

United States Senate

COMMITTEES:
ARMED SERVICES
COMMERCE, SCIENCE, AND
TRANSPORTATION
JUDICIARY
VETERANS' AFFAIRS

January 25, 2021

VIA ELECTRONIC TRANSMISSION

The Honorable Sean O'Donnell
Inspector General
U.S. Environmental Protection Agency
1301 Constitution Avenue N.W.
Washington, DC 20460

The Honorable Gene L. Dodaro
Comptroller General
U.S. Government Accountability Office
441 G Street N.W.
Washington, DC 20548

Dear Inspector General O'Donnell and Comptroller General Dodaro,

I write to ask that the Environmental Protection Agency Office of the Inspector General (EPA OIG) and the Government Accountability Office (GAO) open an investigation into potential violations of the Federal Vacancies Reform Act of 1998 (FVRA) and other potential violations of ethics rules resulting from the actions of EPA's Principal Deputy General Counsel Melissa Hoffer's recent memorandum to toll all pending EPA cases.

On her first day on the job, Ms. Hoffer swiftly sent a memorandum to the U.S. Department of Justice requesting that the Department's Environment and Natural Resources Division attorneys "seek and obtain abeyances or stays of proceedings in pending litigation seeking judicial review of any EPA regulation promulgated between January 20, 2017, and January 20, 2021."¹ Ms. Hoffer electronically signed the letter in her purported capacity as EPA's Acting General Counsel. In her haste to deliver her message, Ms. Hoffer neglected to acknowledge that the Acting General Counsel role is vacant and she only serves in the inferior role of Principal Deputy General Counsel—as confirmed by EPA's current organizational chart.²

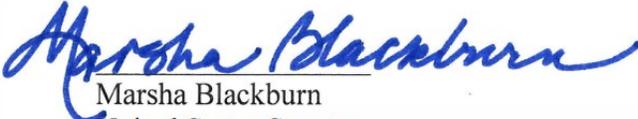
This is potentially a violation of the FVRA and the Appointments Clause of the U.S. Constitution.³ The FVRA grants the President—and only the President—the limited authority to appoint acting officials while preserving the Senate's advice and consent power. The only individuals who may perform the functions and duties of EPA General Counsel in an acting capacity are: (1) the first assistant to the vacant office;⁴ (2) an individual already serving in a Senate confirmed office who is directed by the President to serve as the acting officer;⁵ or (3) a senior officer or employee already serving at EPA who is directed by the President to serve as an acting officer.⁶ But if Ms. Hoffer is indeed the EPA Acting General Counsel, it does not appear she can hold the position through any of these three paths. She was not the "first assistant" when the vacancy arose; she had not been serving in a Senate-confirmed office; and she had not been employed by any other EPA component in the year prior to the vacancy.⁷ And, if the President has not directed Ms. Hoffer to serve as the Acting General Counsel under one of these scenarios, she may not take it upon herself to install herself into a position the Senate has not confirmed.

Secondly, there are conflict of interest concerns posed by Ms. Hoffer's self-appointment, which places her in a position to supervise the litigation of multiple cases where she previously appeared as opposing counsel against the agency. Pursuant to 5 C.F.R. 2635.502, employees must take appropriate steps to avoid the appearance of having their impartiality questioned in the performance of their official duties. According to Justice Department ethics guidelines, an employee is normally recused for a one-year period from a matter in which their former employer whom they provided services to within the previous year is a party or represents a party.⁸ Previously, Ms. Hoffer served in the Massachusetts Attorney General's Office as the Chief of the Energy and Environment Bureau. Recent court filings reveal that she appeared as the attorney of record for the state of Massachusetts in at least two lawsuits challenging the enforceability of EPA regulations in the past year.⁹ Ms. Hoffer should therefore be recused from all of the matters in which Massachusetts is a party.

American workers, farmers and business owners deserve certainty over any new rules, regulations or directives Ms. Hoffer may attempt to issue—especially considering her urgency to undo the regulatory reform success of the previous Administration. Until the new Administration clarifies the real authority belying Ms. Hoffer's position, she should be prohibited from holding herself out to the public and to other agencies as the EPA's Acting General Counsel. Any commands she issues as the purported Acting General Counsel circumvent the FVRA's requirements and the separation of powers. After all, under the FVRA, "[a]n action taken by any person who is not acting" lawfully "shall have no force or effect."¹⁰ At a minimum, Ms. Hoffer should be recused from any matter in which she served as opposing counsel against EPA. Otherwise, the conflict of interest posed by Ms. Hoffer's appointment casts a cloud over anything she and EPA do to reshape the nation's environmental regulatory policy.

Thank you for your attention to this important matter. I look forward to your response.

Sincerely,


Marsha Blackburn
United States Senator

cc: Jean E. Williams and Bruce S. Gelber
Deputy Assistant Attorneys General
U.S. Department of Justice
Environment and Natural Resources Division

Thomas Armstrong
General Counsel
U.S. Government Accountability Office

Jennifer Kaplan
Deputy Assistant Inspector General for Congressional and Public Affairs
U.S. Environmental Protection Agency Office

Enclosures

¹ Letter from Melissa Hoffer, Acting General Counsel, U.S. Environmental Protection Agency, to Jean Williams and Bruce Gelber, Deputy Assistant Attorneys General, Environment and Natural Resources Division, U.S. Department of Justice (Jan. 21, 2021).

² About the Office of General Counsel, U.S. Environmental Protection Agency (Jan. 21, 2021).

<https://www.epa.gov/aboutepa/about-office-general-counsel-ogc> (last accessed on Jan. 25, 2021).

³ 5 U.S.C. § 3345 et seq.; U.S. Const. art. II, § 2, cl. 2.

⁴ 5 U.S.C. § 3345(a)(1).

⁵ *Id.* § 3345(a)(2).

⁶ *Id.* § 3345(a)(3) (the employee must be serving at the agency at the GS-15 rate of pay for not less than 90 days during the year prior to the vacancy).

⁷ The GAO has determined that an individual must be “the first assistant to the General Counsel when the vacancy arose” in order to be eligible to serve as the Acting General Counsel of the Department of Health and Human Services. Letter from Susan Poling, General Counsel, GAO, to White House, No. B-318244 (June 28, 2014), <https://www.gao.gov/products/D10659>. Two OLC opinions have issued conflicting guidance. 23 Op. O.L.C. 60, 64 (1999) (the FVRA does require “that you must be the first assistant when the vacancy occurs in order to be the acting officer by virtue of being the first assistant.”); *but see* 25 Op. O.L.C. 177 (2001) (“an individual need not be the first assistant when the vacancy occurs in order to be the acting officer by virtue of being the first assistant.”). While the Supreme Court has not decided the issue, the D.C. Circuit noted the FVRA “may refer to the person who is serving as first assistant when the vacancy occurs,” *SW Gen., Inc. v. N.L.R.B.*, 796 F.3d 67, 76 (D.C. Cir. 2015).

⁸ Government Ethics Outline, U.S. Department of Justice (Jul. 5, 2017). <https://www.justice.gov/jmd/government-ethics-outline> (last accessed on Jan. 25, 2021).

⁹ *Massachusetts, et al v. EPA, et al*, No. 20-1265 (D.C. Cir. 2020), petition for rev. filed Jul. 20, 2020, <https://www.mass.gov/doc/mats-petition-for-review/download>; *California, et al v. EPA, et al*, No. 20-1357 (D.C. Cir. 2020), petition for rev. filed Sep. 20, 2020, <https://oag.ca.gov/sites/default/files/CA%20v.%20Wheeler%20-%20Methane%20Rescission%20DC%20Cir%20No.%2020-1357.pdf>

¹⁰ 5 U.S.C. § 3348.