United States Senate
WASHINGTON, DC 20510

October 24, 2017

Michael Dourson, Ph.D.
Adviser to the Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue NW, 1101A
Washington, D.C. 20460

Dear Dr. Dourson:

It has come to our attention that you have recently been appointed to the position of "adviser to the administrator" at the Environmental Protection Agency (EPA) while your nomination to serve as EPA's Assistant Administrator of the Office of Chemical Safety and Pollution Prevention (OCSPP AA) is under consideration by the Senate. This appointment raises several concerns that we request you address before a Floor vote on your nomination, assuming the Environment and Public Works Committee agrees to advance it.

Your Appointment as Adviser to the Administrator

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 OCSPP AA before the Senate confirms your nomination while serving as "adviser to the administrator."

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 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 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

[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).

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relationship with the Acting OCSPP AA? If you have a written job description, please provide a copy.

- Has the Administrator formally delegated any duties of the OCSPP AA to you? Which, if any, OCSPP 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 the Senate Environment and Public Works 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 or 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 on a daily basis. You also committed to "mak[ing your] calendar available on a timely basis" when asked if you would make your calendars available daily. Given your extensive work with industries regulated by EPA in the past, how do you define "timely," and if you are unwilling to commit to making your schedule available on a daily basis, why? Will you make your schedule available while in your current position? If so, how frequently?

- In your ethics letter to Kevin Minoli, EPA's designated agency ethics official, you stated upon confirmation you would resign form your positions with the University of Cincinnati, Toxicology Education Foundation, and Dourson, Dourson, and Fowler. Have you resigned from these positions upon accepting your current appointment as adviser to the administrator? If so, please provide copies of the written notification you committed to send Mr. Minoli upon terminating these positions. Have you, as promised in your ethics letter, refrained from "participat[ing] personally or substantially in any particular matter" involving these entities, or those with which you have a personal, financial, or professional interest, including North American Flame Retardant Alliance, Martha C. Dourson, LLC, and CreateSpace Independent Publishing Platform? Please also provide a list of all particular matters from which you have either been recused or for which you have requested waivers in order to continue your participation in.

Frank R. Lautenberg Chemical Safety for the 21st Century Act and Pollutants

You declined to answer several questions for the record from members of the Environment and Public Works Committee due to lack of familiarity with various issues or EPA's perspective on them as a nominee. We are particularly concerned about your incomplete answers to questions about the regulation of pollutants and chemicals, as well as implementation of the Frank R.

Lautenberg Chemical Safety for the 21st Century Act, a broadly bipartisan bill that will be within your purview if confirmed. It has been widely reported that Nancy Beck, previously of the American Chemistry Council, has been working behind the scenes to undermine the protections Congress intended in this law.[2] Your prior association with the tobacco industry and your extensive work for the American Chemistry Council and other chemical manufacturers led *The New York Times* to deem you a "scientist for hire"[3] and accordingly raises similar concerns.

Now that you are "adviser to the administrator," we expect that you have familiarized yourself with these issues and can be more forthright in answering the questions we previously asked. For example:

- Of seven questions asked by Senator Carper related to specific chemicals and how EPA should protect people from exposures to chemicals when setting chemical safety standards, you provided only five partial responses. You did not provide all requested information in response to two questions submitted by Senator Carper that were related to funding sources and sponsors of work on specific chemicals that was performed by TERA. You also refused to answer any of Senator Carper's eight questions related to implementation of the Toxic Substances Control Act.

- In response to three questions asked by Senator Whitehouse about EPA's role regulating mercury and mercury compounds under TSCA, you responded that you were unaware of the status of the agency's work. You declined to respond to Senator Whitehouse's question if you agreed with EPA's endangerment finding and instead indicated you are "not familiar with the details of EPA's endangerment finding and would need to do more research on the topic." You also declined to answer a question from Senator Whitehouse regarding how EPA should consider the synergistic effects of chemicals when considering their approval under FIFRA.

- During repeated questioning by Senator Harris regarding your ethical and moral responsibility to recuse yourself from working on potential conflicts of interest, such as regulations pertaining to the chemical compound perchlorate, you repeatedly indicated that you would defer to the guidance of the EPA Ethics Office. In your responses, you declined to acknowledge that you possess the ability to proactively recuse yourself from such conflicts.

- In response to three questions asked by Senator Cardin about EPA's role regulating trichloroethylene, methylene chloride, and N-Methylpyrrolidone under TSCA, you responded that you were unaware of the status of the agency's work.

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[2] Annie Snider and Alex Guillen, *EPA staffers, Trump Official Clashed over New Chemical Rules*, POLITICO, June 22, 2017, available online at: http://www.politico.com/story/2017/06/22/trump-epa-energy-chemicals-clash-239875.
[3] *Mr. Trump Outdoes Himself in Picking a Conflicted Regulator*, THE NEW YORK TIMES, Oct. 18, 2017, available online at: https://www.nytimes.com/2017/10/17/opinion/mr-trump-outdoes-himself-in-picking-a-conflicted-regulator.html.

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We request you provide more complete answers to the attached questions for the record on toxics and pollutants, informed by your current position at EPA. We look forward to your prompt responses as it will help inform how we engage with your nomination.

Sincerely,

Sheldon Whitehouse
United States Senator

Thomas R. Carper
United States Senator

Benjamin L. Cardin
United States Senator

Bernard Sanders
United States Senator

Jeffrey A. Merkley
United States Senator

Kirsten Gillibrand
United States Senator

Cory A. Booker
United States Senator

Edward J. Markey
United States Senator

Tammy Duckworth
United States Senator

Kamala D. Harris
United States Senator

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Inadequate Responses to QFRs from EPW Members

Senator Carper

Available online at: https://www.epw.senate.gov/public/_cache/files/f0/f0729f1a-4385-453f-b7f8-442825a0721c/A681AA266D5CC024C98FCC85A944EB5E.senator-carper-questions-for-the-record-to-epa-nominees.pdf

Senator Whitehouse

1. Pursuant to the overhauled TSCA, EPA recently published its first inventory of mercury supply, use, and trade in the U.S., which have very little information because it did not benefit from the new reporting requirements. TSCA requires that EPA promulgate a mercury and mercury compound reporting rule by June 22, 2018 to assist in preparation of the inventory, the next one of which is required to be published by April 1, 2020.
   a. Do you commit to completing the mercury and mercury compounds reporting rule by the June 22, 2018 deadline?

   I do not know the status of this rulemaking within the Agency. However, if confirmed I will work to make sure that the TSCA deadline for this rule can be met.

   b. Do you commit to identifying any manufacturing processes or products that intentionally add mercury or mercury compounds and recommend actions to achieve further reductions in such mercury use in the next inventory and publish that inventory by the April 1, 2020 deadline?

   As noted above, I do not know the status of these activities within the Agency. If confirmed, I will work to understand their status and to ensure that EPA is meeting the deadlines required by the Lautenberg amendments to TSCA.

2. Mercury was on the 2012 Workplan Chemical List, but was removed from the list in 2014 because EPA already knew how highly toxic mercury is, and the Agency indicated it would be undertaking activities to implement the Minamata Convention on Mercury anyway. Significantly, this action was taken well before the revised TSCA was enacted. Under the revised law, to facilitate meeting its Convention obligations to reduce mercury use in the production of switches and switches, the phase down of mercury use in polyurethane production, and to regulate mercury use in new products and processes, it may be necessary for EPA to identify mercury among the next round of chemicals prioritized for action under TSCA. Will you include mercury among the next round of chemicals prioritized for action under TSCA as needed to further reduce mercury use in products and processes, and meet our obligations under the Minamata Convention?

   I am not familiar with why mercury was removed from the 2014 workplan list. If confirmed, I will look into this and seek to ensure that EPA is taking necessary steps to further reduce mercury use in products and processes.

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3. How should the EPA consider the synergistic effects of chemicals when considering approval of these chemicals under FIFRA?

   I am not familiar with how synergistic effects are evaluated currently in the pesticides program. If confirmed, I will seek to understand this to ensure that EPA's approach is appropriate.

4. In 2009, as mandated by the Supreme Court and backed by a robust scientific and technical review, the Environmental Protection Agency produced the Endangerment and Cause or Contribute Findings for Greenhouse Gases (GHGs) under Section 202(a) of the Clean Air Act. It found six greenhouse gases - carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride - "taken in combination endanger both the public health and the public welfare of current and future generations." Do you agree with the EPA's endangerment finding? Why or why not?

   I am not familiar with the details of EPA's endangerment finding and would need to do more research on the topic before answering this question.

Senator Markey

5. One of the most significant changes made to TSCA under the LCSA was the streamlined authority for EPA to require testing of chemicals by order. However, to our knowledge that authority has not yet been used in the 15 months since the law took effect.

   Given the importance of testing to fill data gaps, which is critical to both prioritization and risk evaluation -- and fundamental to a "risk-based" system, please tell us your plans for using the section 4 testing authority and approach for filling data gaps for both prioritization and risk evaluation."

   If confirmed, I will seek to better understand the Section 4 testing authority under TSCA. With this knowledge, I will work to ensure that it is appropriately used to help fill gaps for prioritization and risk evaluation.

6. The new law requires EPA to restrict new chemicals where the available data are insufficient to address their risks. How will you evaluate the adequacy of data in PMNs? What will you do to assure that new chemicals are adequately tested?

   I will use a weight of the evidence approach that considers all scientific evidence and information to evaluate PMNs.

7. The industry has pressured EPA to accelerate the completion of the review period for PMNs in order to reduce the PMN backlog. What steps will you take to assure that EPA does not sacrifice the rigor and thoroughness of the review process in return for speed?

   If confirmed, I will work closely with staff to completely understand the PMN review process to ensure its rigor and thoroughness.

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8. EPA staff has pointed to several ways industry can improve the efficiency of the review process by filing more robust PMNs that anticipate and respond to the likely concerns of EPA reviewers. What will you do to motivate industry to file more complete and accurate PMNs?

   If confirmed, I will work closely with staff to completely understand the PMN process. It seems to me that if industry had a better understanding of the EPA evaluation approach, it should incentivize them to provide more complete and accurate PMN submissions.

Senator Duckworth

9. The Environmental Protection Agency (EPA) has said that exposure to cancer-causing chemicals in childhood can be as much as ten times as likely to lead to cancer than the same exposure to the same chemical in an adult. EPA has specific policies in place to account for these differences when it sets safety standards for chemicals.

   You have questioned these polices claiming in your papers that, "by about 6 months of age, children are usually not more sensitive to chemical toxicity than adults" and "we are not aware of reported cases of differential harm to infants or children from low levels of regulated chemicals, like pesticides or food additives." This research was funded by the American Chemistry Council and Croplife America.

   If you are confirmed, do you commit to apply, and not to weaken, EPA's current policies that account for the greater sensitivity and risk children may have from chemical exposures?

   If confirmed, I will apply EPA policies and guidance as they are appropriate and consistent with today's best available scientific evidence.

Senator Cardin

10. Before the end of the last Administration, EPA proposed to ban some uses of three dangerous chemicals using its new Toxic Substances Control Act authority. Trichloroethylene is a probable carcinogen that has been found in unsafe levels in household wells on Maryland's Eastern Shore. Accidental exposures to methylene chloride used in paint and furniture strippers has killed at least 56 people since 1980, including at least two Maryland residents. Exposure to a second chemical used in paint strippers, N-Methylpyrrolidone, is dangerous for pregnant women. If you are confirmed, do you commit to quickly finalize these rules and prohibit the uses of these chemicals?

    If confirmed I commit to quickly getting briefed on the status of these rules so that I can better understand them and the prohibitions proposed.

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