

United States Senate

WASHINGTON, DC 20510

July 23, 2018

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

Dear Mr. McIntosh:

It has come to our attention that you have recently been appointed to the position of “special counsel to the Administrator” at the Environmental Protection Agency (EPA). This appointment was made while your nomination to serve as EPA’s Assistant Administrator for the Office of International and Tribal Affairs (OITA) remains under consideration by the Senate. This appointment raises several concerns that we request you address.

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 ITA AA prior to the Senate’s confirmation of your nomination.

Your appointment runs the serious risk of circumventing the Senate’s constitutional advice and consent responsibility for the position to which you have been nominated. Your involvement in certain EPA decisions could provide grounds for subjects of EPA regulations and oversight to challenge the legal validity of those decisions in court.¹ To ensure your appointment complies with the requirements of 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 OITA AA? If you have a written job description, please provide a copy.
- Have any duties with the OITA AA been formally delegated to you by the Administrator? Which, if any, OITA AA duties are you presently performing?
- During your confirmation process, you entered into an ethics agreement dated April 14, 2018, that was approved by both EPA and the Office of Government Ethics and presented to the Senate Environment and Public Works Committee. Are you governed

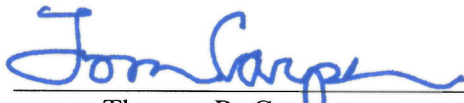
¹ See, e.g., *National Labor Relations Board v. SW General*, 137 S. Ct. 929 (2017) (vacating an NLRB unfair labor practices complaint because the NLRB general counsel at the time had been appointed in violation of the Federal Vacancies Reform Act).

by the same ethics agreement in your current position? If not, what steps will you be taking to avoid actual or apparent conflicts of interest while your nomination remains pending in the Senate?


- Please provide a copy of your signed Trump ethics pledge, and copies of any waivers to the pledge or recusal statements you signed.
- Do you commit to conducting all business using official email addresses or other official means and to refrain from any mediums that are outside the Freedom of Information Act's reach? Please provide all email addresses you have used since starting at EPA and any new ones within seven days of their use.
- In many of your responses to questions for the record, which were submitted after you began work at EPA, you noted your lack of familiarity with the subject matter and a commitment to seek more information following confirmation. Please provide substantive responses to questions 13, 16, 17, 18, 19, 20, 21, 24, 25, 37, 38 and 39.

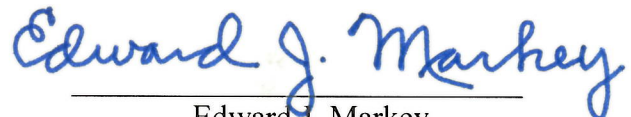
We look forward to your prompt responses as it will help inform how we engage with your nomination.

Sincerely,


Thomas R. Carper
United States Senator


Sheldon Whitehouse
United States Senator


Bernard Sanders
United States Senator


Edward J. Markey
United States Senator