, you issued Implementing Instructions for Planning for Federal Sustainability in the Next Decade on June 10, 2015, pursuant to Executive Order 13693.²² However, Executive Order directs the “Chair of CEQ” to issue such instructions and to take other actions.²³ It does not provide authority for you or other lower-level officials to act on behalf of the Council.

According to section 3348(d) of the Vacancies reform Act, “An action taken by any person who is not acting [in accordance with the Vacancies Reform Act] shall have no force or effect.”²⁴ These and any other actions taken purportedly on behalf of CEQ since September 21, 2014, lack legal authority and effect and have not been “properly issued” as you suggest.

The CEQ Chairman is required to “be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified” in a number of areas.²⁵ The Obama Administration’s attempt to have CEQ managed and overseen on an indefinite basis by a lower-level official who has not been subject to the advice and consent of the Senate is contrary to CEQ’s legal authorities and the Vacancies Reform Act and falls far short of the President’s constitutional duty to ensure the laws of the United States are faithfully executed.

¹⁸ 31 U.S.C. § 1341, et seq.

¹⁹ 31 U.S.C. § 1349.

²⁰ 31 U.S.C. § 1350.

²¹ See, 79 Fed. Reg. 77801, 77823 (December 24, 2014).

²² See, 80 Fed. Reg. 34149 (June 15, 2015).

²³ Executive Order 13693, Planning for Federal Sustainability in the Next Decade, section 4 (March 19, 2015), see 80 Fed. Reg. 15871 (March 25, 2015).

²⁴ 5 U.S.C. § 3348(d)(1).

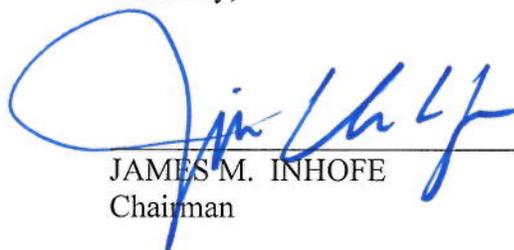
²⁵ 42 U.S.C. § 4342.

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Given the important issues raised by the Committee's oversight to date, I expect you to provide complete and unredacted copies of the requested information without further delay. I also expect you will make yourself available voluntarily upon request for any future oversight hearings that may be scheduled to examine the actions purportedly being taken on CEQ's behalf and compliance with the EPW Committee's oversight requests.

I look forward to your prompt response. The Senate Committee on Appropriations and the Government Accountability Office are being copied on this letter.

Sincerely,



JAMES M. INHOFE
Chairman

Attachment

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