

January 17, 2017

Mr. Kevin S. Minoli
Principal Deputy General Counsel &
Designated Agency Ethics Officer
U.S. Environmental Protection Agency
Mail Code: 2355A
1200 Pennsylvania Ave., NW
Washington, DC 20460

By first class mail

Re: Ethics Agreement of Edward Scott Pruitt dated January 3, 2017

Dear Mr. Minoli:

Citizens for Responsibility and Ethics in Washington (CREW) writes to express our concern regarding the January 3, 2017, letter to you from Edward Scott Pruitt, available on the website of the Office of Government Ethics, concerning his possible nomination to be Administrator of the United States Environmental Protection Agency (EPA).¹ A copy of this letter is also being sent to Mr. Walter M. Shaub, Jr., Director of the Office of Government Ethics.

In his letter, Mr. Pruitt acknowledges his covered relationship with the State of Oklahoma arising out of his current position as Attorney General of that state, as defined under 5 C.F.R. § 2635.502. He also indicates that he “*will seek* authorization to participate personally and substantially” in “particular matters involving specific parties in which [he] know[s] the State of Oklahoma is a party or represents a party” (emphasis supplied). This deviation from the standard language employed in ethics agreements raises a concern that Mr. Pruitt intends to “switch sides” in the litigation and seek to participate as EPA Administrator, if confirmed, which would present both an actual and an apparent conflict of interest, and therefore would be improper under the governing ethics rules.

As Oklahoma Attorney General, Mr. Pruitt sued EPA at least 14 times,² and reportedly has filed briefs opposing EPA in suits brought by others in a number of other cases, at least some of which appear to be ongoing. For Mr. Pruitt now to switch sides and participate as EPA Administrator in any of these matters would present an actual and apparent conflict of interest that is improper under the governing ethics rules. Many factors are present that would cause “a reasonable person with knowledge of the relevant facts to question his impartiality in these matters” and “to question the integrity of the agency’s programs and operations” if he were now

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)

²<https://www.documentcloud.org/documents/3290872-Pruitt-v-EPA-a-Compilation-of-Oklahoma-14.html>

to participate in these cases as Administrator. *See* 5 C.F.R. § 2635.502(a), (d). These factors include Mr. Pruitt's leading role in and vigorous prosecution of these cases against EPA; his many public statements demonstrating his fixed and firm views opposed to the EPA rules and standards at issue in these cases; and his close alignment with and aggressive fundraising from private sector parties involved in these cases and opposed to EPA.

As discussed below, any interest the Government may have in Mr. Pruitt's participation in these cases cannot outweigh the concern over these actual and apparent conflicts of interest that would lead reasonable persons to doubt his impartiality and question the integrity of the agency's programs and operations. *Id.* The rules further state that "[a]n employee's reputation for honesty and integrity is not a relevant consideration for purposes of any determination required by this section." 5 C.F.R. § 2635.502(e).

It is essential, therefore, that Mr. Pruitt be recused from any participation in these lawsuits if confirmed.

1. *Necessity of recusal regardless of whether Oklahoma remains a party.* Mr. Pruitt acknowledges that, absent a waiver issued by you pursuant to 5 C.F.R. § 2635.502(d), he may not participate personally and substantially as Administrator in particular matters involving specific parties to which the State of Oklahoma is a party. That necessarily includes the lawsuits at issue here. That undertaking, however, leaves open the possibility that he could participate in such lawsuits if Oklahoma were to withdraw from them. That would hardly eliminate the actual conflict and appearance of conflict.

As Oklahoma Attorney General, Mr. Pruitt initiated, participated in, and pursued each of these lawsuits jointly with his counterparts in as many as 26 other states (the number depending on the matter), and with lawyers representing dozens of companies, trade associations, and other organizations subject to the EPA rules and standards at issue. Mr. Pruitt has acknowledged in many public statements that he prepared, brought, and pursued these matters jointly with these other attorneys general, often operating through the Republican Attorneys General Association (RAGA), of which he was previously chairman or a principal officer. Mr. Pruitt has held numerous meetings related to these cases and the underlying rulemakings with industry co-litigants and other companies and trade associations benefited by his litigation. He has solicited and accepted funds to support such activities from co-litigants and other private parties aligned with his lawsuits, including through RAGA and the associated Rule of Law Defense Fund.

It is therefore essential that Mr. Pruitt be required to recuse himself entirely from each of these matters even if Oklahoma were to withdraw from them or to waive any conflict.

2. *Necessity for recusal to last the full length of litigation.* Mr. Pruitt has committed not to participate in these matters (in the absence of a waiver) only for one year following his resignation as Oklahoma Attorney General. These litigation matters, however, could easily extend more than one year into the future. There would be serious actual and apparent conflicts leading to reasonable doubts about Mr. Pruitt's impartiality if he were to participate in these lawsuits as EPA Administrator at *any point* in their lifetime. It is therefore essential that Mr. Pruitt's recusals last through the full course of each matter.

3. *No grounds for waivers under 5 C.F.R. § 2635.502(d)*. As noted above, Mr. Pruitt's letter indicates that he plans to seek waivers to participate in the matters discussed above despite the real and apparent conflicts that his participation would pose. Mr. Pruitt's waiver request for any of these matters should be denied based on consideration of the relevant factors listed under that regulation.

The factors to be considered by the agency designee under 5 C.F.R. § 2635.502(d) 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.

Factor (1). The nature of the relationship involved weighs strongly against a waiver. Mr. Pruitt's prior position as Oklahoma Attorney General made him the principal, top-level official who determined the state's position in each of these cases. Mr. Pruitt's joint prosecution of each case with his fellow attorneys general and other allied parties made him a principal determinant of the position of all the allied parties in each of the cases. In none of these matters was he a lower-level functionary or delegate carrying out a higher Oklahoma official's decisions. And, indeed, it is possible that Mr. Pruitt's failure to recuse himself from these cases would violate the Oklahoma Rules of Professional Conduct for attorneys, further demonstrating that Mr. Pruitt's relationship to these cases argues against the propriety of a waiver, and that Mr. Pruitt's participation would create a significant appearance of a conflict of interest. 5 O.S. § 1-App. 3A, at Rule 1.9. These facts lead to the strongest possible real and apparent conflicts of interest, and the strongest possible basis for a reasonable person to question his impartiality if he were to participate as EPA Administrator.

Factor (3). The nature of his role and the exercise of discretion in it weigh strongly against a waiver. As EPA Administrator, Mr. Pruitt would occupy EPA's most substantive and visible role, and if granted a waiver, he would have the most central task in the agency of directing its position in these cases. To the extent that EPA has legal discretion in any of these matters, for Mr. Pruitt to exercise that discretion in making or directing decisions relevant to the litigation would create an actual conflict. It would also create the strongest possible appearance

of conflict, as well as the strongest possible basis for a reasonable person to question his impartiality.

Factor (4). The lawsuits Mr. Pruitt filed or participated in against the EPA, by their nature, challenge a wide variety of rules and policies that represent the EPA's exercise of its most significant statutory obligations. A real or perceived conflict of interest, therefore, in the agency's conduct of these lawsuits presents a significant risk to the agency's credibility and ongoing ability to comply with the will of Congress, in these areas and perhaps in others as well.

Factor (5) and (6). Neither of these factors would justify a waiver. Another EPA appointee or another agency official could be assigned to participate in these cases, provided that person did not also have either real or apparent conflicts of interest causing a reasonable person to question that person's impartiality. Further, there is no feasible adjustment in the Administrator's duties other than total recusal from these matters that could reduce or eliminate the actual or apparent conflicts that would be presented by Mr. Pruitt's participation.

For the foregoing reasons, we respectfully request that you take the necessary steps as EPA's designated ethics official to avoid what would be severe actual and apparent conflicts of interest, as well as to avoid the concern about impartial decision-making that would present a significant risk to the agency's ongoing ability to meet its statutory obligations, by publicly clarifying that if confirmed as Administrator:

- (1) Mr. Pruitt will be recused from participating on EPA's behalf in each of the litigation matters listed on the attachment;
- (2) His recusal will extend to all parties in each such matter;
- (3) His recusal will last the life of each such matter; and
- (4) He will not be granted waivers from such recusal in any of these matters.

Sincerely,



Noah Bookbinder, Executive Director
Citizens for Responsibility and Ethics in Washington

cc: Walter M. Shaub, Jr.
Director
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