

Exhibit B 1



United States
Office of Government Ethics
1201 New York Avenue, NW., Suite 500
Washington, DC 20005-3917

October 4, 2006

DO-06-029

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: "Particular Matter Involving Specific Parties,"
"Particular Matter," and "Matter"

Perhaps no subject has generated as many questions from ethics officials over the years as the difference between the phrases "particular matter involving specific parties" and "particular matter." These phrases are used in the various criminal conflict of interest statutes to describe the kinds of Government actions to which certain restrictions apply. Moreover, because these phrases are terms of art with established meanings, the Office of Government Ethics (OGE) has found it useful to include these same terms in various ethics rules. A third term, "matter," also has taken on importance in recent years because certain criminal post-employment restrictions now use that term without the modifiers "particular" or "involving specific parties."

It is crucial that ethics officials understand the differences among these three phrases. OGE's experience has been that confusion and disputes can arise when these terms are used in imprecise ways in ethics agreements, conflict of interest waivers, and oral or written ethics advice. Therefore, we are issuing this memorandum to provide guidance in a single document about the meaning of these terms and the distinctions among them.

Because the three phrases are distinguished mainly in terms of their relative breadth, the discussion below will proceed from the narrowest phrase to the broadest.

Particular Matter Involving Specific Parties

The narrowest of these terms is "particular matter involving specific parties." Depending on the grammar and structure of the particular statute or regulation, the wording may appear in slightly different forms, but the meaning remains the same, focusing primarily on the presence of specific parties.

1. Where the Phrase Appears

This language is used in many places in the conflict of interest laws and OGE regulations. In the post-employment statute, the phrase "particular matter . . . which involved a specific party or parties" is used to describe the kinds of Government matters to which the life-time and two-year representational bans apply. 18 U.S.C. § 207(a)(1), (a)(2). Occasionally, ethics officials have raised questions because section 207 includes a definition of the term "particular matter," section 207(i)(3), but not "particular matter involving specific parties"; however, it is important to remember that each time "particular matter" is used in section 207(a), it is modified by the additional "specific party" language.¹

In addition to section 207(a), similar language is used in 18 U.S.C. §§ 205(c) and 203(c). These provisions describe the limited restrictions on representational activities applicable to special Government employees (SGEs) during their periods of Government service.²

¹ For a full discussion of the post-employment restrictions, see OGE DAE Ogram DO-04-023, at <https://www.oge.gov/Web/oge.nsf/Resources/DO-04-023:+Summary+of+18+U.S.C.+§+207>.

² These restrictions on SGEs are discussed in more detail in OGE DAE Ogram DO-00-003, at <https://www.oge.gov/Web/oge.nsf/Resources/DO-00-003:+Summary+of+Ethical+Requirements+Applicable+to+Special+Government+Employees>.

As explained below, 18 U.S.C. § 208 generally uses the broader phrase "particular matter" to describe the matters from which employees must recuse themselves because of a financial interest. However, even this statute has one provision, dealing with certain Indian birthright interests, that refers to particular matters involving certain Indian entities as "a specific party or parties." 18 U.S.C. § 208(b)(4); see OGE Informal Advisory Letter 00 x 12. Moreover, OGE has issued certain regulatory exemptions, under section 208(b)(2), that refer to particular matters involving specific parties. 5 C.F.R. § 2640.202(a), (b). Likewise, the distinction between particular matters involving specific parties and broader types of particular matters (i.e., those that have general applicability to an entire class of persons) is crucial to several other regulatory exemptions issued by OGE under section 208(b)(2). 5 C.F.R. §§ 2640.201(c)(2), (d); 2640.202(c); 2640.203(b), (g).

Finally, OGE has used similar language in various other rules. Most notably, the provisions dealing with impartiality and extraordinary payments in subpart E of the Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Conduct) refer to particular matters in which certain persons are specific parties. 5 C.F.R. §§ 2635.502; 2635.503. OGE also uses the phrase to describe a restriction on the compensated speaking, teaching and writing activities of certain SGEs. 5 C.F.R. § 2635.807(a)(2)(i)(4).

2. What the Phrase Means

When this language is used, it reflects "a deliberate effort to impose a more limited ban and to narrow the circumstances in which the ban is to operate." Bayless Manning, Federal Conflict of Interest Law 204 (1964). Therefore, OGE has emphasized that the term "typically involves a specific

proceeding affecting the legal rights of the parties, or an isolatable transaction or related set of transactions between identified parties." 5 C.F.R. § 2640.102(1).³ Examples of particular matters involving specific parties include contracts, grants, licenses, product approval applications, investigations, and litigation. It is important to remember that the phrase does not cover particular matters of general applicability, such as rulemaking, legislation, or policy-making of general applicability.⁴

Ethics officials sometimes must decide when a particular matter first involves a specific party. Many Government matters evolve, sometimes starting with a broad concept, developing into a discrete program, and eventually involving specific parties. A case-by-case analysis is required to determine at which stage a particular matter has sufficiently progressed to involve

³ This definition, found in OGE's regulations implementing 18 U.S.C. § 208, differs slightly from the definition found in the regulations implementing a now-superseded version of 18 U.S.C. § 207, although this is more a point of clarification than substance. Specifically, the old section 207 regulations referred to "identifiable" parties, 5 C.F.R. § 2637.201(c)(1), whereas the more recent section 208 rule refers to "identified" parties. As explained in the preamble to OGE's proposed new section 207 rule: "The use of 'identified,' rather than 'identifiable,' is intended to distinguish more clearly between particular matters involving specific parties and mere 'particular matters,' which are described elsewhere as including matters of general applicability that focus 'on the interests of a discrete and identifiable class of persons' but do not involve specific parties. [citations omitted] The use of the term 'identified,' however, does not mean that a matter will lack specific parties just because the name of a party is not disclosed to the Government, as where an agent represents an unnamed principal." 68 Federal Register 7844, 7853-54 (February 18, 2003).

⁴ Usually, rulemaking and legislation are not covered, unless they focus narrowly on identified parties. See OGE Informal Advisory Opinions 96 x 7 ("rare" example of rulemaking that involved specific parties); 83 x 7 (private relief legislation may involve specific parties).

specific parties. The Government sometimes identifies a specific party even at a preliminary or informal stage in the development of a matter. E.g., OGE Informal Advisory Letters 99 x 23; 99 x 21; 90 x 3.

In matters involving contracts, grants and other agreements between the Government and outside parties, the general rule is that specific parties are first identified when the Government first receives an expression of interest from a prospective contractor, grantee or other party. As OGE explained recently in Informal Advisory Letter 05 x 6, the Government sometimes may receive expressions of interest from prospective bidders or applicants in advance of a published solicitation or request for proposals. In some cases, such matters may involve specific parties even before the Government receives an expression of interest, if there are sufficient indications that the Government actually has identified a party. See OGE Informal Advisory Letter 96 x 21.

Particular Matter

Despite the similarity of the phrases "particular matter" and "particular matter involving specific parties," it is necessary to distinguish them. That is because "particular matter" covers a broader range of Government activities than "particular matter involving specific parties." Failure to appreciate this distinction can lead to inadvertent violations of law. For example, the financial conflict of interest statute, 18 U.S.C. § 208, generally refers to particular matters, without the specific party limitation. If an employee is advised incorrectly that section 208 applies only to particular matters that focus on a specific person or company, such as an enforcement action or a contract, then the employee may conclude it is permissible to participate in other particular matters, even though the law prohibits such participation.

1. Where the Phrase Appears

In addition to 18 U.S.C. § 208, several other statutes and regulations use the term "particular matter."⁵ The representational restrictions applicable to current employees (other than SGEs), under 18 U.S.C. §§ 203 and 205, apply to particular matters.⁶ As mentioned above, section 207 also contains a definition of "particular matter."⁷ However, where the phrase is used in the post-employment prohibitions in

⁵ The relevant language in 18 U.S.C. § 208(a) is "a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter" (emphasis added).

⁶ The prohibition in 18 U.S.C. § 205(a)(2) actually uses the phrase "covered matter," but that term is in turn defined as "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter," 18 U.S.C. § 205(h) (emphasis added).

⁷ The definition in 18 U.S.C. § 207(i)(3) provides: "the term 'particular matter' includes any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding." This language differs slightly from other references to "particular matter" in sections 203, 205 and 208, in part because the list of matters is not followed by the residual phrase "or other particular matter." However, OGE does not believe that the absence of such a general catch-all phrase means that the list of enumerated matters exhausts the meaning of "particular matter" under section 207(i)(3). The list is preceded by the word "includes," which is generally a term of enlargement rather than limitation and indicates that matters other than those enumerated are covered. See Norman J. Singer, 2A Sutherland on Statutory Construction 231-232 (2000).

section 207(a)(1) and (a)(2), it is modified by the "specific parties" limitation.⁸

The phrase "particular matter" is used pervasively in OGE's regulations. Of course, the term appears throughout 5 C.F.R. part 2640, the primary OGE rule interpreting and implementing 18 U.S.C. § 208. Similarly, it is used in 5 C.F.R. § 2635.402, which is the provision in the Standards of Conduct that generally deals with section 208. The phrase also is used throughout subpart F of the Standards of Conduct, which contains the rules governing recusal from particular matters affecting the financial interest of a person with whom an employee is seeking non-Federal employment. 5 C.F.R. §§ 2635.601-2635.606. Moreover, the phrase appears in the "catch-all" provision of OGE's impartiality rule, 5 C.F.R. § 2635.502(a)(2). See also 5 C.F.R. 2635.501(a).⁹ Various other regulations refer to "particular matter" for miscellaneous purposes. E.g., 5 C.F.R. § 2635.805(a) (restriction on expert witness activities of SGEs); 5 C.F.R. § 2634.802(a)(1) (written recusals pursuant to ethics agreements).

2. What the Phrase Means

Although different conflict of interest statutes use slightly different wording, such as different lists of examples of particular matters, the same standards apply for determining what is a particular matter under each of the relevant statutes

⁸ At one time, the post-employment "cooling-off" restriction for senior employees in 18 U.S.C. § 207(c) applied to particular matters, but the language was amended (and broadened) in 1989 when Congress removed the adjective "particular" that had modified "matter." See 17 Op. O.L.C. 37, 41-42 (1993).

⁹ Generally, section 2635.502 focuses on particular matters involving specific parties, as noted above. However, section 2635.502(a)(2) provides a mechanism for employees to determine whether they should recuse from other "particular matters" that are not described elsewhere in the rule. In appropriate cases, therefore, an agency may require an employee to recuse from particular matters that do not involve specific parties, based on the concern that the employee's impartiality reasonably may be questioned under the circumstances.

and regulations. See 18 Op. O.L.C. 212, 217-20 (1994). Particular matter means any matter that involves "deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons." 5 C.F.R. § 2640.103(a)(1) (emphasis added). It is clear, then, that particular matter may include matters that do not involve parties and is not "limited to adversarial proceedings or formal legal relationships." Van Ee v. EPA, 202 F.3d 296, 302 (D.C. Cir. 2000).

Essentially, the term covers two categories of matters: (1) those that involve specific parties (described more fully above), and (2) those that do not involve specific parties but at least focus on the interests of a discrete and identifiable class of persons, such as a particular industry or profession. OGE regulations sometimes refer to the second category as "particular matter of general applicability." 5 C.F.R. § 2640.102(m). This category can include legislation and policymaking, as long as it is narrowly focused on a discrete and identifiable class. Examples provided in OGE rules include a regulation applicable only to meat packing companies or a regulation prescribing safety standards for trucks on interstate highways. 5 C.F.R. §§ 2640.103(a)(1) (example 3); 2635.402(b)(3) (example 2). Other examples may be found in various opinions of OGE and the Office of Legal Counsel, Department of Justice. E.g., OGE Informal Advisory Letter 00 x 4 (recommendations concerning specific limits on commercial use of a particular facility); 18 Op. O.L.C. at 220 (determinations or legislation focused on the compensation and work conditions of the class of Assistant United States Attorneys).

Certain OGE rules recognize that particular matters of general applicability sometimes may raise fewer conflict of interest concerns than particular matters involving specific

parties.¹⁰ Therefore, while both categories are included in the term "particular matter," it is often necessary to distinguish between these two kinds of particular matters. Of course, in many instances, the relevant prohibitions apply equally to both kinds of particular matters. This is the case, for example, in any application of 18 U.S.C. § 208 where there is no applicable exemption or waiver that distinguishes the two.

It is important to emphasize that the term "particular matter" is not so broad as to include every matter involving Government action. Particular matter does not cover the "consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons." 5 C.F.R. § 2640.103(a)(1). For example, health and safety regulations applicable to all employers would not be a particular matter, nor would a comprehensive legislative proposal for health care reform. 5 C.F.R. § 2640.103(a)(1)(example 4), (example 8). See also OGE Informal Advisory Letter 05 x 1 (report of panel on tax reform addressing broad range of tax policy issues). Although such actions are too broadly focused to be particular matters, they still are deemed "matters" for purposes of the restrictions described below that use that term.

¹⁰ As noted above, OGE's impartiality rule generally focuses on particular matters involving specific parties. See OGE Informal Advisory Letter 93 x 25 (rulemaking "would not, except in unusual circumstances covered under section 502(a)(2), raise an issue under section 502(a)"). Furthermore, as also discussed above, several of the regulatory exemptions issued by OGE under 18 U.S.C. § 208(b)(2) treat particular matters of general applicability differently than those involving specific parties. The preamble to the original proposed regulatory exemptions in 5 C.F.R. part 2640 explains: "The regulation generally contains more expansive exemptions for participation in 'matters of general applicability not involving specific parties' because it is less likely that an employee's integrity would be compromised by concern for his own financial interests when participating in these broader matters." 60 Federal Register 47207, 47210 (September 11, 1995). Of course, Congress itself has limited certain conflict of interest restrictions to the core area of particular matters that involve specific parties. E.g., 18 U.S.C. § 207(a)(1), (a)(2).

A question that sometimes arises is when a matter first becomes a "particular matter." Some matters begin as broad policy deliberations and actions pertaining to diverse interests, but, later, more focused actions may follow. Usually, a particular matter arises when the deliberations turn to specific actions that focus on a certain person or a discrete and identifiable class of persons. For example, although a legislative plan for broad health care reform would not be a particular matter, a particular matter would arise if an agency later issued implementing regulations focused narrowly on the prices that pharmaceutical companies could charge for prescription drugs. 5 C.F.R. § 2640.102(a)(1)(example 8). Similarly, the formulation and implementation of the United States response to the military invasion of an ally would not be a particular matter, but a particular matter would arise once discussions turned to whether to close a particular oil pumping station or pipeline operated by a company in the area where hostilities are taking place. 5 C.F.R. § 2640.102(a)(1)(example 7).

Matter

The broadest of the three terms is "matter." However, this term is used less frequently than the other two in the various ethics statutes and regulations to describe the kinds of Government actions to which restrictions apply.

1. Where the Phrase Appears

The most important use of this term is in the one-year post-employment restrictions applicable to "senior employees" and "very senior employees." 18 U.S.C. § 207(c), (d). In this context, "matter" is used to describe the kind of Government actions that former senior and very senior employees are prohibited from influencing through contacts with employees of their former agencies (as well as contacts with Executive Schedule officials at other agencies, in the case of very senior employees). The unmodified term "matter" did not appear in these provisions until 1989, when section 207(c) was amended to replace "particular matter" with "matter" and section 207(d) was first enacted. Pub. L. No. 101-194, § 101(a), November 30, 1989. OGE also occasionally uses the term "matter" in ethics regulations, for example, in the description of teaching,

speaking and writing that relates to an employee's official duties. 5 C.F.R. § 2635.807(a)(2)(E)(1).

2. What the Phrase Means

It is clear that "matter" is broader than "particular matter." See 17 Op. O.L.C. at 41-42. Indeed, the term is virtually all-encompassing with respect to the work of the Government.¹¹ Unlike "particular matter," the term "matter" covers even the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons. Of course, the term also includes any particular matter or particular matter involving specific parties.

Nevertheless, it is still necessary to understand the context in which the term "matter" is used, as the context itself will provide some limits. In 18 U.S.C. § 207(c) and (d), the post-employment restrictions apply only to matters "on which [the former employee] seeks official action." Therefore, the only matters covered will be those in which the former employee is seeking to induce a current employee to make a decision or otherwise act in an official capacity.

¹¹ A now-repealed statute, 18 U.S.C. § 281 (the predecessor of 18 U.S.C. § 203), used the phrase "any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter" (emphasis added). One commentator noted that the term "matter" in section 281 was "so open-ended" that it raised questions as to what limits there might be on the scope. Manning, at 50-51. Manning postulated that some limits might be inferred from the character of the matters listed before the phrase "or other matter." *Id.* at 51. Whatever the force of this reasoning with respect to former section 281, the same could not be said with respect to 18 U.S.C. § 207(c) or (d), as neither of these current provisions contains an exemplary list of covered matters.

Exhibit B2

JAN 03 2017

Mr. Kevin S. Minoli
Designated Agency Ethics Official
U.S. EPA (2310A)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Mr. Minoli:

The purpose of this letter is to describe the steps that I will take to avoid any actual or apparent conflict of interest in the event that I am confirmed for the position of Administrator of the United States Environmental Protection Agency.

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

Upon confirmation, I will resign from my positions with the following entities: Southern Baptist Theological Seminary, and the Windows Ministry Incorporated. I resigned from my position with the Rule of Law Defense Fund on December 8, 2016. For a period of one year after my resignation from each of these entities, I will not participate personally and substantially in any particular matter involving specific parties in which I know that entity is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

Upon confirmation, I will resign from my position as Attorney General of the State of Oklahoma. For a period of one year after my resignation, I will have a "covered relationship" under 5 C.F.R. § 2635.502 with the State of Oklahoma. Pursuant to 5 C.F.R. § 2635.502(d), I will seek authorization to participate personally and substantially in particular matters involving specific parties in which I know the State of Oklahoma is a party or represents a party.

I have been advised that this ethics agreement will be posted publicly, consistent with 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with ethics agreements of other Presidential nominees who file public financial disclosure reports.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Scott Pruitt", with a stylized flourish at the end.

Edward Scott Pruitt

Exhibit B3

February 1, 2017

Mr. Kevin S. Minoli
Designated Agency Ethics Official
U.S. EPA (2310A)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Mr. Minoli:

The purpose of this letter is to supplement my ethics agreement signed on January 3, 2017. The following information supplements my ethics agreement:

I understand that as an appointee I will be required to sign the Ethics Pledge required under the Executive Order dated January 28, 2017 ("Ethics Commitments by Executive Branch Appointees") and that I will be bound by the requirements and restrictions therein in addition to the commitments I made in the ethics agreement I signed on January 3, 2017.

I have been advised that this supplement to my ethics agreement will be posted publicly, consistent with 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with ethics agreements of other Presidential nominees who file public financial disclosure reports.

Sincerely,

A handwritten signature in blue ink, appearing to read "Scott Pruitt", with a large, stylized flourish above the name.

Edward Scott Pruitt

Exhibit B4

United States Senate

WASHINGTON, DC 20510

January 12, 2017

Kevin Minoli
Designated Agency Ethics Official
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Dear Mr. Minoli:

We are in receipt of the Office of Government Ethics [OGE] certified financial disclosure report [Form 278] of Edward Scott Pruitt, and Mr. Pruitt's letter to you outlining the steps he will take to avoid conflicts of interest should he be confirmed as Administrator of the Environmental Protection Agency [EPA]. We are concerned that his representations to date have been incomplete. Without a fuller disclosure of financial and political relationships, EPA may not have sufficient information to evaluate whether Mr. Pruitt should be recused from many matters about which a reasonable person would question his impartiality. We are also concerned that his ethics agreement does not fully address how legal conflicts of interest arising from his representation of the State of Oklahoma in litigation against EPA will be resolved.

With respect to Mr. Pruitt's financial conflicts of interest and his Form 278 disclosures, Mr. Pruitt represents he will not participate personally and substantially in particular matters involving: Southern Baptists Theological Seminary, the Windows Ministry Incorporated, and the Rule of Law Defense Fund [RLDF]. In the attached letter we are sending today to OGE, we have raised concerns that this accounting does not include sufficient detail to allow OGE or EPA to fully assess conflicts of interest arising from his solicitation of funds for 527 and 501(c)(4) organizations, some of which may continue to operate during his tenure as EPA Administrator, should he be confirmed.

For example, RLDF can receive unlimited contributions from individuals, corporations, or partnerships and need not disclose the identity of its donors because it is organized under section 501(c)(4) of the Internal Revenue Code. The RLDF has previously contributed to section 527 political action committees [PACs] like the Republican Attorney Generals Association, effectively laundering the identity of donors whose money ended up funding overtly political purposes. What safeguards will EPA put in place to guard against Mr. Pruitt's involvement in matters involving regulated entities that contribute either publicly or anonymously to PACs and 501(c)(4) organizations with which he has had a prior relationship? In other words, what assurances will we have that regulated entities did not and will not make political contributions in exchange for favorable treatment by him as Administrator? Reporting in the *New York Times* and elsewhere has documented the real risk of pay-to-play arrangements with this nominee.

With respect to conflicts of interest arising from his position as Attorney General of the State of Oklahoma, Mr. Pruitt makes little more than pro forma representations that he will seek your authorization for a one-year period of time concerning matters in which the State of Oklahoma is a party or represents a party. As you may be aware, Mr. Pruitt has brought multiple lawsuits against EPA on behalf of the State of Oklahoma, many of which remain in active litigation with

entities that have contributed large sums of money to RAGA and other PACs with which Mr. Pruitt is affiliated.

- Could you provide us a complete list of matters that in your opinion will require your authorization?
- What factors will you use to assess whether authorization will be granted? What factors will you use to determine how broadly any recusal, if required, must be drawn? For example, Mr. Pruitt has challenged EPA's carbon pollution standards for power plants. Assuming that a recusal would be required in that matter, would it be limited to decisions regarding the litigation, or to other matters considered by the Office and Air and Radiation?
- Mr. Pruitt has agreed to not participate in any particular matter involving the RLDF without prior authorization. RLDF's activities and donors are largely secret. Without more extensive disclosures about RLDF and Mr. Pruitt's role in it, how will you determine whether a particular matter involves the RLDF?
- The ethics agreement entered into by former EPA Administrator Carol Browner included a clear and permanent recusal of her participation in any EPA matter in which the State of Florida was involved as a party and she was involved personally and substantially as Secretary of the Florida Department of Environmental Regulation. Our understanding of Mr. Pruitt's ethics agreement is that he has made no such unequivocal pledge. Why has EPA concluded that a more lenient arrangement for Mr. Pruitt's conflicts is appropriate?
- Mr. Pruitt has agreed to seek your authorization for a one-year period of time. Is it your understanding that any recusal you may require of Mr. Pruitt would be limited to this one-year period? If so, how will you account for his participation in matters after that one-year period where the conflict still exists, like litigation that he has brought against the agency that has not settled or been decided by that time?
- Mr. Pruitt has sued EPA on behalf of the State of Oklahoma. Before authorizing him to participate in EPA decisions involving Oklahoma, how will you determine whether Mr. Pruitt has obtained consent from his client to be released from ethical obligations he may have to it?
- Many of Mr. Pruitt's lawsuits have involved multi-state coalitions. Presumably he has entered into joint prosecution agreements with his co-plaintiffs. Have you reviewed, or will you review, these agreements to assess whether Mr. Pruitt has a "covered relationship" with other states or parties in those lawsuits? Is it your opinion that he would also have to obtain consent from his co-plaintiffs to participate in matters in which EPA's position is adverse to those states?
- It is a general principle of legal ethics that an attorney may not disclose privileged information without the client's consent. Furthermore, in multi-party litigation when two or more clients with a common interest in litigation agree to exchange otherwise privileged information concerning the matter, the communication is privileged as against third persons. Have any provisions been put in place to prevent the unauthorized disclosure by Mr. Pruitt of confidential client information, either from the State of Oklahoma or other state-plaintiffs in Mr. Pruitt's litigation?

- Pursuant to 42 U.S.C. § 7601(d), the authority of the Administrator to issue rules related to topics listed in 42 U.S.C. § 7607(d) is not delegable. How will you address a situation where you determine Mr. Pruitt has a conflict of interest with respect to a rule covering one of these topics?
- If a recusal is determined appropriate in any matter, has the nominee agreed to forgo any briefings during the period of the recusal?
- Under what obligation is Mr. Pruitt to follow determinations made by you concerning his recusals and waivers? If he chooses not to follow your determinations, what recourse is available for EPA?

We are committed to protecting the integrity of the EPA. All Americans should have confidence that EPA's decisions are made transparently, without favor to political donors, and by an Administrator who is committed to protecting the prerogatives and mission of the agency, not those suing it. The EPW Committee has scheduled Mr. Pruitt's confirmation hearing for January 18th. Accordingly, we respectfully request responses to these questions prior to the date of the hearing.

Sincerely,



Thomas R. Carper
United States Senator



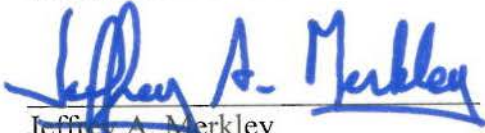
Sheldon Whitehouse
United States Senator



Benjamin L. Cardin
United States Senator



Bernard Sanders
United States Senator



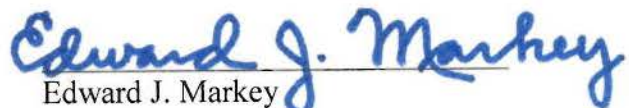
Jeffrey A. Merkley
United States Senator



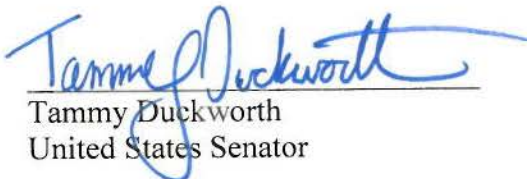
Kirsten Gillibrand
United States Senator



Cory A. Booker
United States Senator



Edward J. Markey
United States Senator



Tammy Duckworth
United States Senator

Enclosure: letter to Walter M. Shaub, Jr., Director of the U.S. Office of Government Ethics

CC: Justina Fugh, Senior Counsel for Ethics Office of General Counsel, U.S. Environmental Protection Agency

Exhibit B5



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

JAN 16 2017

The Honorable Sheldon Whitehouse
United States Senate
530 Hart Senate Office Building
Washington, DC 20510

Dear Senator Whitehouse:

This letter responds to your inquiry of January 12, 2017, requesting specific information regarding the ethics review of E. Scott Pruitt, who has been nominated by President-elect Trump to be the Administrator of the United States Environmental Protection Agency (EPA).

Pursuant to the Ethics in Government Act of 1978 (amended by the Ethics Reform Act of 1989 and the Honest Leadership and Open Government Act of 2007), the EPA ethics team reviewed the public financial disclosure report submitted by Mr. Pruitt. We interacted with his surrogates to ensure that he reported all information necessary and required as set forth in the Ethics in Government Act. See "Contents of Report" at 5 U.S.C. app. §102 and in 5 C.F.R. Part 2634, Subpart C. Based on his submission, the EPA certified the public financial disclosure report on January 4, 2017, and forwarded it to the Office of Government Ethics (OGE), which certified it later that same day. Our certification of the report means that "the individual submitting [it] is in compliance with applicable laws and regulations." See 5 U.S.C. app. §106. In addition to certifying the report, the EPA and OGE also approved the language of Mr. Pruitt's ethics agreement, which conformed to the requirements of 5 C.F.R. Part 2634, Subpart H, Ethics Agreements, and the OGE-issued Nominee Ethics Agreement Guide (2014).

Federal ethics laws and regulations define the assets that are to be considered when assessing whether an employee or nominee has a financial conflict of interest. This assessment considers Mr. Pruitt's direct or imputed assets, which are defined to be his own interests, those of his spouse, minor child, general partner, any organization or entity for whom he serves as officer, director, trustee, general partner or employee, or any person with whom he is negotiating for or has an arrangement concerning prospective employment. See 5 C.F.R. § 2640.103(d). An employee's obligation to recuse himself from a particular matter or obtain a waiver pursuant to 18 U.S.C. §208(b) is based upon consideration of these defined interests. Interests or potential interests beyond those included in the definition are not considered and, therefore, cannot form the basis of an obligation *under federal ethics laws* to recuse oneself. For example, your letter asks whether the EPA considered potential "conflicts of interest arising from [Mr. Pruitt's] solicitation of funds for 527 and 501(c)(4) organizations." The assets of a 527 organization are

not owned directly by Mr. Pruitt or any of his imputed interests, so are, therefore, outside of the bounds of our review. Although Mr. Pruitt himself had a campaign committee for his own political campaigns for office, the EPA received confirmation from his surrogates that he is neither compensated by nor can he direct funds to himself. Further, he is not liable for the campaign's debt and is not owed any money. Mr. Pruitt's surrogates, in an email message from Mr. Adam Raviv, Special Counsel, WilmerHale, dated December 22, 2016, assured the EPA that if confirmed, the "committee will not raise additional money during his service and its only activity will be to settle any liabilities remaining from before his confirmation." We note that, as a federal employee, Mr. Pruitt would be prohibited under the Hatch Act, 5 U.S.C. § 7324, from soliciting any funds whatsoever for any partisan political campaign, group or election.

QUESTION #1: Could you provide us a complete list of matters that in your opinion will require your authorization?¹

ANSWER #1: Upon appointment, Mr. Pruitt will become an employee of the United States Environmental Protection Agency and subject to, among other things, the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, and the conflict of interest statutes codified in Title 18 of the United States Code. The obligation to seek authorization to participate in a specific party matter to avoid a loss of impartiality of the employee originates from 5 C.F.R. § 2635.502(a), which states:

Where an employee knows that a particular matter involving specific parties is likely to have a direct and predictable effect on the financial interest of a member of his household, or knows that a person with whom he has a covered relationship is or represents a party to such matter, and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section.

The regulation, which includes a definitions section, specifies that an employee has a covered relationship with, among others, "[a]ny person for whom the employee has, within the last year, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee." 5 C.F.R. § 2635.502(b)(iv). As set forth in the ethics agreement, Mr. Pruitt has identified that for a period of one year after his resignation from his position as the Attorney General of the State of Oklahoma, he will have a covered relationship with the State of Oklahoma and has agreed to seek authorization prior to participating in any specific party matter in which the State of Oklahoma is a party or represents a party. Similarly, he has identified the Southern Baptist Theological Seminary, Windows Ministry Incorporated, and the Rule of Law

¹ This response differs from the long-standing agency practice of answering questions in a comprehensive narrative in light of the unique nature of the confirmation process and the importance of the federal ethics requirements to that process. In order to facilitate the approach taken, this response includes the wording of the questions contained in your letter verbatim.

Defense Fund as organizations with which he will have a covered relationship for one year from the date he resigns or resigned from his positions with those entities, and has agreed during the time he has a covered relationship with any organization to seek authorization prior to participating in any specific party matter in which any organization in which he has served as director or officer is a party or represents a party.

It is not possible to proactively identify a complete list of specific party matters that could exist across the entire agency that involve the State of Oklahoma or any of the three organizations, nor would it be possible to do so for many other employees who have covered relationships with a state or organization that the EPA interacts on a fairly regular basis. Instead, the employee ensures compliance with the ethics requirements by proactively identifying the persons with which the employee has a covered relationship and then seeking authorization each time the employee seeks to participate in a specific party matter where one of those persons is a party or represents a party.

QUESTION #2: What factors will you use to assess whether authorization will be granted? What factors will you use to determine how broadly any recusal, if required, must be drawn? For example, Mr. Pruitt has challenged EPA's carbon pollution standards for power plants. Assuming that a recusal would be required in that matter, would it be limited to decisions regarding the litigation, or to other matters considered by the Office and Air and Radiation?

ANSWER #2: For the purposes of the impartiality considerations under the Standards of Ethical Conduct, the factors the EPA's Designated Agency Ethics Official will take into consideration are set forth at 5 C.F.R. § 2635.502(d)(1) - (6):

Factors which may be taken into consideration include:

- (1) The nature of the relationship involved;
- (2) The effect that resolution of the matter would have upon the financial interests of the person involved in the relationship;
- (3) The nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) The sensitivity of the matter;
- (5) The difficulty of reassigning the matter to another employee; and
- (6) Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

Should a recusal be necessary, that would prohibit participation in that specific party matter in any way, but a recusal in one specific party matter would not itself prevent participating on other specific party matters in which the "covered relationship" is a party or represents a party, or extend to matters of general applicability. Pursuant to the impartiality rules, any court case is considered a specific party matter. Thus, if the State of Oklahoma is a party or represents a party in a particular piece of litigation, Mr. Pruitt's ethics agreement includes a commitment by him to seek authorization to participate personally and substantially in that litigation. Should Mr. Pruitt

seek authorization to participate in any litigation in which a person with whom he has a covered relationship is a party or represents a party, as stated above, the EPA Designated Agency Ethics Official would consider the factors set forth at 5 C.F.R. § 2635.502(d)(1) - (6) for purposes of compliance with the federal ethics rules. Beyond the federal ethics requirements, as an attorney, Mr. Pruitt would also be subject to the rules of any relevant state bar. Those rules, however, are in addition to, and beyond the scope of, the federal ethics review and requirements discussed in this letter.

QUESTION #3: Mr. Pruitt has agreed to not participate in any particular matter involving the RLDF without prior authorization. RLDF's activities and donors are largely secret. Without more extensive disclosures about RLDF and Mr. Pruitt's role in it, how will you determine whether a particular matter involves the RLDF?

ANSWER #3: Federal ethics requirements apply first to the employee himself, and so Mr. Pruitt has agreed that, for the period of time for which he has a covered relationship with the Rule of Law Defense Fund (RLDF), he will seek authorization prior to participating in any specific party matter in which RLDF is a party or represents a party. Once he becomes a federal employee, Mr. Pruitt will have a continuing obligation to comply with the commitments made in his ethics agreement and the federal ethics requirements. In order to have an obligation to seek authorization to participate personally and substantially in a matter, RLDF must be a party or represent a party in a specific party matter. If RLDF has an interest in a specific party matter but is not itself a party or representing a party in that matter, the federal ethics requirements would not obligate Mr. Pruitt to seek authorization prior to participating in that specific party matter.

QUESTION #4: The ethics agreement entered into by former EPA Administrator Carol Browner included a clear and permanent recusal of her participation in any EPA matter in which the State of Florida was involved as a party and she was involved personally and substantially as Secretary of the Florida Department of Environmental Regulation. Our understanding of Mr. Pruitt's ethics agreement is that he has made no such unequivocal pledge. Why has EPA concluded that a more lenient arrangement for Mr. Pruitt's conflicts is appropriate?

ANSWER #4: In assisting Mr. Pruitt with his ethics agreement, the EPA followed federal ethics requirements and the most recent Ethics Agreement Guide published by the Office of Government Ethics (OGE) in 2014. Both the EPA and OGE certified Mr. Pruitt's ethics agreement as complying with all federal ethics requirements and conforming to the template set forth in OGE's Guide. Each ethics agreement is specific to the individual who is signing the agreement, and so consistency with the agreement of a former EPA Administrator is not a requirement for the agreement to be in compliance with the federal ethics rules. While the question indicated Mr. Pruitt's ethics agreement differs from the ethics agreement entered into by former Administrator Carol Browner in 1997, Mr. Pruitt's ethics agreement is very similar to the agreement entered into by former Administrator Lisa Jackson in 2009. Those comparisons do not demonstrate compliance or non-compliance with the federal ethics requirements.

QUESTION #5: Mr. Pruitt has agreed to seek your authorization for a one-year period of time. Is it your understanding that any recusal you may require of Mr. Pruitt would be limited to this one-year period? If so, how will you account for his participation in matters after that one-year period where the conflict still exists, like litigation that he has brought against the agency that has not settled or been decided by that time?

ANSWER #5: As explained above, the regulations define a person with whom an employee has a covered relationship to include “[a]ny person for whom the employee has, *within the last year*, served as officer, director, trustee, general partner, agent, attorney, consultant, contractor, or employee.” 5 C.F.R. § 2635.502(b)(iv) (*italics added*). After one year, the covered relationship with the former employer under the federal ethics rules no longer exists. At that point in time and into the future, there is no obligation under the federal ethics rules to seek authorization to participate in the relevant specific party matters, and any disqualification on participating in those specific party matters is no longer in effect. An employee may voluntarily continue to recuse himself from such specific party matters after that point, but is not obligated to do so by the federal ethics requirements. Again, this letter discusses only Mr. Pruitt’s obligations under the federal ethics laws and does not address other possible obligations such as compliance with state bar rules.

QUESTION #6: Mr. Pruitt has sued EPA on behalf of the State of Oklahoma. Before authorizing him to participate in EPA decisions involving Oklahoma, how will you determine whether Mr. Pruitt has obtained consent from his client to be released from ethical obligations he may have to it?

ANSWER #6: The federal ethics requirements ensure employees meet certain obligations on behalf of the interests of the federal government, as those interests are articulated in federal laws and regulations. Likewise, the EPA’s ethics program is focused on ensuring compliance with those laws and regulations. To the extent Mr. Pruitt has ethical obligations to the State of Oklahoma or any other organization, ensuring compliance with those non-federal obligations is beyond the scope of the federal ethics requirements and the EPA’s ethics program.

QUESTION #7: Many of Mr. Pruitt's lawsuits have involved multi-state coalitions. Presumably he has entered into joint prosecution agreements with his co-plaintiffs. Have you reviewed, or will you review, these agreements to assess whether Mr. Pruitt has a "covered relationship" with other states or parties in those lawsuits? Is it your opinion that he would also have to obtain consent from his co-plaintiffs to participate in matters in which EPA's position is adverse to those states?

ANSWER #7: As described above, the federal ethics regulations define persons with whom an employee has a covered relationship, and the impartiality standards do not consider that joint prosecution agreements give rise to any covered relationship with co-plaintiffs. Joint prosecution agreements would not be relevant to evaluating compliance with federal ethics requirements and the EPA has not reviewed any such possible agreements.

QUESTION #8: It is a general principle of legal ethics that an attorney may not disclose privileged information without the client's consent. Furthermore, in multi-party litigation when two or more clients with a common interest in litigation agree to exchange otherwise privileged information concerning the matter, the communication is privileged as against third persons. Have any provisions been put in place to prevent the unauthorized disclosure by Mr. Pruitt of confidential client information, either from the State of Oklahoma or other state plaintiffs in Mr. Pruitt's litigation?

ANSWER #8: The federal ethics requirements ensure employees meet certain obligations on behalf of the interests of the federal government, as those interests are articulated in federal laws and regulations. Likewise, the EPA's ethics program is focused on ensuring compliance with those laws and regulations. To the extent Mr. Pruitt has ethical obligations to the State of Oklahoma or any other state or organization, knowledge of such provisions and ensuring compliance with those non-federal obligations is beyond the scope of the federal ethics requirements and the EPA's ethics program.

QUESTION #9: Pursuant to 42 U.S.C. § 7601(d) (sic), the authority of the Administrator to issue rules related to topics listed in 42 U.S.C. § 7607(d) is not delegable. How will you address a situation where you determine Mr. Pruitt has a conflict of interest with respect to a rule covering one of these topics?

ANSWER #9: Should the federal ethics requirements preclude an Administrator from participating in a matter where the authority to take certain actions is defined by a statute or a regulation to rest with the Administrator, and where the statute or regulation specifically states that the authority may not be delegated, the Federal Vacancies Reform Act and other federal law provide a mechanism for another official of the EPA to perform such functions in an acting capacity. For example, if an Administrator is determined to have a conflict of interest and must be recused with respect to any such non-delegable statutory function or duty, he would be deemed unable to perform the function or duty and the Administrator position would be deemed "vacant" with respect to that function or duty. The Federal Vacancies Reform Act identifies the officials who would serve as the acting Administrator to perform the function or duty, and under Executive Reorganization #3 of 1970, the EPA Deputy Administrator acts as Administrator in the event of a vacancy in the office of Administrator.

QUESTION #10: If a recusal is determined appropriate in any matter, has the nominee agreed to forgo any briefings during the period of the recusal?

ANSWER #10: An employee who is recused from participation cannot be briefed on the same particular matter from which he is recused. In its advisory entitled "Effective Screening Arrangements for Recusal Obligations, DO-04-012 (June 1, 2004), the Office of Government Ethics wrote that:

Ethics officials should also counsel employees regarding the scope of their recusals, including the kinds of actions that may constitute personal and substantial participation.

For example, employees with recusal obligations should not assign covered matters on an ad hoc basis. Participating in a decision concerning who should work on a matter, how a matter should be handled, or whether a matter should be acted upon, is a form of participation in the matter. Involvement in preliminary discussions, in interim evaluations, in review or approval at intermediate levels, or in supervision of subordinates working on a matter also amounts to personal and substantial participation. Recusal means no participation in any way, including briefings.

QUESTION #11: Under what obligation is Mr. Pruitt to follow determinations made by you concerning his recusals and waivers? If he chooses not to follow your determinations, what recourse is available for EPA?

ANSWER #11: Pursuant to the Ethics in Government Act at 5 U.S.C. app. §110, Mr. Pruitt is required to comply with his ethics agreement. Pursuant to 5 C.F.R. § 2634.802(b), he is required to comply with his ethics agreement within ninety days from the date of Senate confirmation. As an employee of the EPA, Mr. Pruitt will be subject to the Standards of Ethical Conduct set forth at 5 C.F.R. Part 2635, as well as the conflict of interest statutes codified in Title 18 of the United States Code, which include specific prohibitions against financial and representational conflict of interest.

As a Presidential nominee for a Senate-confirmed position, Mr. Pruitt is required to have one hour of initial ethics training which he may complete before or after his appointment, but not later than two months after his appointment. 5 C.F.R. § 2638.304(b)(1). In addition, he is required to have an ethics briefing to discuss his immediate ethics obligations. This new training requirement, which became effective on January 1, 2017, may be combined with the initial ethics training, but must occur no later than fifteen days after appointment. See 5 C.F.R. § 2638.305(b)(1). As an employee of the EPA, Mr. Pruitt will be subject to the Standards of Ethical Conduct for Employees of the Executive Branch, which includes the basic obligations of public service set forth at 5 C.F.R. § 2635.101(b)(1) – (12).

As the head of this agency, Mr. Pruitt will be “responsible for, and will exercise personal leadership in, establishing and maintaining an effective agency ethics program and fostering an ethical culture in the agency.” 5 C.F.R. § 2638.107. In the event that an employee fails to meet the obligations of his or her ethics agreement, then the EPA may notify the Office of the Inspector General and/or the Office of Government Ethics. See 5 C.F.R. § 2635.101(b)(11), which requires employees to disclose waste, fraud, abuse and corruption to the proper authorities, and 5 C.F.R. § 2638.401, which gives the Office of Government Ethics the authority to take action with respect to deficiencies in an agency’s ethics program.

In closing, thank you for your January 12, 2017, letter requesting specific information regarding the ethics review performed by the EPA with regard to the nomination of E. Scott Pruitt for the position of Administrator. The EPA recognizes the importance of the federal ethics requirements to the confirmation process, and is committed to working with the Congress, Mr. Pruitt, and future nominees to explain those requirements and how they apply to a particular situation.

Consistent with that commitment, Mr. Pruitt's representative requested a copy of the signed version of this response after it has been transmitted to you, and one will be provided to him.

If you have further questions, you may contact me at minoli.kevin@epa.gov or (202) 564-8064, or your staff may contact Justina Fugh, Senior Counsel for Ethics, at fugh.justina@epa.gov or (202) 564-1786 and copy Christina Moody of the EPA's Office of Congressional and Intergovernmental Relations, moody.christina@epa.gov or (202) 564-0260.

Sincerely,



Kevin S. Minoli
Designated Agency Ethics Official
Principal Deputy General Counsel

Exhibit B6

United States Senate

WASHINGTON, DC 20510

February 16, 2017

The Honorable Scott Pruitt
Attorney General of Oklahoma
Oklahoma Attorney General's Office
313 NE 21st Street
Oklahoma City, OK 73105

Dear Mr. Pruitt:

We write to request your commitment to recuse yourself from participating personally and substantially in any matter (including regulations) related to the litigation that you pursued as the Attorney General of Oklahoma for the entirety of your tenure at the Environmental Protection Agency (EPA), and without seeking any waiver, should you be confirmed by the United States Senate. In light of your lengthy record that sought to weaken or repeal a multitude of regulations intended to protect public health by reducing harmful air and water pollution, it is difficult for a reasonable person to conclude that you could be an objective participant in decisions related to these matters.

In your current capacity, you have repeatedly sued EPA to overturn regulations that seek to protect Americans from the effects of soot, ozone, greenhouse gases, mercury, arsenic and other air and water pollutants. These regulations, taken together, are projected to save tens of thousands of lives each year, and avoid cardiovascular disease, asthma and missed days of school and work. Of the 19 cases you have filed, eight remain pending before the courts.

Your Ethics Agreement¹ states that because you have a conflict of interest due to your current role as the Oklahoma Attorney General, for a one-year period, you “will seek authorization to participate personally and substantially in particular matters involving specific parties in which I know the State of Oklahoma is a party or represents a party.” Some of the pending legal proceedings will take longer than a year to resolve even if the EPA ethics officials who will report to you at EPA deny you the authorizations you say you will seek. Moreover, as EPA Administrator, even if you were recused from participating in decision-making on the litigation itself, you may attempt to use your authority to direct EPA personnel to change EPA

¹[https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/1D30B3387FC4E8C0852580A1002C7D1E/\\$FILE/Pruitt,%20Edward%20Scott%20%20%20finalEA.pdf](https://extapps2.oge.gov/201/Presiden.nsf/PAS+Index/1D30B3387FC4E8C0852580A1002C7D1E/$FILE/Pruitt,%20Edward%20Scott%20%20%20finalEA.pdf)

regulations to accomplish exactly the same outcome your lawsuits sought to accomplish. Such an action would be a clear attempt to bypass the spirit of the conflict of interest regulations.

Federal regulations require a federal official to recuse himself from matters where “the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter.”² It is simply impossible for you to meet that test if you switch from plaintiff in your current capacity (in which you were a principal decision-maker on the part of those litigating against EPA), to defendant as EPA Administrator (in which you would be the principal decision-maker on the responses to the lawsuits you filed). It is also impossible for you – or any action you may take as EPA Administrator – to be viewed as impartial if that action consists of the repeal or weakening of environmental protections through regulation that you originally sought to accomplish through litigation.

By contrast, when Carol Browner was EPA Administrator, she promised to recuse herself from matters she personally and substantially worked on for the State of Florida for her entire tenure at EPA. Moreover, the Citizens for Responsibility and Ethics in Washington (CREW) has stated that you should be required to “be recused from any participation in these lawsuits.”³

The American people must have the utmost confidence that members of the Trump administration are exclusively serving our national interests. Until you agree to recuse yourself from all matters (including regulations) related to your litigation against the EPA for the duration of your time in office, they will lack that confidence.

Sincerely,



Edward J. Markey
United States Senator



Thomas R. Carper
United States Senator




Tammy Duckworth
United States Senator




Al Franken
United States Senator

² 5 CFR 2635.502


³ <http://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2017/01/17183250/Letter-to-EPA-ethics-counsel-re-Pruitt-FINAL.pdf>



Elizabeth Warren
United States Senator



Ron Wyden
United States Senator



Richard Blumenthal
United States Senator




Chris Van Hollen
United States Senator



Jeffery A. Merkley
United States Senator



Tom Udall
United States Senator



Sheldon Whitehouse
United States Senator



Richard J. Durbin
United States Senator



Benjamin L. Cardin
United States Senator



Robert Menendez
United States Senator




Kirsten Gillibrand
United States Senator




Robert P. Casey, Jr.
United States Senator



Jack Reed
United States Senator



Patty Murray
United States Senator



Cory A. Booker
United States Senator



Debbie Stabenow
United States Senator



Bernard Sanders
United States Senator



Christopher Murphy
United States Senator



Tammy Baldwin
United States Senator



Sherrod Brown
United States Senator



Jeanne Shaheen
United States Senator



Margaret Wood Hassan
United States Senator



Kamala D. Harris
United States Senator



Gary C. Peters
United States Senator



Maria Cantwell
United States Senator



Mazie K. Hirono
United States Senator

Exhibit B7



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April 7, 2017

VIA ELECTRONIC DELIVERY AND U.S. MAIL

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

RE: Freedom of Information Act Request Regarding Administrator Scott Pruitt

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as amended, and its implementing regulations, I hereby make this request for records on behalf of the Attorney General of California. This request describes: (1) the records sought, and (2) our request for a fee waiver for production of these records.

Request for Materials

The Attorney General of California respectfully requests that the U.S. Environmental Protection Agency (EPA) produce a copy of all of the following records (in electronic format, or print versions if electronic versions are not available):

Documents related to compliance with ethical standards

1. Ethics Agreements entered into by Scott Pruitt on or after November 9, 2016, including but not limited to his January 3, 2017, Ethics Agreement.
2. Communications discussing any Ethics Agreement entered into by Scott Pruitt on or after November 9, 2016.
3. Instruction given by any EPA employee to Scott Pruitt regarding matters from which he should be recused or disqualified.
4. The pledge required by Executive Order 13770 of January 28, 2017 ("Ethics Commitments by Executive Branch Appointees") signed by Scott Pruitt.

5. Waivers of restrictions under section 3 of Executive Order 13770 pertaining to Scott Pruitt.
6. Communications discussing a waiver of restrictions under section 3 of Executive Order 13770 pertaining to Scott Pruitt.
7. Impartiality Determinations (including any determinations under 5 C.F.R. § 2635.502) regarding Scott Pruitt's authorization or ability to participate as Administrator in an activity or decision.
8. Requests by Scott Pruitt to any EPA employee for an Impartiality Determination (including any determination under 5 C.F.R. § 2635.502).
9. Communications discussing an Impartiality Determination (including any determination under 5 C.F.R. § 2635.502) regarding Scott Pruitt.
10. Documents reviewed by EPA ethics officials in evaluating an Impartiality Determination (or other determination under 5 C.F.R. § 2635.502) regarding Scott Pruitt.
11. Notices of disqualification and disqualification statements required by 5 C.F.R. § 2635.502(e) regarding Scott Pruitt.
12. Communications discussing a notice of disqualification or disqualification statement required by 5 C.F.R. § 2635.502(e) regarding Scott Pruitt.
13. Screening arrangements regarding recusal or disqualification of Scott Pruitt from any matter.
14. Communications discussing screening arrangements regarding recusal or disqualification of Scott Pruitt from any matter.
15. Written recusal statements regarding any agreement by Scott Pruitt not to engage in matters implicating his ethics agreement.
16. Communications discussing a written recusal statement regarding any agreement by Scott Pruitt not to engage in matters implicating his ethics agreement.
17. Evidence of compliance documents sent by EPA to the Office of Government Ethics regarding any agreement by Scott Pruitt not to engage in matters implicating his Ethics Agreement.

18. Communications discussing an evidence of compliance documents sent by EPA to the Office of Government Ethics regarding any agreement by Scott Pruitt not to engage in matters implicating his Ethics Agreement
19. Communications from Scott Pruitt discussing any of the following:
 - Environmental Protection Agency 40 C.F.R. Part 60, [FRL-9961-10-OAR], Review of the Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Generating Units, 82 Fed. Reg. 16,330 (Apr. 4, 2017);
 - Environmental Protection Agency 40 C.F.R. Part 60, [FRL-9961-10-OAR], Review of Clean Power Plan, 82 Fed. Reg. 16,329 (Apr. 4, 2017);
 - Environmental Protection Agency 40 C.F.R. Part 60, [FRL-9961-10-OAR], Review of the 2016 Oil and Gas New Source Performance Standards for New, Reconstructed, and Modified Sources, 82 Fed. Reg. 16,331 (Apr. 4, 2017)

(Collectively “Administrator’s Announcements of Review published in the Federal Register on April 4, 2017); and

 - Environmental Protection Agency, 40 C.F.R. Part 60 [FRL-9961-12-OAR], Withdrawal of Proposed Rules: Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations; and Clean Energy Incentive Program Design Details, 82 Fed. Reg. 16144 (Apr. 3, 2017) (hereafter “Administrator’s Withdrawal of Proposed Rules published in the Federal Register on April 3, 2017).
20. Communications between any EPA ethics official (including but not limited to Kevin Minoli and Justina Fugh) and any other person (including but not limited to Scott Pruitt) discussing any of the Administrator’s Announcements of Review published in the Federal Register on April 4, 2017 or the Administrator’s Withdrawal of Proposed Rules published in the Federal Register on April 3, 2017.
21. Communications between any EPA ethics official (including but not limited to Kevin Minoli and Justina Fugh) and any other person regarding Scott Pruitt on or after November 9, 2016.
22. Communications between any EPA employee and the Office of Government Ethics regarding Scott Pruitt on or after November 9, 2016.

23. Communications between any EPA employee and the Oklahoma Bar Association regarding Scott Pruitt on or after November 9, 2016.
24. Communications between any EPA employee and the Oklahoma Attorney General's Office regarding Scott Pruitt on or after November 9, 2016.

Documents related to duties of the Administrator and filling of vacancies.

25. EPA's written policies, procedures, or manuals, in force at any time since January 1, 2009, stating under what circumstances a person may serve as Acting Administrator when the Administrator must be recused due to a conflict of interest or the appearance of lack of impartiality.
26. EPA's written policies, procedures, or manuals, in force at any time since January 1, 2009, stating under what legal authority another person may serve as Acting Administrator when the Administrator must be recused due to a conflict of interest or the appearance of lack of impartiality.
27. EPA's written policies, procedures, or manuals, in force at any time since January 1, 2009, stating under what circumstances a person other than the Administrator may make regulations that are subject to 42 U.S.C. § 7607(d).
28. EPA's written policies, procedures, or manuals, in force at any time since January 1, 2009, stating under what legal authority a person other than the Administrator may make regulations that are subject to 42 U.S.C. § 7607(d).
29. EPA's written policies, procedures, or manuals, in force at any time since January 1, 2009, stating how EPA is to determine when "the absence of the Administrator" exists, as that expression is used in 40 C.F.R. § 1.23.
30. EPA's written policies, procedures, or manuals, in force at any time since January 1, 2009, stating how EPA is to determine when a period of the "absence or disability of the Administrator" or "the event of a vacancy in the office of Administrator" exist, as those terms are used in Reorganization Plan No. 3 of 1970, § 1(c).
31. EPA's written policies, procedures, or manuals, in force at any time since January 1, 2009, stating how EPA is to determine when a period exists during which the Administrator and Deputy Administrator have "become otherwise unable to perform the functions and duties of the office of the Administrator," as those terms are used in any Executive Order providing for an order of succession within EPA (including the Executive Order of January 13, 2017).
32. EPA's written policies, procedures, or manuals, in force at any time since January 1, 2009, stating how EPA is to determine when a period exists during which the

Administrator “is otherwise unable to perform the functions and duties of the office,” as those terms are used in 5 U.S.C. § 3345(a).

The Attorney General believes that the documents sought are publicly available, of great public interest, and not exempt from required disclosure under FOIA. This request is made with the understanding that it will be forwarded to any other offices that may be in possession of the requested documents.

In addition, given that disclosure of these records would be in the public interest, even if you determine that certain of the documents sought are exempt under FOIA, the Attorney General requests that you disclose these documents as a matter of agency discretion. If you deny any part of this request, please cite each specific reason that you believe justifies your refusal to release the information, together with a synopsis of the records withheld. In the case of deletions, please state a reason for each partial denial of access. To expedite this request, I would be willing to discuss specific instances of deletion or other exemption claims in advance of a final decision by the agency.

Request for a Fee Waiver

The California Attorney General is, of course, a noncommercial organization not subject to review fees. In addition, the Attorney General requests a waiver of search and copying fees associated with these requests. Under FOIA, agencies must waive such fees where disclosure is likely to contribute significantly to public understanding of the operations and activities of the government and disclosure is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii). EPA has incorporated this requirement in its regulations for responding to FOIA requests. 40 C.F.R. § 2.107. Under the criteria set forth in the EPA regulations, such a waiver is appropriate here, as explained below.

“Whether the subject of the requested records concerns ‘the operations or activities of the government.’” 40 C.F.R. § 2.107(k)(2)(i).

These requests explicitly concern only the operation or activities of the federal government. Specifically, they concern (1) the process EPA has undertaken to ensure that its Administrator is in compliance with federal ethics regulations, with the Ethics Pledge President Trump required all of his appointees to sign at the time of their appointment, and with the Ethics Agreement Mr. Pruitt submitted to the EPA and on which the Senate relied in confirming him; and (2) EPA’s policies and procedures for determining who (if anyone) can assume the powers of the Administrator if he is recused or disqualified from participating in a matter.

“Whether the disclosure is ‘likely to contribute’ to an understanding of government operations or activities.” 40 C.F.R. § 2.107(k)(2)(ii).

The requested documents are likely to increase public understanding of the process EPA has employed to assure compliance with ethical standards with respect to its Administrator. Information currently in the public domain in this regard consists of statements made by Mr. Pruitt and by an EPA ethics official prior to his confirmation as Administrator. The public is currently unaware of what EPA has done to ensure compliance now that the appearance of a conflict of interest has actually arisen. Further, while EPA and Mr. Pruitt have stated that if he is disqualified from participating in any matter due to ethical conflicts or the appearance of lack of impartiality another EPA employee can fulfill the Administrator’s duties, there is no information in the public record showing that the Federal Vacancy Reform Act or existing EPA procedures allow another EPA employee to assume the Administrator’s rulemaking powers under 42 U.S.C. § 7601(a)(1) on a case-by-case basis. The requested documents would fill this gap in the public’s knowledge about these topics.

“Whether disclosure of the requested information will contribute to ‘public understanding.’ ” 40 C.F.R. § 2.107(k)(2)(iii).

The documents EPA produces in response to these requests will be available to interested parties upon request to the Attorney General. The Attorney General may also present some or all of the documents in public filings in court cases involving EPA.

“Whether the disclosure is likely to contribute ‘significantly’ to public understanding of government operations or activities.” 40 C.F.R. § 2.107(k)(2)(iv).

The amount of information currently available to the public about EPA’s efforts to ensure compliance with ethics standards is minimal and pre-dates Mr. Pruitt’s confirmation as Administrator. The level of public understanding will be enhanced to a significant degree by disclosing these documents.

“Whether the requester has a commercial interest that would be furthered by the requested disclosure.” 40 C.F.R. § 2.107(k)(3)(i).

The California Attorney General is a public officer acting on behalf of the State and the public pursuant to the California Constitution, statutory authority, and common law. See Cal. Const. art. V, § 13; Cal. Gov’t Code § 12511; *D’Amico v. Board of Medical Examiners*, 11 Cal.3d 1, 14-15 (1974). The information sought in this FOIA request will assist the Attorney General in representing the 39 million people of California. Disclosure of the documents sought “is likely to contribute significantly to public understanding of the operations or activities of the Government,” and the materials requested are not sought for any commercial purpose.

"Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is 'primarily in the commercial interest of the requester.'" 40 C.F.R. § 2.107(k)(3)(ii).

As described above, the California Attorney General is a public officer and as such has no commercial interest in the requested documents. The requested documents thus cannot be primarily in the commercial interest of the requester.

Please send all requested materials to my attention, at the address provided above, within 20 days, and produce all records currently existing in electronic format on a CD, pursuant to 5 U.S.C. § 552(a)(3)(B). Please call me at (510) 879-0987 if you have any questions about this request.

Sincerely,

Handwritten signature of Timothy E. Sullivan in black ink, with the initials "DAZ" written at the end.

TIMOTHY E. SULLIVAN
Deputy Attorney General

For XAVIER BECERRA
Attorney General

Exhibit B8



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

MAY - 4 2017

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: My Ethics Obligations

FROM: E. Scott Pruitt
Administrator

TO: Acting Assistant Administrators
Acting General Counsel
Inspector General
Acting Regional Administrators

This memorandum provides you with written notification regarding my ethics obligations. I have conferred with the Office of General Counsel's Ethics Office (OGC/Ethics) and understand that I must recuse myself from matters in which I have a financial interest, or a personal or business relationship. I also understand that I have certain obligations to my state bar and also under the President's Ethics Pledge that I have signed. This recusal statement addresses all of my ethics obligations.

Obligations Under the President's Ethics Pledge

I understand that I have ethics obligations with respect to my former employer and my former client, the State of Oklahoma. The President's Ethics Pledge provides more restrictions than the federal ethics rules, but I am advised by OGC/Ethics that the additional restrictions contained in the pledge that regard former employer and former client do not apply to me. The Executive Order defines "former employer" to exclude state government,¹ and the Office of Government Ethics has determined that this same exclusion applies to the definition of "former client."² Therefore, OGC/Ethics has confirmed that I am not subject to the additional pledge restrictions regarding former employers or former clients.

Ethics Obligations Under the Impartiality Provisions

Pursuant to federal ethics rules, I understand that I have a one-year cooling off period with my former employer and former client. I also understand that I have a "covered relationship" with certain

¹ See Exec. Order 13,770, Section 2(j), which provides that "former employer" does not include ... State government."

² See Office of Government Ethics Legal Advisory 17-02 (February 6, 2017), which states that, "[w]ith respect to Executive Order 13770, ethics officials and employees may continue to rely on OGE's prior guidance regarding Executive Order 13490 to the extent that such guidance addresses language common to both orders," and Office of Government Ethics Legal Advisory DO-09-011 (March 26, 2009), which states that "based on discussions with the White House Counsel's office, OGE has determined that the definition of former client is intended to exclude the same governmental entities as those excluded from the definition of former employer."

organizations in which I was active during the past year. For one year after my resignation as Attorney General, and one year from my resignation from the entities specified below, I will not participate personally and substantially in any particular matter involving specific parties in which any of the following entities is a party or represents a party, unless I am first authorized by OGC/Ethics to participate, pursuant to 5 C.F.R. § 2635.502(d). This federal ethics limitation does not extend to particular matters of general applicability, such as rulemaking.

Name of Entity	Date when recusal from specific party matters ends under Federal Ethics Obligations
State of Oklahoma	February 18, 2018
Southern Baptist Theological Seminary	February 18, 2018
Windows Ministry Incorporated	February 18, 2018
Rule of Law Defense Fund	December 9, 2017

Commitment to My Ethical Responsibilities

To demonstrate my profound commitment to carrying out my ethical responsibilities, while I am the Administrator of the United States Environmental Protection Agency, I will not participate in any active cases in which Oklahoma is a party, petitioner or intervenor, including the following:

Case Name	Citation
American Petroleum Institute, et al. v. EPA	No. 13-1108 (D.C. Cir.)
Florida <i>et al.</i> v. EPA	No. 15-1267 (D.C. Cir.)
Murray Energy, <i>et al.</i> v. EPA	No. 15-3751 (6 th Cir.)
Murray Energy, <i>et al.</i> v. EPA	No. 15-1385 (D.C. Cir.) (consolidated with 15-1392, 15-1490, 15-1491 & 15-1494)
Murray Energy Corp. v. EPA	No. 16-1127 (D.C. Cir.)
Oklahoma <i>ex rel.</i> Pruitt v. EPA	No. 15-cv-00381 (10 th Cir.)
Oklahoma <i>ex rel.</i> Pruitt v. EPA appeal pending <i>sub nom.</i> State of Oklahoma <i>ex rel.</i> Hunter, No. 16-5039 (10 th Cir.)	No. 4:15-cv-381 (N.D. Okla.)
<i>In Re</i> Volkswagen "Clean Diesel" Marketing, Sales, Practices, And Products Liability Litigation (extends to criminal case too)	No. 2672 MDL CRB (JSC) (N.D. Cal.) Criminal case: E.D. Michigan
State of North Dakota v. EPA	No. 15-1381 (D.C. Cir.) (joined with No. 15-1399, then consolidated with No. 15-1381)
State of West Virginia, <i>et al.</i> v. EPA	No. 15-1363 (D.C. Cir.)
Walter Coke Inc. v. EPA	No. 15-1166 (D.C. Cir.)
Wildearth Guardians v. EPA	No. 13-cv-02748 (D.C. Colo.)

I understand that this commitment is longer than is required by the federal impartiality standards, but I am taking this action to avoid even the appearance of any impropriety under federal ethics or professional responsibility obligations.

With respect to cases involving EPA in which Oklahoma joined other states in filing an amicus brief, I understand that Oklahoma was not a party to the litigation itself. I have informed the Designated Agency Ethics Official (DAEO) that Oklahoma itself neither authored the amici briefs nor otherwise participated in the litigation in any way. Most of those cases are resolved, except for *Building Industry Association of the Bay Area, et al. v. Department of Commerce, et al.* (the U.S. Supreme Court denied *certiorari*); *Sierra Club et al., plaintiffs-appellees v. Regina McCarthy in her capacity as Administrator of the United States Environmental Protection Agency, defendants-appellees; State of Arizona et al, intervenor-plaintiff-appellants*, No. 15-15894 (9th Cir.), on appeal from N.D. Cal., No. 13-cv-03953-SI (this case is fully argued and briefed is awaiting decision only); *Wyoming v. EPA*, Nos. 14-9512 and 14-9514 (10th Cir.) (the standard of review argument advanced in the amicus brief that Oklahoma joined was uncontested on review); and *National Association of Manufacturers, petitioner, v. U.S. Department of Defense, U.S. Army Corps of Engineers, and U.S. EPA, et al., respondents*, No. 16-299 (S. Ct.) (U.S. Supreme Court granted *certiorari*, briefing for petitioners and supporting persons is complete, and case will be argued in the upcoming October term).

Thus far, I have not participated in any of the cases listed in this recusal statement officially at all and will continue to recuse for now. In the event that I wish to participate, I will seek an ethics determination from the DAEO, who will apply the federal impartiality standard set forth at 5 C.F.R. § 2635.502. I understand that my professional responsibility obligations may impose consent requirements in order to participate. I will provide notification of such consent, if sought and obtained, to EPA's ethics officials.

Screening Arrangement

In order to help ensure that I do not participate in matters relating to any of the entities listed above, I have taken or will take the following steps:

1. I am instructing Ryan Jackson, Chief of Staff to screen all EPA matters, including existing litigation, directed to my attention that involve outside entities or that require my participation, to determine if they involve any of the entities or organizations listed above.
2. Until such time as a Presidentially Appointed Senate confirmed appointee is confirmed and sworn into a position such as the Deputy Administrator, General Counsel or Assistant Administrator, I am designating the Chief of Staff to take appropriate action or refer it with the Agency for appropriate action or assignment, without my knowledge or involvement.
3. I will provide the Chief of Staff and Sarah Greenwalt, Senior Advisor to the Administrator, with a copy of this memorandum so that they may fully understand the purpose and scope of my

recusal obligations and this screening arrangement. In order to help ensure that I do not inadvertently participate in matters from which I am recused, I am directing the Chief of Staff and/or Ms. Greenwalt to seek the assistance of OGC/Ethics if they are ever uncertain whether or not I may participate in a matter.

4. I will provide a copy of this memorandum to my principal subordinates. I will also instruct my principal subordinates that all inquiries and comments involving any of the entities listed above should be directed to the Chief of Staff without my knowledge or involvement.
5. In consultation with OGC/Ethics, I will revise and update my ethics agreement and/or this memorandum whenever is warranted by changed circumstances, including changes in my financial interests, my personal or business relationships, or the nature of my official duties.
6. In the event of any changes to this screening arrangement, I will provide a copy of the revised screening arrangement memorandum to the Chief of Staff, OGC/Ethics, and any principal subordinates.

cc: Ryan Jackson, Chief of Staff
Sarah Greenwalt, Senior Advisor to the Administrator
Kevin S. Minoli, Designated Agency Ethics Official
Justina Fugh, Alternate Designated Agency Ethics Official

Exhibit B9



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

MAY - 4 2017

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: My Ethics Obligations

FROM: E. Scott Pruitt
Administrator

TO: Acting Assistant Administrators
Acting General Counsel
Inspector General
Acting Regional Administrators

This memorandum provides you with written notification regarding my ethics obligations. I have conferred with the Office of General Counsel's Ethics Office (OGC/Ethics) and understand that I must recuse myself from matters in which I have a financial interest, or a personal or business relationship. I also understand that I have certain obligations to my state bar and also under the President's Ethics Pledge that I have signed. This recusal statement addresses all of my ethics obligations.

Obligations Under the President's Ethics Pledge

I understand that I have ethics obligations with respect to my former employer and my former client, the State of Oklahoma. The President's Ethics Pledge provides more restrictions than the federal ethics rules, but I am advised by OGC/Ethics that the additional restrictions contained in the pledge that regard former employer and former client do not apply to me. The Executive Order defines "former employer" to exclude state government,¹ and the Office of Government Ethics has determined that this same exclusion applies to the definition of "former client."² Therefore, OGC/Ethics has confirmed that I am not subject to the additional pledge restrictions regarding former employers or former clients.

Ethics Obligations Under the Impartiality Provisions

Pursuant to federal ethics rules, I understand that I have a one-year cooling off period with my former employer and former client. I also understand that I have a "covered relationship" with certain

¹ See Exec. Order 13,770, Section 2(j), which provides that "former employer" does not include ... State government."

² See Office of Government Ethics Legal Advisory 17-02 (February 6, 2017), which states that, "[w]ith respect to Executive Order 13770, ethics officials and employees may continue to rely on OGE's prior guidance regarding Executive Order 13490 to the extent that such guidance addresses language common to both orders," and Office of Government Ethics Legal Advisory DO-09-011 (March 26, 2009), which states that "based on discussions with the White House Counsel's office, OGE has determined that the definition of former client is intended to exclude the same governmental entities as those excluded from the definition of former employer."

organizations in which I was active during the past year. For one year after my resignation as Attorney General, and one year from my resignation from the entities specified below, I will not participate personally and substantially in any particular matter involving specific parties in which any of the following entities is a party or represents a party, unless I am first authorized by OGC/Ethics to participate, pursuant to 5 C.F.R. § 2635.502(d). This federal ethics limitation does not extend to particular matters of general applicability, such as rulemaking.

Name of Entity	Date when recusal from specific party matters ends under Federal Ethics Obligations
State of Oklahoma	February 18, 2018
Southern Baptist Theological Seminary	February 18, 2018
Windows Ministry Incorporated	February 18, 2018
Rule of Law Defense Fund	December 9, 2017

Commitment to My Ethical Responsibilities

To demonstrate my profound commitment to carrying out my ethical responsibilities, while I am the Administrator of the United States Environmental Protection Agency, I will not participate in any active cases in which Oklahoma is a party, petitioner or intervenor, including the following:

Case Name	Citation
American Petroleum Institute, et al. v. EPA	No. 13-1108 (D.C. Cir.)
Florida <i>et al.</i> v. EPA	No. 15-1267 (D.C. Cir.)
Murray Energy, <i>et al.</i> v. EPA	No. 15-3751 (6 th Cir.)
Murray Energy, <i>et al.</i> v. EPA	No. 15-1385 (D.C. Cir.) (consolidated with 15-1392, 15-1490, 15-1491 & 15-1494)
Murray Energy Corp. v. EPA	No. 16-1127 (D.C. Cir.)
Oklahoma <i>ex rel.</i> Pruitt v. EPA	No. 15-cv-00381 (10 th Cir.)
National Association of Manufacturers, <i>petitioner</i> , v. U.S. Department of Defense, <i>respondent</i> ³	No. 16-299 (S. Ct.)
Oklahoma <i>ex rel.</i> Pruitt v. EPA appeal pending <i>sub nom.</i> State of Oklahoma <i>ex rel.</i> Hunter, No. 16-5039 (10 th Cir.)	No. 4:15-cv-381 (N.D. Okla.)
<i>In Re</i> Volkswagen “Clean Diesel” Marketing, Sales, Practices, And Products Liability Litigation (extends to criminal case too)	No. 2672 MDL CRB (JSC) (N.D. Cal.) Criminal case: E.D. Michigan
State of North Dakota v. EPA	No. 15-1381 (D.C. Cir.) (joined with No. 15-1399, then consolidated with No. 15-1381)
State of West Virginia, <i>et al.</i> v. EPA	No. 15-1363 (D.C. Cir.)
Walter Coke Inc. v. EPA	No. 15-1166 (D.C. Cir.)
Wildearth Guardians v. EPA	No. 13-cv-02748 (D.C. Colo.)

³ EPA Ethics updated this chart on 5-17-17 to include this case, which was inadvertently omitted. It had erroneously included with the amicus filings on page 3. EPA Ethics notes that the Administrator has not and will not participate in this case.

I understand that this commitment is longer than is required by the federal impartiality standards, but I am taking this action to avoid even the appearance of any impropriety under federal ethics or professional responsibility obligations.

With respect to cases involving EPA in which Oklahoma joined other states in filing an amicus brief, I understand that Oklahoma was not a party to the litigation itself. I have informed the Designated Agency Ethics Official (DAEO) that Oklahoma itself neither authored the amici briefs nor otherwise participated in the litigation in any way. Most of those cases are resolved, except for *Building Industry Association of the Bay Area, et al. v. Department of Commerce, et al.* (the U.S. Supreme Court denied *certiorari*); *Sierra Club et al., plaintiffs-appellees v. Regina McCarthy in her capacity as Administrator of the United States Environmental Protection Agency, defendants-appellees; State of Arizona et al., intervenor-plaintiff-appellants*, No. 15-15894 (9th Cir.), on appeal from N.D. Cal., No. 13-cv-03953-SI (this case is fully argued and briefed is awaiting decision only); and *Wyoming v. EPA*, Nos. 14-9512 and 14-9514 (10th Cir.) (the standard of review argument advanced in the amicus brief that Oklahoma joined was uncontested on review).

Thus far, I have not participated in any of the cases listed in this recusal statement officially at all and will continue to recuse for now. In the event that I wish to participate, I will seek an ethics determination from the DAEO, who will apply the federal impartiality standard set forth at 5 C.F.R. § 2635.502. I understand that my professional responsibility obligations may impose consent requirements in order to participate. I will provide notification of such consent, if sought and obtained, to EPA's ethics officials.

Screening Arrangement

In order to help ensure that I do not participate in matters relating to any of the entities listed above, I have taken or will take the following steps:

1. I am instructing Ryan Jackson, Chief of Staff to screen all EPA matters, including existing litigation, directed to my attention that involve outside entities or that require my participation, to determine if they involve any of the entities or organizations listed above.
2. Until such time as a Presidentially Appointed Senate confirmed appointee is confirmed and sworn into a position such as the Deputy Administrator, General Counsel or Assistant Administrator, I am designating the Chief of Staff to take appropriate action or refer it with the Agency for appropriate action or assignment, without my knowledge or involvement.
3. I will provide the Chief of Staff and Sarah Greenwalt, Senior Advisor to the Administrator, with a copy of this memorandum so that they may fully understand the purpose and scope of my

recusal obligations and this screening arrangement. In order to help ensure that I do not inadvertently participate in matters from which I am recused, I am directing the Chief of Staff and/or Ms. Greenwalt to seek the assistance of OGC/Ethics if they are ever uncertain whether or not I may participate in a matter.

4. I will provide a copy of this memorandum to my principal subordinates. I will also instruct my principal subordinates that all inquiries and comments involving any of the entities listed above should be directed to the Chief of Staff without my knowledge or involvement.
5. In consultation with OGC/Ethics, I will revise and update my ethics agreement and/or this memorandum whenever is warranted by changed circumstances, including changes in my financial interests, my personal or business relationships, or the nature of my official duties.
6. In the event of any changes to this screening arrangement, I will provide a copy of the revised screening arrangement memorandum to the Chief of Staff, OGC/Ethics, and any principal subordinates.

cc: Ryan Jackson, Chief of Staff
Sarah Greenwalt, Senior Advisor to the Administrator
Kevin S. Minoli, Designated Agency Ethics Official
Justina Fugh, Alternate Designated Agency Ethics Official

Exhibit B10

XAVIER BECERRA
Attorney General

State of California
DEPARTMENT OF JUSTICE



1515 CLAY STREET, 20TH FLOOR
P.O. BOX 70550
OAKLAND, CA 94612-0550

Public: (510) 879-1300
Telephone: (510) 879-0987
Facsimile: (510) 622-2270
E-Mail: Timothy.Sullivan@doj.ca.gov

June 14, 2017

VIA ELECTRONIC DELIVERY AND U.S. MAIL

foia.hq@epa.gov & foia_hq@epa.gov

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, D.C. 20460

RE: Notice of Violation of 20-Day Determination Deadline for FOIA Requests
EPA-HQ-2017-005890 and EPA-HQ-2017-006101

Dear Freedom of Information Officer:

The purpose of this letter is to advise you that the U.S. Environmental Protection Agency (EPA) is in violation of the Freedom of Information Act (FOIA) due to its failure to respond to requests of the California Attorney General within 20 working days, as is required by 5 U.S.C. § 552(a)(6)(B)(i). We would prefer to work with EPA cooperatively to obtain the documents we have requested. Please promptly comply with your obligations under FOIA to provide us with the requested records.

On April 7, 2017, we submitted our FOIA request letter (dated April 7, 2017) to EPA through the foiaonline.regulations.gov website. That same day we sent that letter to EPA's National Freedom of Information Officer by U.S. Mail. The letter includes 32 numbered requests concerning (1) the process EPA has undertaken to ensure that Administrator E. Scott Pruitt is in compliance with federal ethics regulations and obligations; and (2) EPA's policies and procedures for determining who (if anyone) can assume the powers of the Administrator if he is recused or disqualified from participating in a matter.

Also on April 7, 2017, in an email to us from foia_hq@epa.gov, EPA acknowledged receipt of the request and assigned it "Tracking Number" EPA-HQ-2017-005890 with "Date Submitted" of April 7, 2017.

On April 13, 2017, we received an email from foia.hq@epa.gov acknowledging receipt of the same April 7, 2017, FOIA request letter and assigning it "Tracking Number" EPA-HQ-2017-006101 with "Date Submitted" of April 13, 2017. On April 20, 2017, EPA sent us a letter via email from Larry F. Gottesman, National FOIA Officer, *denying* our request for a fee waiver as to Request Number EPA-HQ-2017-006101. That letter states that "EPA's Office of General

Counsel (OGC) will be responding to your information request,” and that if the estimated cost of responding to our request exceeds \$25.00, “OGC will contact you regarding the cost of processing your request and seek an assurance of payment.”

On May 17, 2017, EPA sent us a letter via email from Larry F. Gottesman, National FOIA Officer, *granting* our request for a fee waiver as to Request Number EPA-HQ-2017-005890 (which is identical to Request Number EPA-HQ-2017-006101, on which EPA had previously denied our fee waiver request). The letter states that the “EPA Office of the Administrator (AO) will respond to your information request for the Agency.” We have not received any further communication about this request from the Office of the Administrator.

Also on May 17, 2017, we received a phone call from Justina Fugh, Senior Counsel for Ethics, with EPA’s Office of General Counsel. Ms. Fugh indicated that she was handling some of the categories of records we had requested and that she had not yet completed her search. She stated that two documents would be produced immediately, but others would take longer. As to some other categories, she stated that no documents were available. She stated that the responses to certain other categories were being handled by other parts of EPA. We asked that EPA produce documents to us as they became available. To date, we have not received a single document in response to our April 7, 2017, request, nor has anyone else from EPA subsequently contacted us regarding our request.

Under FOIA, EPA is required to have provided us with a comprehensive determination on the scope of the documents it would produce and the exemptions it would claim within 20 working days of receiving our request. 5 U.S.C. § 552(a)(6)(A)(i); *see also Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm’n*, 711 F.3d 180 (D.C. Cir. 2013). That 20-day period expired on May 5, 2017, with respect to request EPA-HQ-2017-005890, and on May 11, 2017, with respect to our identical request EPA-HQ-2017-006101. EPA has never provided the required determination nor any records responsive to the requests.

The public is entitled to prompt release of the requested records, and time is of the essence because of Mr. Pruitt’s suspected involvement in the rulemakings at issue in many of our requests. Since the moment on February 17, 2017, when Mr. Pruitt switched roles from that of Oklahoma Attorney General (suing EPA to overturn multiple rules) to that of Administrator of that same agency (responsible for implementing those rules), his ability to act impartially is a matter of utmost public concern. Mr. Pruitt has now officially directed EPA to review the very rules he was recently suing EPA to have overturned. Under these circumstances, Mr. Pruitt’s ability to participate in these administrative processes or rulemakings with the necessary impartiality may reasonably be questioned. *See, e.g.*, 5 C.F.R. § 2635.502(a)(2). Before Mr. Pruitt becomes further enmeshed in EPA’s review of or changes to these rules, EPA must

National Freedom of Information Officer
U.S. Environmental Protection Agency
June 14, 2017
Page 3

immediately produce records showing how and if it is taking steps to comply with ethical standards.¹

Please contact me as soon as possible if you would like to discuss our FOIA requests. We look forward to receiving the requested records shortly.

Sincerely,

A handwritten signature in black ink, appearing to read "T. Sullivan", written in a cursive style.

TIMOTHY E. SULLIVAN
Deputy Attorney General

For XAVIER BECERRA
Attorney General

OK2017304228
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¹ Press reports indicate that Mr. Pruitt issued a memorandum entitled "My Ethics Obligations," dated May 4, 2017, in which he states that, unless he receives authorization, he will be recused from participating in certain litigation against EPA in which Oklahoma is a party. Mr. Pruitt's memorandum suggests that he does not agree to recuse himself from participating in new rulemaking efforts that are directly related to the litigation on which he is recused.

Exhibit B 1 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STATE OF CALIFORNIA,
Office of the Attorney General
1300 "I" Street
Sacramento, CA 95814-2919

Plaintiff,

v.

**U.S. ENVIRONMENTAL PROTECTION
AGENCY,**
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Defendant

Case No. 1:17-cv-1626

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiff State of California, by and through Attorney General Xavier Becerra, ("Plaintiff") seeks injunctive, declaratory, and other appropriate relief against the United States Environmental Protection Agency ("EPA") to remedy EPA's violations of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

2. Plaintiff sent a written request to EPA on April 7, 2017, seeking, pursuant to FOIA, specified records concerning (a) the process EPA has undertaken to ensure that Administrator E. Scott Pruitt is in compliance with federal ethics regulations and obligations; and (b) EPA's policies and procedures for determining who (if anyone) can assume the powers of the Administrator if he is recused or disqualified from participating in a matter.

3. EPA has failed to comply with FOIA. EPA did not provide Plaintiff with a determination on the scope of the documents it would produce and the exemptions it would claim within 20 working days of receiving the request. 5 U.S.C. § 552(a)(6)(A)(i). EPA has not

produced any documents to Plaintiff, and EPA has not claimed any exemptions allowing it to withhold documents.

4. Beginning in 2011 and continuing up to the moment he was sworn in as EPA Administrator on February 17, 2017, Mr. Pruitt served as the Attorney General of Oklahoma. While serving as Oklahoma Attorney General, Mr. Pruitt filed numerous lawsuits against EPA that attacked the legal and factual justification for rules promulgated by EPA. These lawsuits include, but are not limited to, actions asking courts to strike down EPA's rules limiting greenhouse gas emissions from existing fossil fuel power plants (80 Fed. Reg. 64,661 (Oct. 23, 2015); *see West Virginia v. EPA* (D.C. Cir., No. 15-1363)) and from new, modified, and reconstructed fossil fuel power plants (80 Fed. Reg. 64,510 (Oct. 23, 2015); *see North Dakota v. EPA* (D.C. Cir., No. 15-1381)); limiting methane and volatile organic compound pollution from new, modified, and reconstructed sources in the oil and gas sector (81 Fed. Reg. 35,824 (June 3, 2016); *see North Dakota v. EPA* (D.C. Cir., No. 16-1242 (consolidated with *Am. Petroleum Inst. v. EPA* (No. 13-1108)))); establishing National Ambient Air Quality Standards for ground-level ozone pollution (80 Fed. Reg. 65,292 (Oct. 26, 2015); *see Murray Energy Corp. v. EPA* (D.C. Cir., No. 15-1385)); and limiting hazardous air pollutants emitted from coal- and oil-fired power plants (81 Fed. Reg. 24,420 (Apr. 25, 2016); *see Murray Energy Corp. v. EPA* (D.C. Cir., No. 16-1127)).

5. Upon his swearing in at EPA, Administrator Pruitt became the head of the agency responsible for implementing the very same rules that he had been working to overturn just moments earlier. Mr. Pruitt's public attacks on the legal and factual justification EPA provided for many rules, including his filing of lawsuits seeking to invalidate them, while Oklahoma Attorney General, raise a question regarding his ability to participate in administrative processes and rulemakings concerning these same rules with the impartiality required by federal law. *See, e.g.,* 5 C.F.R. § 2635.502(a)(2).

6. Administrator Pruitt has now officially directed EPA to stay, reconsider, and possibly revise or even rescind many of these same rules. Administrator Pruitt's actions create

the appearance that he is not acting impartially by attempting to achieve the same results through rulemaking as Administrator that he sought to achieve through litigation as Oklahoma Attorney General. *See, e.g.*, 5 C.F.R. §§ 2635.102(b)(8) & (b)(14).

7. California, as either a party or amicus curiae in ongoing litigation, has been defending the validity of some of these rules Mr. Pruitt sought to have invalidated as Oklahoma Attorney General. *See, e.g.*, *West Virginia v. EPA* (D.C. Cir., No. 15-1363); *North Dakota v. EPA* (D.C. Cir., No. 15-1381); *North Dakota v. EPA* (D.C. Cir., No. 16-1242 (consolidated with *Am. Petroleum Inst. v. EPA* (No. 13-1108))); *Murray Energy Corp. v. EPA* (D.C. Cir., No. 15-1385); *Murray Energy Corp. v. EPA* (D.C. Cir., No. 16-1127).

8. The public is entitled to prompt release of the requested records so that whatever steps EPA has undertaken to avoid the appearance of lack of impartiality by Administrator Pruitt may be evaluated and acted upon, if necessary. Plaintiff has been harmed and will continue to be harmed by EPA's violations of FOIA, which have resulted in the impermissible withholding of records and the impermissible concealment of the operations of the federal government.

JURISDICTION AND VENUE

9. This Court has jurisdiction over this matter pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 because this action arises under FOIA.

10. Because EPA did not provide Plaintiff with a determination on the scope of the documents it would produce and the exemptions it would claim within 20 working days of receiving Plaintiff's April 7, 2017, request, Plaintiff is deemed to have exhausted its administrative remedies and may now seek judicial review. 5 U.S.C. § 552(a)(6)(C)(i); 40 C.F.R. § 2.104(a).

11. Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B) because FOIA grants the district court in the District of Columbia jurisdiction to issue FOIA injunctions and orders and also because the District of Columbia is the district in which Plaintiff is informed and believes the relevant EPA records are located.

12. This Court has authority to grant declaratory relief, and related necessary or proper relief, pursuant to 28 U.S.C. §§ 2201 and 2202.

PARTIES

13. Plaintiff State of California brings this action by and through Attorney General Xavier Becerra. Under the California Constitution, the Attorney General of California is the chief law officer of the state and has the power, among other things, to file any civil action or proceeding directly involving the rights and interests of the state. Plaintiff is a “person” authorized to request records from a federal agency pursuant to FOIA. 5 U.S.C. § 551(2) (defining a “person” to include “an individual, partnership, corporation, association, or public or private organization”); § 552(a)(3). The headquarters of the California Attorney General is located at 1300 “I” Street, Sacramento, California 95814-2919.

14. Defendant EPA is an authority of the Government of the United States and is therefore an “agency” required to comply with FOIA. 5 U.S.C. § 551(1). Its headquarters is located at 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460.

ADDITIONAL FACTS

15. On April 7, 2017, Plaintiff submitted a FOIA request letter dated April 7, 2017, to EPA through the foiaonline.regulations.gov website. That same day Plaintiff sent that letter to EPA’s National Freedom of Information Officer by U.S. Mail. The letter consisted of requests concerning (a) the process EPA has undertaken to ensure that Administrator Pruitt is in compliance with federal ethics regulations and obligations; and (b) EPA’s policies and procedures for determining who (if anyone) can assume the powers of the Administrator if he is recused or disqualified from participating in a matter.

16. Also on April 7, 2017, in an email to Plaintiff from foia_hq@epa.gov, EPA acknowledged receipt of the request and assigned it “Tracking Number” EPA-HQ-2017-005890 with “Date Submitted” of April 7, 2017.

17. On April 13, 2017, in an email to Plaintiff from foia.hq@epa.gov, EPA acknowledged receipt of the same April 7, 2017, FOIA request letter and assigned it “Tracking Number” EPA-HQ-2017-006101 with “Date Submitted” of April 13, 2017.

18. On April 20, 2017, EPA sent Plaintiff a letter via email from Larry F. Gottesman, National FOIA Officer, denying Plaintiff’s request for a fee waiver as to Request Number EPA-HQ-2017-006101. That letter states that “EPA’s Office of General Counsel (OGC) will be responding to your information request,” and that if the estimated cost of responding to the request exceeds \$25.00, “OGC will contact you regarding the cost of processing your request and seek an assurance of payment.”

19. Plaintiff did not appeal EPA’s denial of its fee waiver request.

20. On May 17, 2017, EPA sent Plaintiff a letter via email from Larry F. Gottesman, National FOIA Officer, granting Plaintiff’s request for a fee waiver as to Request Number EPA-HQ-2017-005890 (which is identical to Request Number EPA-HQ-2017-006101, on which EPA had denied the fee waiver request on April 20, 2017). The letter states that the “EPA Office of the Administrator (AO) will respond to your information request for the Agency.” Plaintiff has not received any further communication about Request Number EPA-HQ-2017-005890 from the Office of the Administrator.

21. Also on May 17, 2017, Plaintiff received a phone call from an attorney with EPA’s Office of General Counsel, who indicated that she was handling some of the categories of records Plaintiff had requested, that she had not yet completed her search for all of those categories, and that the responses to certain other categories were being handled by other parts of EPA.

22. Other than as described above, as of June 14, 2017, Plaintiff had not received any other communication about its requests from EPA’s Office of General Counsel or anyone else from EPA.

23. As of June 14, 2017, EPA had not provided to Plaintiff any documents in response to its April 7, 2017, FOIA request.

24. On June 14, 2017, Plaintiff sent a letter to EPA pointing out EPA's violation of FOIA and asking EPA immediately to comply.

25. As of the time of filing this Complaint, the only communication EPA has made to Plaintiff regarding the request subsequent to Plaintiff's June 14, 2017, letter was a June 30, 2017, voicemail from an EPA employee stating that EPA was working on the request.

26. Under FOIA, EPA was required to have provided Plaintiff with a determination on the scope of the documents it would produce and the exemptions it would claim within 20 working days of receiving the request. 5 U.S.C. § 552(a)(6)(A)(i). That 20-day period expired on May 5, 2017, with respect to request EPA-HQ-2017-005890, and on May 11, 2017, with respect to the identical request EPA-HQ-2017-006101. EPA has never provided to Plaintiff the determination required by 5 U.S.C. § 552(a)(6)(A)(i).

27. EPA did not provide written notice to Plaintiff that any unusual circumstances exist, which would have allowed EPA to extend the 20-day time limit of 5 U.S.C. § 552(a)(6)(A)(i) by a maximum of 10 additional working days.

28. Because EPA failed to provide Plaintiff with the determination required by 5 U.S.C. § 552(a)(6)(A)(i) within 20 working days of the request, FOIA prevents EPA from assessing search fees on Plaintiff for records responsive to the April 7, 2017, request. 5 U.S.C. § 552(a)(4)(A)(viii).

29. As of the time of filing this Complaint, EPA has not produced any records to Plaintiff, and EPA has not claimed any exemptions allowing it to withhold the requested records.

30. As of the time of filing this Complaint, EPA has failed to provide Plaintiff with reasonably segregable portions of records (after deletion of portions lawfully exempt under FOIA) that are responsive to Plaintiff's April 7, 2017, request.

31. Because of EPA's violations of FOIA, Plaintiff has been required to expend resources to prosecute this action.

PLAINTIFF'S CLAIMS FOR RELIEF

Claim One (Failure to Conduct Adequate Search)

32. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

33. Plaintiff has a statutory right to have EPA process its FOIA request in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). EPA violated Plaintiff's rights in this regard when it unlawfully failed to undertake a search that is reasonably calculated to locate all records that are responsive to Plaintiff's April 7, 2017, FOIA request letter.

34. Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, EPA will continue to violate Plaintiff's rights to receive public records under FOIA.

Claim Two (Wrongful Withholding of Non-Exempt Records)

35. Plaintiff re-alleges and incorporates by reference the allegations made in paragraphs 1 through 31, inclusive.

36. EPA violated FOIA by refusing to disclose records responsive to Plaintiff's April 7, 2017, FOIA request letter.

37. Plaintiff has a statutory right to the records it seeks.

38. Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, EPA will continue to violate Plaintiff's right to receive public records under FOIA.

Claim Three (Failure to Provide Reasonably Segregable Portions of Records Lawfully Subject to a FOIA Exemption)

39. Plaintiff re-alleges and incorporates by reference the allegations made in paragraphs 1 through 31, inclusive.

40. EPA violated FOIA by failing to provide Plaintiff with reasonably segregable portions of records (after deletion of portions lawfully exempt under FOIA) that are responsive to Plaintiff's April 7, 2017, FOIA request letter, as required by 5 U.S.C. § 552(b).

41. Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, EPA will continue to violate Plaintiff's right under FOIA to receive reasonably segregable portions of records (after deletion of portions lawfully exempt under FOIA).

PRAYER FOR RELIEF

Wherefore, Plaintiff prays that this Court:

1. Order EPA to conduct searches that are reasonably calculated to locate all records responsive to Plaintiff's April 7, 2017, FOIA request letter (numbers EPA-HQ-2017-005890 and EPA-HQ-2017-006101), with the cut-off date for such searches being the date the searches are conducted, and to provide Plaintiff, by a date certain, with all responsive records and reasonably segregable portions of responsive records sought.

2. Declare that EPA's failure to make a timely determination of Plaintiff's April 7, 2017, FOIA request letter is unlawful under FOIA, 5 U.S.C. § 552(a)(6)(A)(i).

3. Declare that EPA's failure to search for and disclose to Plaintiff all records that are responsive to Plaintiff's April 7, 2017, FOIA request letter, as alleged above, is unlawful under FOIA, 5 U.S.C. § 552(a)(3).

4. Declare that EPA's failure to provide Plaintiff with reasonably segregable portions of records (after deletion of portions lawfully exempt under FOIA) that are responsive to Plaintiff's April 7, 2017, FOIA request letter, as alleged above, is unlawful under FOIA, 5 U.S.C. § 552(b).

5. Award Plaintiff its reasonable litigation costs and attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E).

6. Grant such other relief as the Court may deem just and proper.

Dated: August 11, 2017

Respectfully submitted,

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Attorney General of California
DAVID A. ZONANA
Supervising Deputy Attorney General

/s/ Timothy E. Sullivan

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Exhibit B12

**New York, California, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts,
New Mexico, Oregon, Rhode Island, Virginia, Washington, the District of Columbia,
Boulder (CO), Chicago, New York City, Philadelphia, Broward County (FL), and
South Miami (FL)**

August 30, 2017

Kevin S. Minoli
Acting General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW (2310A)
Washington, D.C. 20460

Re: Letter from Administrator Pruitt Advising Governors on Legal Effect of Stay
of Clean Power Plan

Dear Acting General Counsel Minoli:

We write to express our strong disagreement with the unsolicited legal advice that Scott Pruitt, the EPA Administrator, provided to the Governors of 47 states in letters dated March 30, 2017, concerning the effect of the Supreme Court's stay of the Clean Power Plan on the rule's compliance deadlines (see attached example, sent to the Governor of New York). Although the letters do not purport to take final agency action, we are nonetheless concerned that because the EPA Administrator authored the letters, states and power companies may mistakenly believe they can rely on Mr. Pruitt's views. The D.C. Circuit's recent decision on August 8, 2017 granting an abeyance of the litigation for an additional 60 days compels us to weigh in on the issue at this time.¹ Until and unless EPA lawfully replaces the Clean Power Plan, it remains the law of the land, despite the current stay of its compliance deadlines. Because the letters are both premature and legally incorrect, and also improper in light of Mr. Pruitt's agreement to recuse himself from litigation over the Clean Power Plan, EPA should retract the letters.

As you are aware, prior to Mr. Pruitt becoming EPA Administrator, he sued EPA on multiple occasions challenging the proposed and final Clean Power Plan, including *West Virginia et al. v. EPA* (D.C. Cir. No. 15-1363 and consolidated cases). Our states and local governments have intervened in support of the Clean Power Plan in that litigation. Last February, the Supreme Court stayed the Clean Power Plan pending merits review by the D.C. Circuit. The parties proceeded with expedited briefing, and argument was held before an *en banc* panel in late September. The decision remains pending. The

¹ Several non-governmental organizations who are intervenor-respondents in the Clean Power Plan litigation previously wrote you about this same topic by letter dated May 30, 2017. See Letter from Environmental Defense Fund, et al. to Administrator Pruitt and Acting General Counsel Minoli re. Administrator's March 30, 2017 Letter to Governors Regarding the Clean Power Plan (May 30, 2017).

court's August 8 order continuing the case in abeyance means that the stay will remain in effect for at least another 60 days from the date of the order.

Mr. Pruitt's March 30 letters to Governors opined on a controversial question regarding this litigation: If the Clean Power Plan is eventually upheld by the courts (if, for example, EPA's attempt to rescind or replace it is struck down as unlawful), should the rule's deadlines for states to submit plans (September 2018) and for power plants to reduce their carbon dioxide emissions (beginning in 2022) be adjusted?² His letters assert that "case law and past practice of the EPA supports the application of day-to-day tolling" of the rule's "compliance dates" for every day that the litigation remains pending. But there are two significant problems with this statement.

First, when, as here, a compliance deadline is established by a duly promulgated rule, any modification of that deadline can only be accomplished by court order at the conclusion of merits review, or by a revised rulemaking that goes through the familiar notice-and-comment process. Thus, even if the letters had purported to take final agency action (which, as noted above, they did not), there would be no legal support for the unilateral extension of regulatory deadlines through a letter from the EPA Administrator.

Second, there is likewise no legal basis to automatically extend the Clean Power Plan's compliance deadlines for every day that this litigation remains pending, especially given that the compliance deadlines are many months or even years away. The Supreme Court's stay order is silent on this issue, despite the fact that at least one of the stay applicants, Basin Electric Power, explicitly requested such relief.

Mr. Pruitt also fails to identify any specific "case law" supporting such "day-to-day tolling" of the Clean Power Plan's deadlines. And contrary to Mr. Pruitt's view of EPA's "past practice," the agency explained just last year that "the legal effect of the stay on the Clean Power Plan's deadlines is ambiguous, and the question of whether and to what extent tolling is appropriate will need to be resolved once the validity of the Clean Power Plan is finally adjudicated. At that point, the effect of the stay will be able to be assessed in light of all relevant circumstances." 81 Fed. Reg. 42,940, 42,946 (June 30, 2016). That position is fully consistent with a reviewing court's exercise of equitable discretion as well as an agency's obligation to consider all relevant evidence in the rulemaking record. In either situation, one of the "relevant circumstances" that must be considered is whether states and power companies can feasibly comply with their emission reduction obligations under the rule's original deadlines. On that score, EPA

² This question has been the subject of scholarly articles, *see, e.g.*, Richard L. Revesz and Alexander Walker, *Understanding the Stay: The Implications of the Supreme Court's Stay of the Clean Power Plan* (Apr. 2016), available at: http://policyintegrity.org/files/publications/CPP_Stay_PolicyBrief.pdf, as well as discussion at a hearing of the Senate Environment and Public Works Committee last June. *See* <https://www.epw.senate.gov/public/index.cfm/2016/6/implications-of-the-supreme-court-stay-of-the-clean-power-plan>.

noted earlier this year that carbon pollution from power plants has continued to decline since the rule was finalized, putting power plants well on their way to meeting their compliance obligations.³

In addition to being legally erroneous, Mr. Pruitt's opining in the letters on a particular issue concerning the Clean Power Plan litigation is inconsistent with his agreement not to participate in the litigation in light of his representation of Oklahoma in the case. Given his recognition in the May 4, 2017 ethics memorandum that his recusal for one year is appropriate to prevent "any appearance of impropriety," the same underlying concern would apply to the letters, in which he seeks to persuade the Governors of his view of how a stay issued in the course of the litigation should affect parties' future compliance responsibilities.

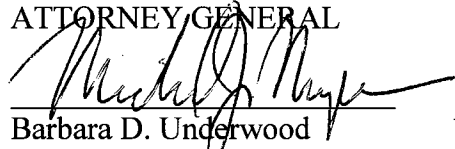
In summary, Mr. Pruitt's erroneous view of the effect of the Supreme Court's stay on the Clean Power Plan's deadlines does not provide a reasonable basis for states or power companies to delay compliance if the rule is eventually upheld. And the letter is also inappropriate in light of his recusal from participating in the litigation. We therefore respectfully request that the agency notify the Governors that it is retracting the letters.

Sincerely,

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³ See Basis for Denial of Petition to Reconsider and Petitions to Stay the CAA section 111(d) Emission Guidelines for Greenhouse Gas Emissions (Jan. 11, 2017), at 22-26, available at https://www.epa.gov/sites/production/files/2017-01/documents/basis_for_denial_of_petitions_to_reconsider_and_petitions_to_stay_the_final_cpp.pdf

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