

September 13, 2017

Susan Bodine
Special Counsel to the Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Ms. Bodine:

It has come to our attention that you have recently been appointed to the position of “special counsel to the administrator on compliance” at the Environmental Protection Agency (EPA) while your nomination to serve as EPA’s Assistant Administrator of the Office of Enforcement and Compliance Assistance (OECA AA) remains under consideration by the Senate. This appointment raises several concerns that we request you address before we can consent to any time agreement to process your nomination.

1. Your appointment as special counsel

The Federal Vacancies Reform Act of 1998 provides, with limited exceptions, the “exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency ... for which appointment is required to be made by the President, by and with the advice and consent of the Senate....” 5 U.S.C. § 3347. Further, as the Supreme Court held in *Buckley v. Valeo*, “any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’ and must, therefore, be appointed in the manner prescribed” in Article II, Section 2, clause 2 of the Constitution. 424 U.S. 1, 126 (1976). Accordingly, it would be unlawful for you to assume any of the delegated authorities of the OECA AA before the Senate confirms your nomination while serving as “special counsel.”

Your appointment creates the appearance, and perhaps the effect, of circumventing the Senate’s constitutional advice and consent responsibility for the position to which you have been nominated. Your improper involvement in EPA enforcement decisions could provide grounds for subjects of EPA actions to challenge the legal validity of those actions in court.¹ To ensure your appointment is not violating the Federal Vacancies Reform Act of 1998, please respond to the following:

- What is your official job title and type of appointment (e.g., non-career SES, Schedule C, administratively-determined)? Who, if anyone, are you supervising? What is your relationship with the Acting OECA AA? If you have a written job description, please provide a copy.

¹ See, e.g., *National Labor Relations Board v. SW General*, 137 S.Ct. 929 (2017) (Vacating an NLRB unfair labor practices complaint because the NLRB general counsel at the time had been appointed in violation of the Federal Vacancies Reform Act).

- Have any duties of the OECA AA been formally delegated to you by the Administrator? Which, if any, OECA AA duties have you or are you presently performing?
- During your confirmation process, you entered into an ethics agreement that was approved by both EPA and the Office of Government Ethics and presented to this Committee. Are you governed by the same ethics agreement in your current position? Please provide a copy of the signed Trump ethics pledge, and copies of any waivers to the pledge or recusal statements.
- You committed to notifying the Committee of all of your EPA email addresses “within seven days of using a new email address, including any aliases or pseudonyms.” Please provide all email addresses you have used since starting at EPA and any new ones within seven days of their use.
- You also committed to “conducting all business using official email addresses and other means and to refrain from any mediums that are outside the Freedom of Information Act’s reach.” Do you commit to do the same pre-confirmation?
- During previous administrations, senior EPA managers’ schedules have been available to the public. Given your extensive work with industries regulated by EPA in the past, will you make your schedule available?

2. Enforcement of the New Source Performance Standard (NSPS) methane oil and gas rule

Several Senators recently wrote to Administrator Pruitt about his continued attempts to undermine the New Source Performance Standard (NSPS) methane oil and gas rule. The letter referenced an email released by EPA stating it would enforce the methane rule on a “case by case” basis. EPA’s recent comments about enforcement on a “case by case” basis appear to be a “no action assurance” which can only be issued by the Office of Enforcement and Compliance Assurance Acting Administrator through a written finding.

Now that you are advising the Administrator on compliance issues, you are in a position to answer questions about this policy, the answers to which are important to the Senate’s consideration of your nomination.

- Is it your understanding that EPA will enforce the methane rule on a case-by-case basis? If so, were you involved in the formulation of this policy? Please explain how EPA’s case-by-case approach to compliance with the Methane Rule is consistent with EPA’s “No Action Assurance” policy, which dates back to 1984.
- Please provide any written guidance that you have authored or reviewed concerning enforcement of the Methane Rule.
- During your confirmation hearing, you committed to “enforce all regulations that are in effect.” Do you believe EPA’s “No Action Assurance” should continue to be a basis for EPA’s enforcement policy? If not, please explain why.
- Which states have been delegated enforcement authority over the Methane Rule? What oversight and/or assistance will EPA provide these states to ensure that regulated entities are complying with the rule?

- What types of reports and notifications will EPA require states with delegated enforcement authority to submit to the agency to ensure that the states are enforcing the rule?

3. Questions for the record

You declined to answer several questions for the record from members of the Environment and Public Works Committee due to lack of familiarity with the issue or EPA's perspective on it as a nominee. Consistent with your commitment to seek briefings on these issues, we expect that now that you are "special counsel to the administrator on compliance" you have familiarized yourself with these issues and that EPA policies and practices sufficiently to answer the questions we previously asked. We restate those questions and your answers below, and request that you amend your answers to reflect your new position.

1) EPA recently developed the agency's EJ2020 action Agenda to better deliver on its historical promises of reducing disparities in environmental protection. Will you utilize and uphold this guidance and procedures outlined in this document throughout the work of your office? Please explain.

I am not familiar with EPA's EJ2020 action agenda. If confirmed, I will seek a briefing on this guidance.

2) In EPA's environmental justice strategic plan for 2016-2020, OECA is identified as the program leading environmental justice compliance and enforcement. The following strategies in the plan are below. If confirmed, will you commit to implementing each of these strategies in your leadership of the office? If not, why?

- Direct more EPA enforcement resources to the most overburdened communities;
- work with federal, state, tribal, and local co-regulatory partners to pursue vigorous enforcement for violations in overburdened communities and leverage limited compliance resources by improving joint planning and targeting of enforcement activities; and
- strengthen communication so enforcement cases can benefit from the knowledge of local communities, and empower communities with information about pollution and violations that affect them.

I am not familiar with the environmental justice strategic plan for 2016-2020. If I am confirmed I will seek a briefing on it. As I stated above, I agree that communication is important.

3) Are you aware of criticism—including a 2016 United States Commission on Civil Rights report—that EPA has historically done a poor job of enforcing Title VI? Do you agree or disagree? If you agree, what changes would you make? If you disagree, what evidence suggests to you that environmental justice enforcement has been adequate?

I am not familiar with that report. If I am confirmed I will seek a briefing on this issue. As I noted above, in December 2016, EPA reorganized the functions of the formerly Office of Civil Rights (OCR) with respect to its External Compliance and Complaints Program. This external civil rights enforcement function now resides organizationally within the External Civil Rights Compliance Office, which is located in EPA's Office of General Counsel.

4) Early feedback from states, tribes, and associations to the Office of Enforcement and Compliance Assurance's FY2018-2019 National Program Managers Guidance includes a call for the EPA to further "streamline the process for states to gain approval of Alternative Compliance Monitoring Strategies that include allowances for different inspection frequencies and alternative monitoring approaches and to explicitly recognize in the National Program Managers Guidance opportunities for states to use ACMSs."

- a. How can OECA streamline the process for allowing states to use ACMSs under the CAA, CWA, and RCRA?
- b. How will EPA ensure the ACMSs are meeting overarching enforcement and compliance goals?

I am not familiar with the issues that states, tribes, and associations are raising in their comments. If confirmed, I will request a briefing on these issues.

5) Under your leadership, will you push for greater inclusion of technology-based tools for compliance monitoring and implementation, including electronic reporting and additional air or water quality monitors?

If confirmed, I will request a briefing on "Next Generation" compliance tools.

6) What is the role of Regional Administrators in bringing enforcement actions against polluters? **It is my understanding that EPA Regional Administrators have been delegated significant authority for certain actions. If I am confirmed, I will seek a briefing to fully understand the OECA delegations of authority.**

7) On June 5, Attorney General Sessions circulated a memo to all component heads and United States Attorneys barring DOJ attorneys from "enter[ing] into any agreement on behalf of the United States in settlement of federal claims or charges, including agreements settling civil litigation, accepting plea agreements, or deferring or declining prosecution in a criminal matter, that directs or provides for a payment or loan to any non-governmental person or entity that is not a party to the dispute" with limited exceptions.

- Do you interpret Attorney General Sessions' memo to prohibit payments to states, tribes, or local governments as part of a settlement, plea agreement, or other such arrangement? **With three exceptions, the memo prohibits payments to non-party, non-governmental entities. Thus, it does not appear to apply to payments to governmental entities. If I am confirmed, I will seek a briefing on the intended effect of this memo.**
- Do you interpret Attorney General Sessions' memo to prohibit settlement from including provisions like the \$2 billion for zero emission vehicle development and \$2.7 billion in a trust for states to undertake projects that reduce emissions from vehicles in the VW settlement?
If I am confirmed, I will seek a briefing on the intended effect of this memo.
- In your experience, do you feel settlement funds in environmental cases have gone to "bankroll third-party special interest groups or the political friends of whoever is in

power” as Attorney General Sessions stated in the press release accompanying his June 7 memo? If so, please provide examples that illustrate your concerns.

If I am confirmed, I will seek a briefing on the actions that this memo is intended to preclude.

- Will you revise or eliminate OECA’s Supplemental Environmental Projects Policy to align with Attorney General Sessions’ prohibition on third party payments?

I believe that OECA’s SEPs policy already conforms to the June 7 memo because it already precludes third party payments. If I am confirmed, I will seek a briefing on the actions that this memo is intended to preclude.

8) Do you believe all covered water systems should follow EPA’s drinking water analytical methods when testing drinking water for contamination? If so, what efforts will you undertake to ensure all water systems are brought into compliance?

I am not familiar with the issue raised in this question. If I am confirmed, I will seek a briefing on it.

9) Rhode Island ozone air quality issues are largely due to transported emissions from upwind states leading to ozone formation that pollutes the air and lungs of people in downwind states like mine. The Rhode Island Department of Environmental Management reports that there remain a number of power plants located in upwind states that have pollution control equipment installed to reduce nitrogen oxides emissions that either do not use that equipment during the ozone season or do not use it in a way that optimizes the reduction of nitrogen oxides emissions. Why would this be the case?

I do not know. If confirmed, I will request a briefing on this issue.

You stated that “Congressional oversight is very important,” that “you have deep respect for the oversight responsibility of Congress,” and that your “bias would always be to respond to any Member of Congress, whether the majority or the minority, and certainly would not see that there would be any change in practice from EPA.” Now that you are an employee of EPA, we expect you will act on that philosophy. We look forward to your prompt response as it will help inform how we engage with your nomination.

Sincerely,



Sheldon Whitehouse
United States Senator



Jeffrey A. Merkley
United States Senator

Cc: Senator John Barrasso, Chairman, Environment and Public Works Committee
Senator Thomas Carper, Ranking Member, Environment and Public Works Committee