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Attention: Docket ID No. EPA-HQ-OAR-2017-0346
Docket ID No. EPA-HQ-OAR-2010-0505

The Attorneys General of California, Illinois, Iowa, Maine, Maryland, the Commonwealth of Massachusetts, New Mexico, New York, Oregon, the Commonwealth of Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia, the State of Colorado, and the Corporation Counsel of the City of Chicago ("States") respectfully submit these comments on the Environmental Protection Agency's ("EPA") two proposed rules that would collectively stay, for a period of over two years, multiple Clean Air Act compliance requirements contained in the final rule titled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources," published in the Federal Register on June 3, 2016 ("2016 Rule"). *See* Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Three Month Stay of Certain Requirements, 82 Fed. Reg. 27,641 (June 16, 2017), Docket ID No. EPA-HQ-OAR-2017-0346; Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements, 82 Fed. Reg. 27,645 (June 16, 2017), Docket ID No. EPA-HQ-OAR-2010-0505 ("Proposed Stay Rules").

The Proposed Stay Rules are blatantly unlawful; EPA lacks statutory authority to impose the proposed stays—which would effectively repeal key provisions of the 2016 Rule for twenty-seven months—and its effort amounts to an impermissible end-run around well-established administrative law requirements governing the process for repeal of federal rules.[1] The fact that EPA is taking notice and comment does not cure that fatal defect. The Proposed Stay Rules are also arbitrary and capricious because EPA has failed to either justify its reversal of its prior position regarding the importance of reducing methane emissions from the oil and natural gas

[1] To the extent EPA claims a need for additional time to reconsider these key provisions of the 2016 Rule, *see, e.g.*, 82 Fed. Reg. 27,645, that rationale is unavailing in light of the recent decision by the Court of Appeals for the District of Columbia Circuit holding that EPA's initial grant of a separate three-month administrative stay in furtherance of its reconsideration of those same provisions was arbitrary and capricious, since the underlying reconsideration grant failed to satisfy the requirements of the Act. *Clean Air Council v. Pruitt*, 2017 WL 2838112 (D.C. Cir. July 3, 2017).

sector or reconcile the stay with its own rulemaking record. Administrator Pruitt's involvement also renders the Proposed Stay Rules arbitrary and capricious, an abuse of discretion, and unconstitutional, because of his direct involvement in litigation challenging the 2016 Rule.

Further, the Proposed Stay Rules would significantly harm our states by delaying reductions in emissions of methane, volatile organic compounds ("VOCs"), and hazardous air pollutants. EPA's Proposed Stay Rules seek to freeze multiple important compliance requirements contained in the 2016 Rule. The 2016 Rule satisfies EPA's long overdue statutory obligation to limit greenhouse gas ("GHG") emissions—specifically methane—from new oil and natural gas facilities that harm public health and welfare. The oil and natural gas sector is the largest industrial source of methane emissions, accounting for a third of total methane emissions in the United States.[2] According to EPA, the rule will prevent 300,000 tons of methane emissions in 2020, and 510,000 tons of methane emissions in 2025. 81 Fed. Reg. at 35,827. The 2016 Rule will thus help to prevent and mitigate harms that climate change poses to human health and the environment, including increased heat-related deaths, damaged coastal areas, disrupted ecosystems, more severe weather events, significant reduction in water storage in winter snowpack in mountainous regions, and longer and more frequent droughts. 81 Fed. Reg. at 35,834-35,837; *see also Massachusetts v. EPA*, 549 U.S. 497, 521 (2007); Endangerment & Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,523-66,536 (Dec. 15, 2009). Although carbon dioxide is the most ubiquitous GHG, methane is far more potent on a per unit basis, with a 100-year global warming potential twenty-eight to thirty-six times that of carbon dioxide according to studies cited by EPA. 81 Fed. Reg. at 35,837-35,838. In addition to reducing methane emissions, the 2016 Rule also places limits on VOC emissions and, as an additional benefit, reduces hazardous air pollutant emissions, which will help clean the air in many local communities near oil and natural gas operations. *Id*. at 35,827.[3] By exempting industry compliance with the requirements of the 2016 Rule, EPA's Proposed Stay Rules will adversely impact public health and the environment. Each day the stay is in place, our residents will be exposed to methane, VOCs, and hazardous air

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[2] EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2015 (2017) ("2017 GHGI"), at ES-16, Table ES-2, *available at* https://www.epa.gov/sites/production/files/2017-02/documents/2017_complete_report.pdf

[3] EPA's issuance of the 2016 Rule also triggered the agency's duty to propose guidelines for states to develop plans to limit methane emissions from existing sources under Clean Air Act section 111(d). 42 U.S.C. § 7411(d); 40 C.F.R. § 60.21(a). *See* Letter from 15 Attorneys General and Chicago Corporation Counsel to Administrator Pruitt (June 29, 2017), *available at* https://ag.ny.gov/sites/default/files/2017_06_29_ltr_oag-epa_clean_air_act_notice_of_intent_to_sue.pdf. Regulation of emissions from existing sources is crucial because existing sources comprise the vast majority of the sector's emissions. *See* Environmental Defense Fund, Rising Risk: Improving Methane Disclosure in the Oil and Gas Industry (January 2016), *available at* https://www.edf.org/sites/default/files/content/rising_risk_full_report.pdf (stating that "roughly 90% of emissions in 2018 are forecast to come from existing sources.").

pollutants that would otherwise have been avoided if the 2016 Rule's requirements remained in force.

Therefore, for the reasons detailed herein, our States strongly oppose the Proposed Stay Rules and respectfully request that EPA withdraw them and fulfill its most basic duty to implement and enforce the 2016 Rule's important public health and environmental protections.

I. REGULATORY BACKGROUND

Section 111 of the Clean Air Act contains the New Source Performance Standards ("NSPS") program, which requires EPA to regulate all categories of stationary (non-vehicle) sources that cause, or contribute significantly to, air pollution that may reasonably be anticipated to endanger public health or welfare. 42 U.S.C. § 7411(b)(1)(A). Section 111(b) requires EPA to establish standards of performance governing the emission of air pollutants from new sources, and to review and, if appropriate, revise, those standards at least every eight years. 42 U.S.C. § 7411(b)(1)(B). EPA sets performance standards for new sources by reference to emissions levels that can be achieved using the most up-to-date control technology that is both feasible and cost-effective for each type of pollutant, but it does not mandate any specific equipment or technology. 42 U.S.C. § 7411(a)(1) & (b)(5). Under the Clean Air Act, an existing source that is modified or reconstructed after regulations are proposed for new sources is also considered a new source. 42 U.S.C. § 7411(a)(2); 40 C.F.R. § 60.15.

In 1979, EPA listed crude oil and natural gas production as a source category that contributes significantly to air pollution that may reasonably be anticipated to endanger public health and welfare. *See* Priority List and Additions to the List of Categories of Stationary Sources, 44 Fed. Reg. 49,222 (Aug. 21, 1979). EPA originally promulgated standards of performance for the oil and natural gas sector in 1985. The eight-year deadline for reviewing these standards expired in 1993. EPA failed to timely review the standards of performance, leading multiple groups to file suit in 2009 to compel such review. That case, *Wild Earth Guardians v. EPA*, No. 1:09-CV-00089 (D.D.C.), resulted in a consent decree setting forth a schedule for proposing any final revisions by November 30, 2011. EPA proposed revisions to the oil and natural gas NSPS in August 2011, 76 Fed. Reg. 52,738 (Aug. 23, 2011), and signed a final rule to complete the mandated review for oil and natural gas operations on April 17, 2012. 77 Fed. Reg. 49,490 (Aug. 16, 2012) ("2012 Rule"). However, despite previously determining in 2009 that methane and other GHGs endanger public health and welfare, EPA did not establish performance standards or emission guidelines for methane emissions from this industrial sector in the 2012 Rule.

On December 11, 2012, New York, Connecticut, Delaware, Maryland, Massachusetts, Rhode Island, and Vermont notified EPA of their intent to sue the agency for violating the Clean Air Act by failing to adopt limits on methane emissions from equipment used in oil and natural

gas production, processing, and transmission in the 2012 Rule. [4] As explained in that notice letter, EPA had determined that methane emissions endanger public health and welfare, and that processes and equipment in the oil and natural gas sector emit vast quantities of methane. EPA had compelling data, including from eighteen years of experience administering the Natural Gas Star Program, demonstrating that many measures to avoid (or reduce) methane leaks from new and existing oil and natural gas operations were available and cost-effective. In light of EPA's findings, those States asserted that EPA's failure in its 2012 rulemaking to determine whether standards limiting methane emissions from oil and natural gas operations under section 111 of the Clean Air Act were appropriate was a violation of a nondiscretionary duty of the Administrator and constituted an unreasonable delay in taking agency action.

After 2012, additional studies confirmed that the oil and natural gas sector is the largest industrial source of methane emissions, accounting for a third of total methane emissions in the United States. *See* Oil and Natural Gas Sector: Emission Standards for New and Modified Sources, Proposed Rule, 80 Fed. Reg. 56,593. Recognizing the importance of reducing methane emissions, in June 2013, President Obama issued a Climate Action Plan, which directed EPA and other federal agencies to develop a comprehensive interagency strategy to reduce methane emissions. In March 2014, the Obama Administration built on the Climate Action Plan with its Strategy to Reduce Methane Emissions. That strategy identified methane reductions as an important step to achieve near-term beneficial impacts in mitigating global climate change and committed EPA to assessing significant sources of methane and other emissions from the oil and natural gas sector, soliciting input from independent experts through a series of technical white papers, and determining how best to pursue further methane reductions from these sources. Many of the undersigned Attorneys General filed comments on the EPA white papers advocating for the direct regulation of methane from new and existing oil and natural gas development and delivery equipment.[5] States that had noticed their intent to sue EPA over its failure to address oil and natural gas sector methane emissions withheld suit as these efforts took shape.

In January 2015, the Administration announced its goal to cut methane emissions from the oil and natural gas sector by as much as forty-five percent from 2012 levels by 2025. In September 2015, EPA proposed regulations to require new and modified equipment to meet standards to limit their methane emissions. 80 Fed. Reg. 56,593 (Sept. 18, 2015). Many of the undersigned Attorneys General submitted comments on the proposed standards for new and modified sources, and further urged EPA to move forward expeditiously with regulation of

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[4] *See* Attachment 1, Clean Air Act Notice of Intent to Sue Letter to Lisa P. Jackson, Administrator, U.S. Environmental Protection Agency, from New York, Connecticut, Delaware, Maryland, Massachusetts, Rhode Island, and Vermont (Dec. 11, 2012).

[5] *See* Attachment 2, Letter from Eric T. Schneiderman, et al., to Gina McCarthy, "Re: Comments on EPA Methane White Papers" (June 16, 2014) (signed by attorneys general of Delaware, Maryland, Massachusetts, New York, Oregon, Rhode Island, and Vermont); See Attachment 3, Letter from Eric Schneiderman, et al., to Janet McCabe, "Re: Addressing Methane Emissions from Distribution Sector" (Sept. 12, 2014) (signed by attorneys general of Delaware, Maryland, Massachusetts, New York, Oregon, Rhode Island, and Vermont).

existing sources. *See, e.g.*, Letter from Attorneys General of New York, Massachusetts, Oregon, Rhode Island, and Vermont to United States Environmental Protection Agency, Docket ID No. EPA-HQ-OAR-2010-0505 (Dec. 4, 2015).

On June 3, 2016, pursuant to its authority under Section 111(b) of the Clean Air Act, EPA finalized the 2016 Rule to reduce emissions of methane, VOCs and other pollutants from new and modified production, gathering, processing, transmission and storage equipment in the oil and natural gas industry. 81 Fed. Reg. 35,824 (June 3, 2016). Specifically, the 2016 Rule targets the following emissions sources of methane and VOCs: hydraulically fractured oil well completions, pneumatic pumps, fugitive emissions from well sites and compressor stations, and equipment leaks at natural gas processing plants. *Id.* at 35,825. By this rule, EPA encouraged the use of emerging technology in leak monitoring and set a fixed schedule for monitoring leaks of twice per year for all well sites and four times per year for all compressor stations. *Id.* at 35,826, 35,846. According to EPA, the 2016 Rule is expected to reduce 300,000 tons of methane, 150,000 tons of VOCs, and 1,900 tons of hazardous air pollutants (as a co-benefit of reducing VOCs) in 2020. *Id.* at 35,827. In 2025, the rule would reduce 510,000 tons of methane, 210,000 tons of VOCs, and 3,900 tons of hazardous air pollutants. *Id.* EPA analyzed the costs and benefits of the 2016 Rule, including the revenues from recovered natural gas that would otherwise be vented, and determined that the 2016 Rule would result in a net benefit estimated at $35 million in 2020 and $170 million in 2025. *Id.* at 35,827-35,828.

The 2016 Rule also complements state regulation to control methane emissions from the oil and natural gas sector. For example, California's regulation, approved by the California Air Resources Board in March 2017, requires quarterly monitoring and repairing of methane leaks from both onshore and offshore oil and natural gas wells, natural gas processing facilities, compressor stations, and other equipment used in the processing and delivery of oil and natural gas. *See* Cal. Code Regs. tit. 17, §§ 95665, *et al*. California's regulation requires oil and natural gas operators above a certain size to implement vapor recovery systems that will capture methane so that it can be reused. California's regulation seeks to curb methane emissions at oil and natural gas production facilities by up to forty-five percent over the next nine years.[6] Colorado adopted rules in February 2014 that govern new and existing wells and natural gas compressor stations. Colorado requires leak inspections either monthly, quarterly, annually, or one time, depending on facility emissions. These regulations are expected to reduce methane and ethane emissions from Colorado's oil and natural gas sector by approximately 64,000 tons per year. In July 2017, Colorado proposed to require more frequent inspections within the state's ozone nonattainment area. Colorado's experience demonstrates that infrared camera inspections are cost-effective.

[6] New York is also moving ahead to develop, propose and adopt, as necessary, regulations to limit emissions from existing oil and natural gas transmission facilities, such as compressor stations, not regulated by the federal New Source Rule. *See* New York Methane Reduction Plan (May 2017), *available at* http://www.dec.ny.gov/docs/administration_pdf/mrpfinal.pdf.

Even with these robust state efforts, EPA action is needed—and, indeed, required—under the Clean Air Act, to ensure baseline national standards of performance in the oil and natural gas sector, especially in states with no such backstop programs. Under Administrator Pruitt, however, there has been a significant reversal in federal efforts to address methane emissions from this sector. In March 2017—in response to a request from Attorneys General with whom he was previously allied in opposing EPA rules—Administrator Pruitt withdrew, without any notice or opportunity to comment, EPA's information collection request to the oil and natural gas industry requesting information on methane emissions from existing sources. The agency had declared this information vital to regulating existing sources in this sector. EPA ICR No. 2548.01, Nov. 10, 2016. Many of our States objected to that unexplained withdrawal.[7] On April 18, 2017, Administrator Pruitt announced that EPA had convened a proceeding for reconsideration of the 2016 Rule. On June 5, 2017, EPA issued its first, administrative, three-month stay of the rule, and on June 16, 2017, EPA announced its additional proposed twenty-seven month stays of the 2016 Rule.

II. EPA'S PROPOSED STAY RULES OF THE 2016 RULE WILL ADVERSELY IMPACT PUBLIC HEALTH AND THE ENVIRONMENT

The States have a demonstrated, legally protected interest in protecting our residents from harmful air pollution that contributes to climate change and endangers public health and welfare. By EPA's own admission, the 2016 Rule will prevent thousands of tons of methane, VOCs, and hazardous air pollutants from being emitted into the air from the oil and natural gas sector. Numerous scientific assessments, including, but not limited to, EPA's 2009 Endangerment Finding,[8] establish that anthropogenic GHG emissions, including methane, may reasonably be anticipated to endanger public health and welfare. Some of those public health impacts include increased ozone pollution (VOCs are a precursor to ground-level ozone formation[9]) with an associated increased risk of morbidity and mortality; extreme weather events (e.g., hurricanes, storms, heat waves) resulting in increased risk of death, injuries, illness, infections and disease; and rising sea levels with coastal areas at risk of damage to property, land erosion, and habitat loss. *See* 81 Fed. Reg. 35,824, 35,833-35,834. Children, the elderly, and the poor are most vulnerable to climate-related health effects. *Id.* at 35,833. Scientific assessments since the 2009 Endangerment Finding have only strengthened the case that GHGs endanger public health and welfare, and we are currently seeing new records for climate indicators such as increased global average surface temperatures (the last fifteen years have been fifteen of the sixteen warmest years on record), Arctic sea ice retreat, and increased GHG concentrations in the atmosphere. *Id.* at 35,834-35,836.

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[7] *See* Letter re: Withdrawal of Final Methane Information Collection Request to Scott Pruitt, Administrator, from Massachusetts, California, District of Columbia, Illinois, Maine, Maryland, New York, Rhode Island, and Vermont (Apr. 3, 2017).

[8] *See* "Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Rule," 74 Fed. Reg. 66,496 (Dec. 15, 2009).

[9] Ground level ozone is formed when VOCs react with oxides of nitrogen in sunlight.

The public health impacts of VOCs are also well documented. *Id.* at 35,837. VOCs are a main precursor to the formation of ozone, which can cause harmful respiratory symptoms such as airway inflammation and asthma. *Id.* Long-term exposure to VOCs can also result in premature death from lung and/or heart disease. *Id.* Children and people with respiratory disease are most at risk. *Id.* EPA has further found that harmful hazardous air pollutants like formaldehyde and benzene are known to cause cancer and other adverse health effects. *Id.* at 35,824, 35,837 ("[B]enzene . . . can lead to a variety of health concerns such as cancer and noncancer illnesses (e.g., respiratory, neurological).").

By exempting industry compliance with these important safeguards, EPA's Proposed Stay Rules will adversely impact public health and the environment. More than 18,000 oil and natural gas wells throughout the country have been drilled, fractured, or re-fractured since the 2016 Rule was proposed on September 18, 2015. *See* Decl. of Dr. David R. Lyon, Attachment 5 to Petitioners' Emergency Motion for a Stay or, in the Alternative, Summary Vacatur, *Clean Air Council, et al. v. Pruitt*, No. 17-1145 (D.C. Cir., June 5, 2017) (ECF No. 1678141). More than 14,000 such wells are subject to the leak detection and repair requirements of the 2016 Rule and 11,000 such wells are producing wells located in states that do not impose their own comparable leak detection and repair programs. *Id.* Thus, if EPA's Proposed Stay Rules went into effect, those wells—and any additional new wells currently under development—will not be subject to the federal compliance requirements, including the continued inspection and repair of leaks of these pollutants and submissions of reports. As such, those residents will be exposed to methane, VOCs, and hazardous air pollutants that would otherwise have been avoided if requirements to find and fix leaks remained in force. Leaving aside any new wells, if the 2016 Rule is stayed for the proposed twenty-seven months, at least 48,138 tons of methane, 13,272 tons of VOCs, and 506 tons of hazardous air pollutants will be emitted during that period that would have been controlled and prevented under the 2016 Rule. *See id.*, at 13 (stating that the stay of the 2016 Rule for one year would result in 21,395 tons of methane, 5,899 tons of VOCs, and 225 tons of hazardous air pollutants). EPA even acknowledges that the environmental health or safety harms caused by the Proposed Stay Rules will have a "disproportionate effect on children." 82 Fed. Reg. 27,645, 27,650 (June 16, 2017).[10] It has wholly failed to justify the Proposed Stay Rules in light of the harms they will likely cause.

III. EPA'S PROPOSED STAY RULES EXCEED ITS STATUTORY AUTHORITY UNDER THE CAA

The Proposed Stay Rules would put in place a two-year stay, which qualifies as a major rule and would take effect sixty-days after publication, and a three-month stay that would take

[10] A recent study found that the increase in ozone levels in 2025 from oil and natural gas emissions will result in 750,000 summertime asthma attacks in children under the age of 18. *See* Gasping for Breath, An analysis of the health effects from ozone pollution from the oil and gas industry, Clean Air Task Force (Aug. 2016), *available at* http://www.catf.us/resources/publications/files/Gasping_for_Breath.pdf

effect immediately upon publication. EPA's proposed action would thereby seek to deliver to industry an uninterrupted exemption from the rule's requirements between the expiration of EPA's original three-month stay (which the D.C. Circuit Court of Appeals struck down) and the effective date of EPA's two-year stay. *See* 82 Fed. Reg. at 27,641. EPA asserts that the Proposed Stay Rules would provide EPA "sufficient time to propose, take public comment, and issue a final action on the issues concerning the specific requirements on which EPA has granted reconsideration." *Id*. at 27,645. Those reconsideration issues are: (1) EPA's decision to regulate low-production wells, (2) the process for proving compliance by "alternative means," (3) the requirement that a professional engineer certify proper design of vent systems, and (4) EPA's decision to exempt pneumatic pumps from regulation with a professional engineer certification. Notably, these are the same four issues that EPA relied upon to issue its unlawful stay of the rule under Clean Air Act section 307(d)(7)(B) on June 5, 2017.

A. EPA's Proposed Stay Rules Run Afoul of Section 307(d)(7)(B)'s Three-Month Limitation

Administrative agencies may act only pursuant to the authority delegated to them by Congress. *See Verizon v. FCC*, 740 F.3d 623, 632 (D.C. Cir. 2014). "Accordingly, EPA must point to something in either the Clean Air Act or the [Administrative Procedure Act] that gives it authority to stay the [2016 Rule]." *Clean Air Council v. Pruitt*, 2017 WL 2838112, at *4 (D.C. Cir. July 3, 2017). Here, EPA fails to cite any statutory authority for the Proposed Stay Rules, but references Clean Air Act section 307(d)(7)(B). Section 307(d)(7)(B) authorizes the EPA Administrator to "convene a proceeding for reconsideration" if a person "raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection" within the public comment period or if the grounds for such objection arose after the public comment period and "if such objection is of central relevance to the outcome of the rule." 42 U.S.C. § 7607(d)(7)(B). Section 307(d)(7)(B) only provides, however, for a limited *three-month* administrative stay of the rule during reconsideration. *Id.*; *see also Lead Indus. Ass'n v. EPA*, 647 F.2d 1184, 1186 (D.C. Cir. 1980) (the Act "limits any stay that may be issued by EPA or a court during . . . reconsideration to a period of no longer than three months."). Indeed, in a separate notice of proposed rulemaking delaying another Clean Air Act rule, EPA recently acknowledged that the term of an administrative stay granted pursuant to Section 307(d)(7)(B) is limited to three months. *See* Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Further Delay of Effective Date, 82 Fed. Reg. 27,133, 27,134 (June 14, 2017). Therefore, EPA's Proposed Stay Rules based on the grant of reconsideration contravene the express language of Clean Air Act section 307(d)(7)(B).

EPA further makes the vague assertion that "[w]hen we have issued similar stays in the past, it has often been our practice to also propose a longer stay through a rulemaking process." 82 Fed. Reg. at 27,646 (citing 74 Fed. Reg. 36,427 (July 23, 2009)). In that final action, EPA relied on Clean Air Act section 301(a) to issue a nine-month stay of a regulation. *See* 74 Fed. Reg. 48,153 (Sept. 22, 2009). To the extent EPA is relying here on its general rulemaking authority under section 301 of the Clean Air Act for the Proposed Stay Rules, the D.C. Circuit has held that EPA cannot do so. *See Natural Res. Def. Council v. Reilly*, 976 F.2d 36, 40-41

(D.C. Cir. 1992). In *Reilly*, EPA attempted to use its general rulemaking authority under Section 301 to stay the effective date of a previously finalized rule. Section 301 authorizes the EPA Administrator "to prescribe such regulations as are necessary to carry out his functions under this chapter." 42 U.S.C. § 7601(a)(1). *Reilly*, 976 F.2d at 40. The D.C. Circuit held that section 301 does not authorize EPA to stay regulations already promulgated and, in fact, "EPA ha[s] no authority to stay the effectiveness of a promulgated standard except for the single, three-month period authorized by section 307(d)(7)(B)." *Id.* at 40-41; *see also* 42 U.S.C. § 7607(b)(1) ("[t]he filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action … *and shall not postpone the effectiveness* of such rule or action) (emphasis added); *Id.* §7607(d)(7)(B) ("such reconsideration *shall not postpone the effectiveness* of the rule.") (emphasis added). The decision in *Reilly* comports with the Clean Air Act's express mandate that regulations shall go into effect upon promulgation. *See* 42 U.S.C. § 7611(b)(1)(B) ("Standards of performance or revisions thereof *shall become effective upon promulgation*") (emphasis added); *see also id.* § 7411(e) ("After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source").

B. The D.C. Circuit Has Already Ruled That Section 307(d)(7)(B) Does Not Authorize a Stay of the 2016 Rule for the Reconsideration Issues That EPA Has Identified

Even if Clean Air Act section 307(d)(7)(B) authorized a stay longer than three months pending reconsideration—and it does not—the D.C. Circuit has already ruled that EPA's first three-month stay was arbitrary and capricious and in excess of EPA's statutory authority. EPA issued its first, administrative, three-month stay of the 2016 Rule on June 5, 2017, citing Clean Air Act section 307(d)(7)(B) and asserting that industry's petitions for reconsideration raised new issues that could not have been raised during the rulemaking. A group of environmental organizations, joined by many of the undersigned States, challenged EPA's decision in the D.C. Circuit and filed an "emergency motion for a stay or, in the alternative, summary vacatur."

On July 3, 2017, the D.C. Circuit vacated the stay as unauthorized by Clean Air Act section 307(d)(7)(B). The Court found, upon examination of the record, that "industry groups had ample opportunity to comment on all four issues on which EPA granted reconsideration, and in several instances, the agency incorporated those comments directly into the final rule." *Clean Air Council*, 2017 WL 2838112 at *9. Therefore, "[b]ecause it was not 'impracticable' for industry groups to have raised such objections during the notice and comment period, CAA section 307(d)(7)(B) did not require reconsideration and did not authorize the stay." *Id*. As such, EPA's reliance on the same four reconsideration issues as the rationale for its Proposed Stay Rules makes the twenty-seven month stay arbitrary and capricious as well.

IV. EPA'S PROPOSED STAY RULES ARE ARBITRARY AND CAPRICIOUS, AN ABUSE OF DISCRETION, AND CONTRARY TO LAW

EPA's Proposed Stay Rules are also arbitrary and capricious because EPA fails either to justify reversal of its position as set forth in the 2016 Rule, or reconcile its decision to stay the 2016 Rule with the determination in its rulemaking record that the 2016 Rule is necessary to address harm to public health and welfare. Further, because the evidence shows that Administrator Pruitt has prejudged the Proposed Stay Rules, his involvement as decision maker is a violation of due process. Finally, EPA's failure to require Administrator Pruitt to undergo the ethics authorization process before participating in the rulemaking is an action without observance of procedure of law rendering the Stay Rules subject to reversal under section 307(d)(9)(D) of the Clean Air Act.

A. EPA Fails to Justify its Change of Position or Reconcile the Proposed Stay Rules with Its Own Rulemaking Record

As the Supreme Court has explained, "[o]ne of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). The requirement is satisfied "when the agency's explanation is clear enough that its 'path may reasonably be discerned.'" *Id*. (citing *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974)); *see also Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.") "But where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law." *Encino*, 136 S. Ct. at 2125.

EPA's Proposed Stay Rules are "essentially an order delaying the rule's effective date, and [the D.C. Circuit] has held that such orders are tantamount to amending or revoking a rule." *Clean Air Council* 2017 WL 2838112 at *2; *see Public Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) (holding the temporary suspension of a rule pending a new notice and comment process "is a paradigm of a revocation" and represents "a 180 degree reversal of [the agency's] 'former views as to the proper course.'"). In addition, because the Proposed Stay Rules represent a change in EPA's position, the Administrative Procedure Act requires that the agency meet several requirements, including that it: (1) display "awareness that it is changing position;" (2) show that "the new policy is permissible under the statute"; (3) "believe[]" the new policy is better; and (4) provide "good reasons" for the new policy. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). And if the Proposed Stay Rules rest upon factual findings that contradict a prior policy, then the agency must include "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy. *Id*. at 515-16; *see also Lone Mountain Processing, Inc. v. Secretary of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013) ("[A]n agency changing its course must supply a reasoned analysis indicating

that prior policies and standards are being deliberately changed, not casually ignored. Failing to supply such analysis renders the agency's action arbitrary and capricious.")

Here, EPA has not met any of these criteria. First, it has not displayed any awareness that it is changing its position that the 2016 Rule is necessary now to address harm to public health and welfare from oil and natural gas facilities. Second, it has failed to demonstrate that delaying the 2016 Rule's compliance obligations is permissible under the Clean Air Act, as discussed above. Third, EPA has not even articulated a reasonable belief that the delay is consistent with any of the statute's objectives. Fourth, it has not provided "good reasons" for the Proposed Stay Rules. EPA's reason for the second, proposed, three-month stay is to avoid the potential gap and "resulting confusion" created by the expiration of EPA's original administrative three-month stay (which was struck down by the D.C. Circuit in July of 2017) and the effective date of EPA's proposed two-year stay. 82 Fed. Reg. 27,641. EPA's reason for the proposed two-year stay is to give EPA "sufficient time to propose, take public comment, and issue a final action on the issues concerning the specific requirements on which EPA has granted reconsideration." 82 Fed. Reg. 27,645. Thus, in issuing the Proposed Stay Rules, EPA relies solely on the reconsideration issues—a rationale already rejected by the D.C. Circuit. Finally, EPA has not provided *any* reasoned basis for rejecting or revising the conclusions set forth in the rulemaking record for the 2016 Rule, and has not demonstrated why it can now reject those findings. Indeed, as in *Encino*, EPA has "offered barely any explanation" for its change in position. *Encino*, 136 S. Ct. at 2126. In promulgating the 2016 Rule, EPA found significant environmental and health benefits to reducing methane emissions from the oil and natural gas sector. EPA's Proposed Stay Rules contradicts these findings, and EPA must reconcile its significant change in position with its own rulemaking record.

B. EPA Cannot Rely on Administrative Procedure Act Section 705 for EPA's Proposed Stay Rules

Under section 705 of the Administrative Procedure Act, an agency "may postpone the effective date of action taken by it, pending judicial review" when it "finds that justice so requires." 5 U.S.C. § 705. "The standard for [this type of] stay at the agency level is the same as the standard for a stay at the judicial level: each is governed by the four-part preliminary injunction test applied in this Circuit." *Sierra Club v. Jackson*, 833 F.Supp.2d 11, 30 (D.D.C. 2012). Thus, to the extent EPA is relying on section 705 to postpone the effective date of the 2016 Rule, EPA must first demonstrate that "legal challenges to the agency action are likely to succeed on the merits, that there will be irreparable harm absent a stay, that this irreparable harm outweighs the denial of the rule's benefits during the stay, and that the public interest is served by a stay." *Id*. EPA has failed to make that showing.

EPA also fails to draw a rational connection between the Proposed Stay Rules and any pending judicial review of the 2016 Rule. *See Sierra Club*, *supra*, 833 F.Supp.2d at 34 ("EPA seeks to justify a stay of its rules 'pending judicial review,' the agency must have articulated, at a minimum, a rational connection between its stay and the underlying litigation in the court of appeals.") Drawing that rational connection will prove difficult given that on May 18, 2017, EPA

successfully moved the D.C. Circuit to hold in abeyance the pending litigation over the merits of the 2016 Rule. Per Curiam Order Granting Mot. to Hold Cases in Abeyance, *American Petroleum Institute v. EPA*, No. 13-1108 (D.C. Cir., May 18, 2017) (ECF No. 1675813). Moreover, EPA's Proposed Stay Rules are tethered solely to objections raised in reconsideration petitions and make no mention of pending litigation. Section 705 does not authorize an agency to postpone the effective date of a rule pending reconsideration.

Finally, the 2016 Rule became effective on August 2, 2016, ten months *before* EPA proposed this twenty-seven month stay, which is "essentially an order delaying the rule's effective date." See *Clean Air Council*, WL 2838112 at *2. EPA therefore lacks authority to issue the Proposed Stay under section 705, because that provision only allows agencies to "postpone the effective date" of a rule before it takes effect. As the D.C. Circuit has found, section 705 only "permits an agency to postpone the effective date of a not yet effective rule, pending judicial review." *Safety-Kleen Corp. v. EPA*, No. 92-1629, 1996 U.S. App. LEXIS 2324, at *2-3 (D.C. Cir. Jan. 19, 1996) (per curiam). Consistent with its plain meaning, EPA has not interpreted section 705 to authorize the agency to postpone the effective date of a rule whose effective date has already passed. *See* 76 Fed. Reg. at 28,326 (finding that the "effective date" of the rule "ha[d] already passed and thus a stay under APA section 705 [wa]s not appropriate"). Therefore, any attempt by EPA to rely on section 705 now for EPA's Proposed Stay Rules directly contravenes EPA's prior interpretation of that statutory provision.

C. Administrator Pruitt's Involvement in EPA's Rulemaking Process on the Proposed Stay Rules Is a Violation of Due Process, Invalidating Any Action to Finalize the Stays

Administrator Pruitt should recuse himself from any further involvement in EPA's Proposed Stay Rules because a failure to do so would violate due process and render the final agency action staying the rule invalid. A government decision maker has prejudged the factual and legal issues in an administrative process if he has already made up his mind before the rulemaking proceedings begin. *See Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1174 (D.C. Cir. 1980). In that circumstance, unless the decision maker is recused from participating in the rulemaking, the agency violates due process. *See Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1170, 1174 (D.C. Cir. 1979). A final agency action reached in violation of due process is invalid under both the Clean Air Act, 42 U.S.C. § 7607(d)(9), and the Administrative Procedure Act, 5 U.S.C. § 706(2).

Here, only one year ago, then-Oklahoma Attorney General Pruitt and other state attorneys general challenged the 2016 Rule as "in excess of the agency's statutory authority . . . arbitrary, capricious, an abuse of discretion and not in accordance with law," and requested the court "to hold unlawful and set aside the rule." Petition for Review, *West Virginia v. EPA*, No. 16-1264 (D.C. Cir., Aug. 2, 2016) (ECF No. 1629120). The attorneys general told the court they "believe strongly that EPA lacks legal authority to promulgate this Rule" and, therefore, sought expedited briefing. Reply in Support of Petitioners' Motion to Govern Further Proceedings, *West Virginia v. EPA*, No. 16-1264 (D.C. Cir., Nov. 14, 2016) (ECF No. 1645884). During his confirmation

process, Administrator Pruitt acknowledged that he "participated personally and substantially" in that case.[11] Later, EPA released a memorandum dated May 4, 2017, in which Administrator Pruitt agreed to recuse himself from specified active court proceedings in which he had sued EPA while serving as Oklahoma Attorney General, including litigation regarding the 2016 Rule.[12] Significantly, Administrator Pruitt's May 2017 recusal memo makes clear that he has not recused himself from participating in the underlying EPA rulemaking for litigation matters in which he has acknowledged a conflict. Thus, Administrator Pruitt has refused to recuse himself from—or even ask for ethics authorization to participate in—rulemakings such as EPA's Proposed Stay Rules.[13]

Administrator Pruitt has already made up his mind that the 2016 Rule must be rescinded due to the illegality he alleged, and EPA's Proposed Stay Rules effectively achieve the same outcome. Administrator Pruitt reiterated during his Senate confirmation process that he continued to believe that: "In each case filed against the EPA, in the view of the State of Oklahoma, the EPA had acted in excess of the authority granted to it by Congress."[14] After being confirmed, Administrator Pruitt continued to issue public statements that he still held the view that all of the lawsuits he filed, such as the one to overturn this 2016 Rule, were correct because EPA had acted outside its statutory authority in issuing the rules.[15] In light of his past conduct

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[11] *See* Attachment 4, *excerpts from* Questions for the Record for the Honorable E. Scott Pruitt, Senate Environment and Public Works Committee, Hearing entitled, "Nomination of Attorney General Scott Pruitt to be Administrator of the U.S. Environmental Protection Agency," Jan. 18, 2017, (hereafter "Questions for the Record"), 14 ("As Attorney General of Oklahoma, I have participated personally and substantially in the following suits against the EPA: . . . *West Virginia v. EPA*, No. 16-1264 (D.C. Cir.)."), *full document available at* https://www.epw.senate.gov/public/_cache/files/6d95005c-bd1a-4779-af7e-be831db6866a/scott-pruitt-qfr-responses-01.18.2017.pdf.

[12] *See* Attachment 5, My Ethics Obligations, Memorandum from E. Scott Pruitt (May 4, 2017), *available at* https://foiaonline.regulations.gov/foia/action/public/view/record?objectId=090004d2812efc2b&fromSearch=true.

[13] When this conflict was pointed out to him by Senators during his confirmation process, Administrator Pruitt responded that he did not understand federal ethics regulations on recusal to apply to regulatory rulemakings of general applicability. *See* Attachment 4, Questions for the Record, 118 (response to Sen. Markey questions 15, 16), 120 (Markey 21), 226 (response to Sen. Whitehouse question 88).

[14] *See* Attachment 4, Questions for the Record, 15-16 (response to Sen. Cardin question 13). *See also id.* 39 (response to Sen. Carper question 8) ("As Attorney General, I have brought legal challenges involving EPA regulations out of concern that EPA has exceeded its statutory authority based on the record and law in that matter.")

[15] On May 11, 2017, Administrator Pruitt's official EPA Administrator Twitter account sent out a statement directing the public to an article on The Daily Caller website, which quotes him explaining the reason he sued EPA so many times as follows: "They deserved it and they

and his statements that the 2016 Rule is invalid as a matter of law and should not be implemented, Administrator Pruitt has already prejudged the outcome of the current administrative process to determine whether implementation of the 2016 Rule should be stayed. His participation in this rulemaking proceeding is therefore a violation of due process. *Lead Indus. Ass'n v. EPA*, 647 F.2d at 1174; *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d at 1170, 1174. Because of this, any resulting finalization of the Proposed Stay Rules should be struck down on the ground that it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "contrary to constitutional right, power, privilege, or immunity." 42 U.S.C. § 7607(d)(9)(A), (B); 5 U.S.C. § 706(2)(A), (B).

D. EPA's Failure to Require Administrator Pruitt to Undergo the Ethics Authorization Process Before Participating in the Rulemaking Is an Action Without Observance of Procedure of Law

In addition, if Administrator's Pruitt participates in finalizing the Proposed Stay Rules, they would be subject to reversal due to EPA's failure to observe procedures required by law. 42 U.S.C. § 7607(d)(9)(D); 5 U.S.C. § 706(2)(D). Federal ethics regulations provide a mechanism for EPA to analyze the appearance of lack of impartiality by Administrator Pruitt in connection with this rulemaking—resulting in either the granting of authorization or disqualification—but EPA did not follow those procedures. That failure is arbitrary and capricious and is "so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such error[] had not been made." 42 U.S.C. § 7607(d)(9)(D).

First, EPA failed to require Administrator Pruitt to follow the procedures specified in 40 C.F.R. § 2635.502(d) to obtain ethics authorization before he became involved in the Proposed Stay Rules. That provision sets forth a multifactor test for determining whether an agency employee may participate in a particular matter where it would raise a question in the mind of a reasonable person about the employee's impartiality.

As Administrator Pruitt conceded in his May 4, 2017, recusal memorandum, he would need to obtain ethics authorization to participate in any of the lawsuits he filed against EPA while serving as Oklahoma Attorney General, as these are considered a "particular matter involving specific parties," and he has a covered relationship with his recent employer and client, the State of Oklahoma.[16] While it is generally true that the obligation to seek prior ethics

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deserved it because they exceeded their statutory authority, they exceeded their constitutional authority." See Attachment 6, *available at* https://twitter.com/EPAScottPruitt/status/862745467679121408

[16] An employee has a covered relationship with a person or entity for whom he "served as officer, director, trustee, general partner, agent, attorney, consultant, contractor or employee." 5 C.F.R. § 2635.502(b)(iv).

authorization applies in the case of a "particular matter involving specific parties,"[17] and that rulemakings of general applicability are usually not treated as a "particular matter involving specific parties," the general rule instructing all federal employees to avoid the appearance of impropriety in carrying out their official duties still applies:

> Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

5 C.F.R. § 2635.101(b)(14). Moreover, the ethics regulations specify that an employee's involvement in matters that do not involve "specific parties," such as most rulemakings, may still require the employee first to obtain authorization from the agency ethics official. When there is a reasonable question as to whether participation in a matter "would raise a question regarding his impartiality," the employee is to seek authorization before participating and not participate without such authorization. 5 C.F.R. § 2635.502(a)(2) (stating that in such circumstances the employee should use the same process to determine whether to participate as would apply to the

[17] Where "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." 40 C.F.R. § 2635.502(a). *See also* 5 C.F.R. § 2635.502(e) ("Unless the employee is authorized to participate in the matter [by the agency designee], an employee shall not participate in a particular matter involving specific parties when . . . the role of a person with whom he has a covered relationship[] is likely to raise a question in the mind of a reasonable person about his impartiality. Disqualification is accomplished by not participating in the matter.")

other conflicts specified in that section).[18] Here, there is no evidence[19] that Administrator Pruitt has sought and obtained explicit written authorization from EPA's Designated Ethics Official to be involved in this rulemaking. Not only has Administrator Pruitt not obtained this authorization before participating in the rulemaking on the stays, he has denied any obligation to do so.

As discussed in section IV.C, *supra*, the facts are compelling that Administrator Pruitt cannot impartially determine whether a stay of the 2016 rule is appropriate. In view of such circumstances, it was arbitrary and capricious for EPA not to determine whether Administrator's Pruitt should have been disqualified from the rulemaking pursuant to 40 C.F.R. § 2635.502(d).

Second, EPA's error was so serious and related to matters of such relevance to the rules that there is a substantial likelihood that any final rule imposing stays of the 2016 Rule would have been significantly changed if such errors had not been made. It is important to the integrity of this rulemaking process that Administrator Pruitt not participate, as his involvement taints what should be an objective and fair decision making process. Indeed, avoiding after-the-fact repercussions of a conflicted employee's involvement in a matter was one of the reasons why the Office of Government Ethics promulgated the regulation in 5 C.F.R. § 2635.502(a)(2). As it explained:

> [E]mployees have long been obligated to act impartially and to avoid even the appearance of loss of impartiality. However, they have not been provided a specific mechanism to resolve difficult issues of whether, in particular circumstances, a possible appearance of loss of impartiality is so significant that it should

[18] The preamble to the Office of Government Ethics' proposed rule introducing this provision (which was adopted in the final rule), explains that even apart from "particular matters involving specific parties," an employee is expected to use the ethics authorization process when an appearance problem arises: "Notwithstanding the section's use of this concept [specific parties] and its focus on specified relationships, questions about an employee's impartiality can arise from any number of interests or relationships an employee might have and *in connection with his or her participation in matters that do not necessarily involve specific parties*. Proposed § 2635.502 therefore provides that *an employee should use the process* set forth in that section when circumstances other than those specifically described raise questions about his or her impartiality in the performance of official duties." Standards of Ethical Conduct for Employees of the Executive Branch, Proposed Rule, 56 Fed. Reg. 33,778, 33,786 (July 23, 1991) (emphasis added); *see also* Attachment 7, Office of Gov't Ethics Memo DO-06-029 (Oct. 4, 2006) at 7, n.9 ("[A]n 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."), *available at*: https://www2.oge.gov/Web/OGE.nsf/0/C10C6B23AC67F74685257E96005FBDD7/$FILE/do-06-02_9.pdf.

> disqualify them from participation in particular matters. The proposed rule would provide employees with *a means to ensure that their conduct will not be found, as a matter of hindsight, to have been improper*.[20]

As discussed in sections III and IV.A and B, *supra*, EPA has failed to articulate a lawful or reasoned basis for staying the 2016 Rule. There is a substantial likelihood that an impartial decision maker, confronted by the same facts and law, would have decided that a stay of the 2016 Rule is unwarranted.

V. CONCLUSION

For these reasons, the States strongly oppose EPA's Proposed Stay Rules and respectfully request that EPA not finalize the twenty-seven month stay of the 2016 Rule.

Sincerely,

FOR THE STATE OF CALIFORNIA

XAVIER BECERRA
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By: /s/ Kavita P. Lesser

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[20] Proposed Rule, Standards of Ethical Conduct for Employees of the Executive Branch, Proposed Rule, 56 Fed. Reg. 33,778, 33,786 (July 23, 1991) (emphasis added).

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ATTACHMENT 1

BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED

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Connecticut Attorney General George Jepsen
Delaware Attorney General Joseph R. Biden, II
Maryland Attorney General Douglas F. Gansler
Massachusetts Attorney General Martha Coakley
Rhode Island Attorney General Peter Kilmartin
Vermont Attorney General William H. Sorrell

December 11, 2012

Lisa P. Jackson
Administrator
Environmental Protection Agency
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RE: Clean Air Act Notice of Intent to Sue for Failure to Determine Whether Standards of Performance Are Appropriate for Methane Emissions from Oil and Gas Operations, and to Establish Such Standards and Related Guidelines for New and Existing Sources

Dear Administrator Jackson:

The States of New York, Connecticut, Delaware, Maryland, Rhode Island, and Vermont, and the Commonwealth of Massachusetts, respectfully request that the Environmental Protection Agency remedy its failure under the Clean Air Act to set performance standards for new sources and guidelines for existing sources that curb emissions of methane from the oil and gas sector. EPA has determined that emissions of this potent greenhouse gas endanger public health and welfare, and that processes and equipment in the oil and gas sector emit vast quantities of methane. Moreover, EPA has compelling data, including from 18 years of experience administering the Natural Gas Star Program, demonstrating that many measures to avoid (or reduce) methane emissions from new and existing oil and gas operations are available and cost-effective. Despite these findings, EPA has missed the applicable deadline for determining whether standards and guidelines limiting methane emissions from oil and gas operations under section 111 of the Clean Air Act are appropriate and for issuing such standards. EPA's ongoing failure to address the sector's methane emissions violates the Clean Air Act and harms the health and welfare of our residents.

I. Background

From severe droughts and heat waves to a string of devastating storms in the northeast over the last two years, it is becoming ever more apparent that increasing greenhouse gas pollution contributes to climate disruption in the U.S. and around the globe. Methane is a very potent greenhouse gas -- pound for pound, it warms the climate about 25 times more than carbon dioxide. EPA has found that the impacts of climate change caused by methane include "increased air and ocean temperatures, changes in

precipitation patterns, melting and thawing of global glaciers and ice, increasingly severe weather events, such as hurricanes of greater intensity and sea level rise." 77 Fed. Reg. 49,490, 49,535 (Aug. 23, 2011). Oil and gas systems are the largest source of methane emissions in the U.S. and the second largest industrial source of U.S. greenhouse gas emissions behind only electric power plants. For example, methane emissions from this sector make almost one-fifth of the contribution to climate change that carbon dioxide emissions from coal-fired power plants do. EPA must fully comply with its legal obligations under the Clean Air Act to regulate emissions that endanger public health and welfare by controlling this significant source of dangerous greenhouse gas pollution.

Section 111 of the Clean Air Act requires EPA to establish standards of performance governing the emission of air pollutants from new sources in the oil and gas sector and to review, and if appropriate, revise, those standards at least every 8 years. *See* 42 U.S.C. § 7411(b)(1)(B). As part of this 8-year review, EPA had a mandatory duty (1) to make a determination whether standards covering methane emissions are "appropriate," and, (2) if it is appropriate, to promulgate standards. The Act and EPA's regulations also require EPA to issue emission guidelines covering the release of methane from any existing oil and gas operations for which standards of performance have been issued. *See id.* § 7411(d); 40 C.F.R. § 60.22(a).

EPA originally promulgated standards of performance for the oil and gas sector in 1985. The 8-year deadline for reviewing these standards expired in 1993. EPA finally signed a rule to complete the mandated review for oil and gas operations on April 17, 2012. 77 Fed. Reg. 49,490 (Aug. 16, 2012). However, although the agency revised the standards for several pollutants, EPA did not make the required appropriateness determination regarding methane, nor did EPA establish performance standards or emission guidelines for methane emissions from this industrial sector.

Consequently, unless you promptly correct these failures, we intend to file suit in federal district court against you as EPA administrator and EPA for failures to timely:

(1) make the required determination whether standards of performance limiting methane emissions from oil and gas sources are appropriate and, if so, failing to timely issue revised performance standards limiting methane emissions from this source category; and

(2) issue emissions guidelines for the control of methane emissions from existing oil and gas sources.

Jurisdiction to adjudicate and enforce the Administrator's failure to carry out non-discretionary duties lies with the district court under section 304 of the Act. *See Environmental Defense Fund v. Thomas*, 870 F.2d 892, 897 (2d Cir. 1989); *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 194 (D.C. Cir. 2011). This letter provides notice as required under section 304 of the Clean Air Act, 42 U.S.C. § 7604, and 40 C.F.R. part 54. Unless EPA takes the required actions by the end of the applicable notice period, we intend to bring a suit for EPA's failure to perform the non-discretionary duties outlined in 42 U.S.C. §§ 7411(b)(1)(B), 7411(d), and 40 C.F.R. § 60.22(a), and for the agency's unreasonable delay in the performance of these duties. The suit will seek injunctive and declaratory relief, the costs of litigation, and may seek other relief.

II. EPA Failed to Perform Its Non-Discretionary Duties to Determine Whether Standards of Performance for Methane Are Appropriate and, if so, to Establish Such Standards and Related Emissions Guidelines.

Section 111 of the Clean Air Act requires EPA to establish "standards of performance" for emissions of air pollutants from categories of new, modified, and existing sources. After EPA sets initial

standards of performance for a listed category, section 111(b)(1)(B) imposes a timetable for EPA to review and revise those standards: "The Administrator shall, at least every 8 years, review and, if appropriate, revise such standards following the procedure required by the subsection for promulgation of such standards." 42 U.S.C. § 7411(b)(1)(B). EPA failed timely to review the standards of performance that it initially established in 1985 for sources in the oil and gas sector, leading multiple groups to file suit in 2009 to compel such review. That case, *Wild Earth Guardians v. EPA*, No. 1:09-CV-00089 (D.D.C.), resulted in a consent decree setting forth a schedule for proposing any final revisions by November 30, 2011.

In August 2011, EPA proposed revisions to the oil and gas NSPS. 76 Fed. Reg. 52,738 (Aug. 23, 2011). EPA did not propose any standards for methane emissions, despite previously determining that methane and other greenhouse gases endanger public health and welfare. 74 Fed. Reg. 66,496 (Dec. 15, 2009). Numerous organizations submitted comments on the proposed rule stating that EPA was required, as part of its mandated 8-year statutory review, to determine whether it was "appropriate" to add standards of performance for additional, previously-unregulated pollutants, such as methane, and, if so, to revise them accordingly.

EPA signed a final rule revising some aspects of the oil and gas standards on April 17, 2012, which was published in the Federal Register on August 16, 2012. 77 Fed. Reg. 49,490. EPA failed to determine whether it is appropriate to establish methane standards. Instead, EPA stated that "[i]n this rule, we are not taking final action with respect to regulation of methane. Rather, we intend to continue to evaluate the appropriateness of regulating methane with an eye toward taking additional steps if appropriate." *Id.* at 49,513. The agency further stated that "over time," it would assess emissions data received pursuant to the recently implemented greenhouse gas emissions reporting program, but set forth no timetable for taking final action to address methane emissions. *Id.*

EPA's failure to decide one way or another within the 8-year statutory review deadline whether it is appropriate to revise the oil and gas NSPS to regulate methane emissions violates section 111(b)(1)(B) of the Clean Air Act. That section imposes a clear-cut nondiscretionary duty of timeliness that requires EPA to make a decision within the 8-year review period whether it is "appropriate" to revise the standards to regulate methane, regardless of whether the substance of that decision is discretionary. The Second Circuit Court of Appeals in *Thomas*, 870 F.2d at 900, held that substantially similar language contained in section 109(d) of the Clean Air Act -- which provides that, at five-year intervals, EPA "shall complete a thorough review" and "promulgate such new standards as may be appropriate"-- imposed a nondiscretionary duty to make a decision. In that case, like here, EPA had declined to make any formal decision to either revise or decline to revise the standards for a specific pollutant. EPA argued that its non-decision was unreviewable by the D.C. Circuit under section 307 because it involved no decision or other agency "action" and was also not subject to challenge in district courts under section 304 because it was discretionary." *Id.* at 896. The Court rejected EPA's argument, holding that EPA may not leave the matter "in a bureaucratic limbo subject neither to review in the District of Columbia Circuit nor to challenge in the district court. *Id.* at 900. While the Court agreed that the "as may be appropriate" language of section 109(d) provided EPA with discretion to determine whether revision was appropriate and what the substance of those revisions should be, the presence of the language "shall complete" and "required" in that section implied that the district court "has jurisdiction to compel the Administrator to make *some* formal decision whether or not to revise the [standards]." *Id.*

Here, section 111(b)(1)(B) contains the mandatory term "shall" -- which applies to both of the verbs "review" and "revise"-- and a clear-cut statutory deadline of "at least every 8 years." Because EPA cannot make any revisions without first completing its review, the language requires EPA to both complete the review and make the revisions within the 8-year review period. Therefore, a district court

has jurisdiction to compel EPA to make a determination one way or another as to whether revision of the oil and gas NSPS is appropriate and to issue any revision it determines is appropriate.

In addition, EPA has a mandatory duty to include in its 8-year review new pollutants like methane that it has not previously regulated, but that it has since determined endanger public health and welfare. It would be wholly inconsistent with the mandatory nature of section 111 if EPA could refuse to address, as part of its 8-year review, air pollutants that are emitted by an already-listed source category and that EPA has already determined endanger public health and welfare. Rather, the structure of the Act demonstrates Congress' intent that EPA thoroughly review and revise NSPS for a source category at least every 8 years and not limit such review to making changes to existing standards, but instead require EPA to enact more stringent air pollution requirements as circumstances change, as new information becomes available regarding the adverse public health and welfare effects of air pollutants, and as new technologies become available to control emissions of such pollutants. Congress contemplated the 8-year review to encompass EPA's revision of the standards to address other air pollutants, particularly those emitted by a source category that, based on current information, are now determined to significantly contribute to that source's endangerment of public health and welfare and/or for which there is demonstrated control technology available. Further, EPA's past practice confirms that the agency must consider during its 8-year review all of the air pollutants emitted by the source category under review and set NSPS for any of those pollutants that cause or contribute significantly to that source's endangerment of public health and welfare and for which there is demonstrated control technology. *See* 41 Fed. Reg. 3826-27 (Jan. 26, 1976) (addition of standards for SO_2 and CO in NSPS for primary aluminum reduction plants); 42 Fed. Reg. 22506-07 (May 3, 1977) (addition of standards for NO_X, SO_2, and CO in NSPS for lime manufacturing plants); 49 Fed. Reg. 25,106-07 (June 19, 1984) (addition of standards for PM, CO, and hydrocarbon emissions in NSPS for fossil fuel-fired industrial steam generating units).

EPA failed to act on regulation of methane under section 111 despite possessing extensive information that adding methane standards for oil and gas operations is "appropriate." In prior 8-year reviews of standards of performance under section 111, EPA has consistently applied two criteria in determining whether it is appropriate to include a standard for a health- and welfare-endangering air pollutant: (i) the extent of the source category's contribution to the emissions of the pollutant, and (ii) the availability of methods to reduce those emissions. *See, e.g.*, 75 Fed. Reg. 54,970 (Sept. 9, 2010) (finalizing new NO_x standard for cement plants). Applying these criteria to the oil and gas sector demonstrates that methane standards are appropriate at this time.

First, EPA has recognized that "processes in the Oil and Natural Gas source category emit significant amounts of methane." 76 Fed. Reg. at 52,756/1. Indeed, the proposal stated that the sector's methane emissions are equivalent to more than 328 million metric tons of carbon dioxide per year. *Id.* at 52,756/2. As a result, oil and gas operations are the second largest industrial source of U.S. greenhouse gas emissions, behind only electric power plants. *Cf.* 74 Fed. Reg. 16,448, 16,597 Table VIII-1 (April 10, 2009) (showing 2009 estimates of greenhouse gas emissions from other industrial source categories). As EPA explained in the 2012 final rule, "methane emissions from the oil and gas industry represent about 40 percent of the total methane emissions from all sources and account for about 5 percent of all CO_2e [carbon dioxide equivalent] emissions in the United States, with natural gas systems being the single largest contributor to United States anthropogenic methane emissions." 77 Fed. Reg. at 49,535/2. Although EPA projects that the standards adopted in the 2012 final rule for emissions of volatile organic compounds (VOCs) and hazardous air pollutants will have the incidental benefit of also reducing annual methane emissions by about 19 million metric tons CO_2e, *id.* at 49,535/3, the vast majority of methane emissions from this sector will remain uncontrolled.

EPA's failure even to consider directly controlling methane emissions through standards and guidelines resulted in the omission of controls for certain operations that emit large amounts of methane.

For example, EPA declined to establish standards for compressors and pneumatic controllers in the natural gas transmission and distribution segment asserting that, although this equipment emits large quantities of methane, much of the VOCs already have been removed by the time the natural gas stream reaches these sources. *See* 77 Fed. Reg. at 49,522-23 (declining to regulate transmission and distribution compressors because of "the relatively low level of VOC emitted from these sources").

Second, there are readily available methods to reduce methane emissions. In fact, the high methane content of these currently uncontrolled emissions means that adopting standards and guidelines that require methane emissions controls would be cost-effective (or even profitable) at many of these additional emission points. In the final rule, EPA recognized the economic value of emissions control measures for oil and gas equipment that lead to the recovery of hydrocarbon products, including methane, "that can be used on-site as fuel or reprocessed within the production process for sale." 77 Fed. Reg. at 49,534/1. Indeed, EPA found that the rule "will result in net annual costs savings of about $11 million (in 2008 dollars)." *Id.* By ending the waste of methane at sources of emissions not covered by the standards for VOCs, standards of performance that address methane emissions directly likely would add to the economic benefits of the rule. For instance, although compressors located at a wellhead or in the transmission, storage, and distribution segment are not covered under the rule, 77 Fed. Reg. at 49,492/2, EPA has determined that the payback period for compressor maintenance activities that reduce methane emissions is a mere 1 to 3 months. *See* EPA, "Reducing Methane Emissions from Compressor Rod Packing Systems" (Oct. 2006) at 1 (indicating payback periods from 1 to 3 months for compressor maintenance activities that reduce methane emissions). In addition, through EPA's voluntary Natural Gas Star Program, EPA has worked with oil and gas companies to identify more than 100 cost-effective technologies and practices to reduce methane emissions from sources of emissions not covered by the rule. *See* http://www.epa.gov/gasstar/tools/recommended.html.

Section 111(d) of the Clean Air Act also requires EPA to address methane emissions from existing sources, as well as from new and modified facilities. 42 U.S.C. § 7411(d)(1)(A). The Act requires EPA to establish procedures under which each state submits to the agency a plan to adopt, implement, and enforce standards of performance for existing sources for certain pollutants, and to promulgate standards of performance under such plans. *Id.* § 7411(d). The existing source requirements apply to those pollutants, such as methane, that have not been identified as criteria pollutants or hazardous air pollutants, but that are regulated under the new source performance standards for a category of sources. *Id.* § 7411(d)(1). Thus, the Act creates a direct connection between the new source standards and those to be developed for existing sources.

EPA's regulations require the agency to publish "emissions guidelines" "which reflect[] the degree of emission reduction achievable through the application of the best system of emission reduction which (taking into account the cost of such reduction) the Administrator has determined has been adequately demonstrated for designated facilities." 40 C.F.R. §§ 60.21(e), 60.22(a, b). These guidelines are implemented by state agencies who develop and submit to EPA plans to curb emissions of designated pollutants from existing sources. *Id.* § 60.23(a); 42 U.S.C. § 7411(d)(1). EPA has issued emission guidelines at the same time as new source standards for a listed category. *See* 62 Fed. Reg. 48,348 (Sept. 15, 1997) (standards of performance and emissions guidelines for hospital/medical/infectious waste incinerators); 61 Fed. Reg. 9905 (Mar. 12, 1996) (same for municipal solid waste landfills); 60 Fed. Reg. 65,387 (Dec. 19, 1995) (same for municipal waste combustors).

In sum, EPA has failed to review and update as necessary the existing oil and gas standards. EPA's continuing failure to make a final appropriateness determination during its 8-year review and to make the necessary revisions is contrary to section 111(b)(1)(B) of the Clean Air Act. *See* 42 U.S.C. § 7411(b)(1)(B). EPA's failure to make an appropriateness determination also has prevented EPA from fulfilling its duty to publish emissions guidelines covering methane emissions from existing facilities in

the oil and gas sector. EPA's continuing failure to publish these guidelines is contrary to section 111(d) of the Clean Air Act and the regulations implementing that section. *See* 42 U.S.C. § 7411(d); 40 C.F.R. § 60.22(a). We are therefore providing notice that, as of 60 days from the date of this letter, we intend to sue you as EPA administrator and EPA for EPA's failure to take these non-discretionary actions.

III. EPA Has Unreasonably Delayed Determining Whether Standards of Performance for Oil and Gas Operations Are Appropriate and, if so, Establishing Such Standards and Related Emissions Guidelines.

As set forth above, section 111(b)(1)(B) imposes a non-discretionary duty on EPA to review and, if appropriate, revise the NSPS for each category of sources, and section 111(d) and 40 C.F.R. § 60.22(a) impose a non-discretionary duty to establish emissions guidelines covering existing sources. Even if those provisions can be read to contain any ambiguity as to the deadline for these mandatory duties, EPA has unreasonably delayed taking action on methane emissions from the oil and gas sector.

EPA has long known the significance of the oil and gas sector's contribution to methane emissions and the availability and cost-effectiveness of measures for reducing those emissions. EPA's knowledge that oil and gas operations are one of the nation's largest methane sources dates to at least 1997, as the agency has published annual sector-by-sector inventories of U.S. greenhouse gas emissions since 1997, covering emissions since 1990.[1] Similarly, EPA has long had ample data on measures for controlling methane emissions. For example, in 2008, EPA explained that because of its experience implementing the agency's Natural Gas STAR Program, a voluntary public-private partnership with the oil and gas industry initiated in 1993, "many of [the] technologies and management practices" available to control methane emissions from the sector "have been well documented (including information on cost, benefits and reduction potential) and implemented in oil and gas systems throughout the U.S." EPA, Office of Air and Radiation, Technical Support Document for the Advanced Notice of Proposed Rulemaking for Greenhouse Gases; Stationary Sources, Section VII at 30 (June 2008).

EPA has been actively engaged in rulemaking to revise the oil and gas sector standards of performance at least since April 2010, when the agency began sending requests to visit regulated facilities to gather information. *See, e.g.*, Letter from K.C. Hustvedt, EPA, to Tom Monahan, ExxonMobil Production Co. (Apr. 30, 2010) Docket No. EPA–HQ–OAR–2010–0505-0053. In response to the 2009 litigation discussed above, EPA proposed revisions to the standards of performance for oil and gas operations in August 2011. 76 Fed. Reg. at 52,738. However, instead of drawing on the successes of the Natural Gas Star Program to propose a course of action, or even soliciting comment on the issue, the agency chose to ignore the problem. The proposal stated only that "[a]lthough this proposed rule does not include standards for regulating [methane emissions], we continue to assess these significant emissions and evaluate appropriate actions for addressing these concerns." *Id.* at 52,756/2. Multiple parties filed comments in November 2011 objecting to the failure to propose methane standards for this source category. Commenters argued that EPA had abundant evidence that uncontrolled methane emissions from oil and gas operations significantly contribute to atmospheric greenhouse gas pollution, that control measures are available and cost-effective, and that methane standards therefore are appropriate and legally required. *See, e.g.*, Comments of Sierra Club et al. at 74-80 (Nov. 30, 2011) Docket No. EPA–HQ–OAR–2010–0505-4240.

Notwithstanding these comments and the detailed information EPA already had in its possession, the agency has failed to make any appropriateness determination regarding the oil and gas sector's

[1] Links to each annual GHG emissions inventory are at http://www.epa.gov/climatechange/emissions/usgginv_archive.html.

methane emissions, or to propose or promulgate performance standards to meet its obligations under section 111(b)(1)(B) of the Act with regard to the oil and gas sector's methane emissions. EPA's failure to complete the rulemaking required under section 111(b)(1)(B) to address methane emissions from new and modified oil and gas operations has also resulted in an unreasonable delay in establishing emissions guidelines for the controlling methane emissions from existing oil and gas sector sources. EPA's unreasonable delay in issuing these guidelines in turn delays both the date by which states must submit plans for the control of methane from existing oil and gas operations, 40 C.F.R. § 60.23(a), and the date by which existing sources must comply with approved pollution control standards, *see id.* § 60.24(c). Therefore, we are also providing 180-day notice that we intend to sue you as EPA administrator and EPA for EPA's unreasonably delaying final agency action to determine whether standards for methane emissions from oil and gas operations are appropriate, to make the necessary revisions to 40 C.F.R. Part 60, and to issue emissions guidelines for methane emissions from existing oil and gas operations.

IV. Conclusion

EPA's acknowledgement that oil and gas operations account for a large share of methane emissions points to the urgent need to reduce these emissions. The agency's long experience with control strategies that recover methane emissions from oil and gas operations for productive uses confirms that there are cost-effective measures for this source category that would provide an appropriate basis for establishing a standard of performance for methane emissions. But EPA's failure to make progress in deciding whether standards are appropriate demonstrates that litigation may be needed to prompt the required agency action. Accordingly, the States of New York, Connecticut, Delaware, Maryland, Rhode Island, and Vermont, and the Commonwealth of Massachusetts, submit this notice of intent to sue for EPA's failure to complete the review of the standards of performance for oil and gas operations as mandated by section 111(b)(1)(B) of the Clean Air Act and for the agency's unreasonable delay in the completion of that action. The States of New York, Connecticut, Delaware, Maryland, Rhode Island, and Vermont, and the Commonwealth of Massachusetts, also give notice of their intent to sue for EPA's failure to complete the emissions guidelines for existing sources required by section 111(d) of the Clean Air Act and EPA's regulations at 40 C.F.R. § 60.22(a) and for the agency's unreasonable delay in the completion of that action.

We are willing to explore any effective means of resolving this matter without the need for litigation. However, if we do not hear from you within the applicable time periods provided in section 304 of the Act, we intend to file suit in United States District Court.

Very truly yours,

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June 16, 2014

Via Electronic Mail (w/cc to: oilandgas.whitepapers@epa.gov)
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Administrator
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Washington, DC 20460

RE: Comments on EPA Methane White Papers

Dear Administrator McCarthy:

The Attorneys General of New York, Delaware, Maryland, Massachusetts, Oregon, Rhode Island, and Vermont (together, "States") respectfully submit these comments on the Environmental Protection Agency's five white papers addressing major sources of methane emissions from the oil and gas sector. These papers stem from the Administration's strategy to reduce methane emissions, which EPA acknowledges to be a key element in the President's Climate Action Plan. The States view EPA's publication of the white papers as a positive step in the direction of cutting methane emissions from the oil and gas industry. The States urge EPA to take the next logical step of promptly setting emission standards and guidelines for methane for these sources under sections 111(b) and (d) of the Clean Air Act for the sources identified in the white papers.

1. Background

The Need for Prompt Action to Reduce Greenhouse Gases, Including Methane

Greenhouse gas pollution is warming our planet, with significant and wide-ranging adverse effects to human health and welfare. The recently released U.S. Global Change Research Program's Third National Climate Assessment concludes that the evidence of human-induced global warming continues to strengthen and that impacts are increasing across the country. Finding that "climate change, once considered an issue for a distant future, has moved firmly into the present," the Assessment's authors present compelling bases for the need to

reduce greenhouse gas emissions from major sources, such as the oil and gas sector.[1] Given the strong body of science that demonstrates the impacts on human health and the environment, EPA must act expeditiously to ensure that major sources of greenhouse gases – such as the oil and gas industry – promptly and aggressively limit their emissions. Prompt and effective action in the power generating, industrial, and transportation sectors are required if the U.S. and the rest of the world are to have a reasonable chance of avoiding the most severe impacts of global warming.

EPA determined in its 2009 endangerment finding that methane is one of the six greenhouse gases that endangers public health and welfare. See 74 Fed. Reg. 46,696 (Dec. 15, 2009). Methane is a very potent greenhouse gas. Pound for pound, it warms the climate about 34 times more than carbon dioxide over a 100-year period, according to the Intergovernmental Panel on Climate Change, and even more over shorter periods. As noted in the White House's Strategy to Reduce Methane Emissions (March 2014), methane accounts for about 9 percent of greenhouse gas emissions in the country, and that percentage will rise by 2030 unless measures are put in place to cut those emissions. Id. at 1. Not surprisingly, therefore, the President's Climate Action Plan issued in June 2013 states that curbing emissions of methane is "critical" to our effort to address global climate change. Climate Action Plan at 10.

In evaluating methane emissions from the oil and gas industry, there are four major segments from development to delivery that must be considered during which methane either leaks or is intentionally vented to the atmosphere. Each of these segments represents a significant percentage of methane emissions:

- Production. The production segment includes extraction of oil and gas from a well and use of gathering pipes or lines to move the fuel to a processing facility.
- Processing. The processing segment involves the use of compressors to move natural gas from the well to facilities that remove liquids to create "pipeline quality" gas, which is then shipped via pipelines in the transmission phase.
- Transmission. The transmission segment includes the use of pipelines and compressors to ship natural gas from processing facilities to distributors.
- Distribution. The distribution segment includes the use of city gates to receive the natural gas from pipelines and then distribute the gas through smaller lines to commercial and residential customers.

According to 2012 emissions data from the oil and gas sector, the production segment accounts for approximately 32 percent of methane emissions, the processing segment 14 percent, the transmission segment 33 percent, and the distribution segment 20 percent. U.S. EPA, Greenhouse Gas Inventory Report (April 2014), Table 3-43. Because each of these segments represents a significant percentage of emissions, a successful strategy to reduce methane must address all four segments. EPA has previously acknowledged that its authority under the Clean Air Act covers emissions from all of these segments. 76 Fed. Reg. at 52,745.

[1] U.S. Global Change Research Program, Climate Change Impacts in the United States: The Third National Climate Assessment (doi:10.7930/J0Z31WJ2) (Jerry M. Melillo, Terese (T.C.) Richmond, and Gary W. Yohe, eds. 2014).

The critical need to limit methane emissions was further underscored by EPA's recently-proposed Clean Power Plan targeting greenhouse gas emissions from existing power plants. One of the underpinnings of that rule is to encourage states to switch from energy generation using coal to generation using natural gas and lower carbon-intensive fuels. Because of the readily-available supply of natural gas in this country, and the fact that natural gas is mostly methane, we must act to ensure that the global warming benefits of switching from coal to natural gas are not diminished because of the release of methane throughout the natural gas system. According to a recent World Resource Institute report, cutting methane leakage rates from natural gas systems to less than one percent of total production would ensure that the climate impacts of natural gas are lower than coal or diesel fuel. World Resources Institute, Clearing the Air: Reducing Upstream Greenhouse Gas Emissions from U.S. Natural Gas Systems (March 2013).

State Action on Reducing Methane Emissions from the Oil and Gas Sector

It is the States' position that not only is targeting methane emissions a necessary component of a successful strategy to address global warming, it is required under the Clean Air Act. In that vein, in December 2012, seven of the States sent a notice of intent to sue EPA based on the agency's failure to set emission standards for methane in its 2012 New Source Performance Standard (NSPS) rule for the oil and gas sector, 77 Fed. Reg. 49,490 (Aug. 16, 2012). Oregon sent a similar notice of intent in June 2013. As explained in the notice letters, EPA has determined that emissions of this potent greenhouse gas endanger public health and welfare, and that processes and equipment in the oil and gas sector emit vast quantities of methane. We further explained that EPA has compelling data, including from 18 years of experience administering the Natural Gas Star Program, demonstrating that many measures to avoid (or reduce) methane emissions from new and existing oil and gas operations are available and cost-effective. In light of these findings, EPA's failure to determine in its 2012 rulemaking whether it is appropriate at this time to set standards limiting methane emissions from oil and gas operations under section 111 of the Clean Air Act is a violation of a nondiscretionary duty of the Administrator or constitutes an unreasonable delay in taking agency action.

Although the 60-day and 180-day notice periods to bring a nondiscretionary duty and unreasonable delay claim, respectively, have now expired, the States have chosen not to file a lawsuit as of this date in light of the President's subsequent commitment that EPA and other federal agencies would examine how to reduce methane emissions from the oil and gas sector. See Climate Action Plan at 10. This commitment was fleshed out in the Administration's Strategy to Reduce Methane Emissions, which was issued on March 28, 2014. As set forth in the methane strategy document, EPA's issuance of technical white papers is the first step in a process in which the agency is considering direct regulation of methane in the oil and gas sector through rulemaking. Methane Strategy at 2. Under this schedule, the agency would issue any proposed rule this fall, to be followed with the promulgation of a final rule and deadline for state implementation plan submittals by the end of 2016. Id.

In the meantime, a number of states – including Colorado, Ohio, and Wyoming – have enacted regulations to prevent methane leaks from the oil and gas sector. Colorado's rules, passed in February, govern both new and existing wells and require leak inspections either monthly, quarterly, or annually, depending on the amount of emissions. Colorado has stated that

it expects these regulations, which target methane emissions directly rather than as a co-benefit of reducing other pollution, to reduce methane emissions by approximately 65,000 tons per year.

2. Comments on Methane White Papers

EPA's five white papers describe sources of methane emissions in the oil and gas sector and methods that are available to limit those emissions. The States' comments on each of these white papers (Oil and Gas Sector Leaks, Hydraulically Fractured Oil Well Completions and Associated Gas during Ongoing Production, Pneumatic Devices, Compressors, and Liquids Unloading Processes) are set forth below.

Leak Detection and Repair

EPA's "Oil and Natural Gas Sector Leaks" white paper acknowledges that as the oil and natural gas exploration and production industry in the U.S. grows rapidly, so does the potential for greater methane emissions from leaks. As EPA notes, "leak emissions occur through many types of connection points (e.g., flanges, seals, threaded fittings) or through moving parts of valves, pumps, compressors, and other types of process equipment." Oil and Natural Gas Sector Leaks White Paper at 3. The white paper identifies a number of different leak detection technologies, including portable analyzers and infrared cameras, which are readily available and inexpensive. As discussed in the recently issued report by Carbon Limits, "Quantifying Cost-effectiveness of Systematic Leak Detection and Repair Programs Using Infared Cameras," (March 2014), infrared cameras can be used relatively inexpensively to scan an entire facility for leaks. Furthermore, EPA has determined that "once a leak is found it is almost always economical to repair the leak" and that inspection and maintenance programs "can effectively decrease leak emissions." Id. at 55. In light of these findings that leak detection and repair programs can effectively reduce methane emissions from leaks at a reasonable cost, EPA should follow the lead of states such as Colorado that have made these programs mandatory.

Unfortunately, the white paper leaves out a significant source of methane leaks by excluding methane emissions from the distribution sector, *i.e.*, only considering leaks that are "upstream of the city gate." Oil and Natural Gas Sector Leaks White Paper at 3. As EPA noted above, however, EPA has found that methane leaks in distribution from city gates and associated above-ground facilities and from underground pipes comprise about one-fifth of methane emissions from the oil and gas sector. As a result, leaving this segment unaddressed would undermine the President's goal of significantly cutting methane from the oil and gas sector as an important strategy to address global warming.

Distribution sector methane leaks present significant environmental, economic, and safety concerns for states. In Massachusetts alone, leaking pipelines are estimated to release between eight and twelve billion cubic feet of methane a year, at a cost of about $38 million per year to customers. Shanna Cleveland, *Into Thin Air: How Leaking Natural Gas Infrastructure is Harming Our Environment and Wasting a Valuable Resource* (CLF, Boston), Nov. 2012, at 7, 12, available at http://www.clf.org/static/natural-gas-leaks/WhitePaper_Final_lowres.pdf. A number of recent studies have documented extensive leaks from thousands of miles of underground piping in cities such as Boston, New York, and Washington, D.C. See, e.g., Nathan

G. Phillips, et al., Mapping Urban Pipeline Leaks: Methane Leaks Across Boston, Environmental Pollution, Vol. 173 (Feb. 2013) at 1-4 (copy attached). For example, a team using infrared imaging discovered 3,356 leaks with fifteen times the global background level for methane in Boston alone. Gas distribution companies in 2011 reported releasing 69 billion cubic feet of natural gas to the atmosphere, almost enough to meet the state of Maine's gas needs for a year and equal to the annual carbon dioxide emissions of about six million automobiles. See *America Pays for Gas Leaks: Natural Gas Pipeline Leaks Cost Consumers Billions* (Staff Report Prepared for Senator Edward J. Markey, Washington, D.C.) Aug. 2013, at 2 & 7, Table 3, available at: http://www.markey.senate.gov/documents/markey_lost_gas_report.pdf. As a result, nationally consumers paid at least $20 billion from 2000-2011 for gas that was unaccounted for and never used. Id. at 1.

Some states have undertaken efforts to deal with this problem. Since 2009, Massachusetts has promoted replacement of leaking distribution pipeline through the use of Targeted Infrastructure Replacement Funds that provide for expedited reimbursements to utilities that replace aging steel and cast iron infrastructure, as opposed to the use of traditional rate recovery. The Massachusetts Department of Public Utilities has also opened an investigation into the Service Quality Standards for local electric and gas distribution companies that is investigating, among other items, appropriate metrics for leak detection and response. And, the Massachusetts Legislature recently took up legislation (H3873 and S2073, currently in conference committee) to address gas leaks. Similarly, in New York, the New York Attorney General's Office successfully argued to the Public Service Commission that Consolidated Edison should be required to increase it rate of replacement of old distribution system pipes in New York City in order to reduce methane emissions. As a result of that proceeding, Con Ed is also conducting a study to improve detection of distribution system leaks and quantification of associated leak rates. Although these state efforts represent important steps, federal action is needed to drive a more concerted, immediate effort to eliminate leaks and reduce methane emissions from the distribution segment.

In light of the significant emissions from the distribution segment, at a minimum EPA should broaden its scope of potential regulatory action to encompass emissions from city gates, which the agency has previously identified as the largest source of methane emissions in distribution. See EPA, Technical Support Document: Petroleum and Natural Gas Systems for the 2010 Final Rule – Mandatory Reporting of Greenhouse Gases from Petroleum and Natural Gas Systems – Subpart W, at 76, available at: http://www.epa.gov/ghgreporting/documents/pdf/2010/Subpart-W_TSD.pdf. City gates are metering and pressure regulating facilities located at the custody transfer points where natural gas is delivered from transmission pipelines into the lower pressure lines of local distribution companies. Distribution providers that are participants in EPA's Natural Gas STAR program have reported significant savings and methane emission reductions by implementing inspection and maintenance programs of city gates, which are easier to fix than underground piping. Based on data provided by these companies, implementing these programs at gate stations and associated above-ground facilities can result in gas savings worth up to $1,800 per year, at a cost between $20 and $1,200. EPA, Lessons Learned: Directed Inspection and Maintenance at Gate Stations and Surface Facilities, Pub. No. EPA430-B-03-007 (2003).

Hydraulically-Fractured Oil Wells

The white paper on hydraulically-fractured oil wells and associated natural gas production underscores the need for emission standards and guidelines for these sources. In its 2012 NSPS, EPA did not include "oil wells" in the definition of affected facilities, so those wells are currently exempt from rule's reduced emission completion, *i.e.*, "green completion," requirements that apply to hydraulically-fractured gas wells. The NSPS rule requires flaring of gas wells until January 1, 2015, at which time producers will need to use green completion equipment to separate out the gas from the water and send the gas into pipelines, where it subsequently can be sold.

The white paper supports the conclusion that hydraulically-fractured oil wells (either completion of a newly-fractured well or re-stimulation of a previously fractured well and ongoing production) are also significant sources of both methane and volatile organic compound (VOC) emissions. For example, the Environmental Defense Fund/Stratus study cited in the white paper estimated methane emissions from hydraulically-fractured oil well completions (venting, flaring, etc.) at approximately 247,000 metric tons of methane per year. An ERG/ECR study cited in the white paper estimated VOC emissions at approximately 116,230 tons per year (assuming a 7-day flowback period). Furthermore, the emission figures for methane at least may underestimate the amount of those emissions given that aerial, or "top down" surveys of oil fields in Colorado, Utah, and elsewhere have detected much higher levels of methane than found in the "bottom up" studies in the white paper.

The white paper further shows that the types of measures required for gas wells (complete combustion, green completions) as well as other alternative technologies are available to limit methane and VOC emissions from oil wells. Although the cost effectiveness of these measures appears to vary depending upon different factors, such as the existence of nearby gas pipelines, those considerations can be addressed in the context of implementing the requirements to hydraulically-fractured oil wells.

Compressors and Pneumatic Devices

Regarding the white papers addressing compressors and pneumatic devices, in the 2012 NSPS rulemaking, EPA identified compressors (reciprocating and centrifugal) and pneumatic devices (controllers and pumps) in the natural gas transmission segment as equipment that emits large quantities of methane. But at the time, EPA declined to establish standards to limit these emissions based on its approach of focusing on reducing VOCs, which are largely removed by the time the natural gas stream reaches compressors and pneumatic devices in the transmission segment. See 77 Fed. Reg. at 49,522-23 (declining to regulate transmission compressors and pneumatics because of "the relatively low level of VOC emitted from these sources").

In light of the President's subsequent commitment to reduce methane emissions and the issuance of the methane strategies document, a VOC-focused rationale is no longer supportable. The white papers for compressors and pneumatic devices confirm that this equipment is the source of significant amounts of methane emissions. According to EPA, compressors emitted more than 2 million tons of methane in 2012, with more than 50 percent of that amount coming

from the transmission segment. Oil and Natural Gas Sector Compressors White Paper at 43. Similarly, EPA estimates that pneumatic controllers are responsible for about 13 percent of methane emissions from the oil and gas sector, while pneumatic pumps account for about 16 percent of methane emissions from the production and processing segments. Oil and Natural Gas Sector Pneumatic Devices White Paper at 56-57.

Moreover, both of the white papers demonstrate that methane can be significantly and cost-effectively reduced by establishing emission standards for methane from compressors and pneumatic devices. Centrifugal compressor emissions may be cost-effectively controlled by using dry seals in place of wet seals, while reciprocating compressor emissions may be controlled by the periodic replacement of rod packing systems. Compressors White Paper at 43. Pneumatic controller emissions can be significantly reduced by replacing high-bleed controllers with either low- or zero-bleed controllers, while methane from pneumatic pumps can be cut in many instances by replacing them with instrument air pumps and electric pumps. Pneumatic Devices White Paper at 56-57. These findings in the white papers are consistent with previous EPA determinations concerning this equipment and in other studies. See, e.g., EPA, "Reducing Methane Emissions from Compressor Rod Packing Systems" (Oct. 2006) at 1 (indicating payback periods from 1 to 3 months for compressor maintenance activities that reduce methane emissions); WRI Clearing the Air report at 6 (replacing existing high-bleed pneumatic devices with low-bleed equivalents throughout natural gas system identified as one of three strategies that could cost-effectively cut methane emissions by 30 percent); Natural Resources Defense Council, "Leaking Profits: The Oil and Gas Industry Can Reduce Pollution, Conserve Resources, and Make Money by Preventing Methane Waste," (2012) (improved maintenance of reciprocating compressors and replacement of high-bleed pneumatic controllers with low-bleed or zero-bleed controllers identified as two of ten cost-effective strategies that could reduce methane emissions from oil and gas sector by 80 percent).

Liquids Unloading

The white paper on liquids unloading discusses methane and VOCs that are emitted when companies periodically open mature wells to the atmosphere to unload well bore liquids, such as water and condensate, which accumulate in the bottom of the well. This process, typically referred to as a "well blowdown," can result in large quantities of methane and VOCs being released. Although emission figures vary, EPA estimates that methane and VOC emissions from liquids unloading comprised about 14 percent of emissions from the natural gas production segment in 2012.

Rather than using well blowdown methods to unload liquids and allow the flow of gas from the well to resume, there are available technologies that perform this same function while significantly reducing emissions. As the white paper notes, plunger lifts are the most common of the technologies. Of these, the use of optimized plunger lift systems (e.g., those that use smart well automation) offer the dual benefits of decreasing the amount of emissions by more than 90 percent while reducing the need for venting due to overloading. Oil and Natural Gas Sector Liquids Unloading Processes White Paper at 16; see also NRDC Leaking Profits report at 24-25 (summarizing emission reductions attributable to use of plunger lift systems). Previous studies have also demonstrated that plunger lift systems are cost-effective. Id.; WRI Clearing the Air

report at 6 (identifying use of plunger lift systems at new and existing wells during liquids unloading as one of three technologies that could cut methane emissions in the oil and gas sector by 30 percent). Other available technologies – such as artificial lifts, velocity tubing, and foaming agents – can achieve even greater emission reductions, eliminating emissions entirely from liquids uploading. Liquids Unloading White Paper at 17-18.

3. Conclusion

In summary, EPA's publication of the white papers for the oil and gas sector represents a positive step in implementing the President's directive to significantly cut methane emissions from this industry. The States urge EPA to take the next logical step of proposing emission standards and guidelines for methane for the sources discussed in the white papers under sections 111(b) and (d) of the Clean Air Act, as it has done recently with carbon dioxide emissions from power plants. In light of the potency of methane as a short-term accelerator of global warming, the States urge EPA to act in expedited fashion by proposing standards and emission guidelines by this fall.

Sincerely,

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/s/ Michael J. Myers
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ATTACHMENT 3

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Massachusetts Attorney General Martha Coakley
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Rhode Island Attorney General Peter F. Kilmartin
Vermont Attorney General William H. Sorrell

September 12, 2014

By Electronic Mail
Janet McCabe
Acting Assistant Administrator for Air and Radiation
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Addressing Methane Emissions from Distribution Sector

Dear Assistant Administrator McCabe:

In June, the Attorneys General of New York, Delaware, Maryland, Massachusetts, Oregon, Rhode Island, and Vermont (together, "States") submitted comments on the Environmental Protection Agency's five white papers addressing major sources of methane emissions from the oil and gas sector. This letter is to follow up on the request in our comments that EPA address methane leaks from the distribution sector. Specifically, the States believe that a recent EPA Inspector General's report further strengthens our position that EPA should regulate methane leaks from the distribution sector as part of the Administration's strategy to achieve significant reductions in methane emissions from the oil and gas industry.

By way of brief background, we noted in our June comments that the critical need to limit methane emissions from the production and delivery of natural gas was further underscored by EPA's recently-proposed Clean Power Plan targeting greenhouse gas emissions from existing power plants. One of the building blocks of the rule is the expanded use of natural gas combined cycle plants to generate electricity. In light of the fact that natural gas is mostly methane and EPA has found that methane is one of the greenhouse gases that endangers public health and welfare, minimizing leaks throughout the natural gas system is necessary to ensure that any global warming benefits of the expanded use of natural gas for power production are not undermined. But as we pointed out in our comments on the "Oil and Natural Gas Sector Leaks" white paper, EPA left out an important piece of the puzzle by excluding methane emissions from the distribution sector despite the agency's finding that methane leaks from distribution comprise about 20 percent of total methane emissions from oil and gas production and delivery. We also shared our experience in taking action to address distribution sector leaks both to address climate change and protect public safety while emphasizing the need for federal action to drive a more concerted, immediate effort to eliminate leaks and reduce methane emissions from distribution.

The need for EPA to include regulation of methane emissions from the distribution sector as part of the Administration's methane reduction strategy was further underscored by the recent EPA Inspector General's report entitled "Improvements Needed in EPA Efforts to Address Methane Emissions from Natural Gas Distribution Pipelines," Report No. 14-P-0324 (July 25, 2014), available at: http://www.epa.gov/oig/reports/2014/20140725-14-P-0324.pdf. The Inspector General found that leaks of methane from distribution pipelines, which account for about half of methane leaks from the distribution sector, cost consumers approximately $192 million in 2011. The report further bolsters the position of our States regarding the importance of addressing these emissions. The Inspector General found that three of our States (Maryland, Massachusetts and New York) are particularly impacted due to the many miles of distribution lines we have that are especially prone to leak. For example, New York and Massachusetts rank second and third, respectively, in the country in miles of cast and wrought iron distribution lines. IG Report at 3, Table 1. The report concludes that voluntary efforts by industry have failed to result in any meaningful methane emission reductions from the distribution sector and that consistent with the Administration's methane strategy, EPA should develop a strategy to address these emissions. The Inspector General cited the financial disincentive for local distribution companies to fix methane leaks, other than for safety reasons, as an important reason why EPA action in this area is necessary.

Therefore, we urge EPA to consider the Inspector General's report together with the States' comments on the agency's white paper on methane leaks as part of its decision making on how best to implement the President's call to promptly and effectively reduce methane emissions from the oil and gas industry. The States request that EPA propose methane emission standards and guidelines for the sources discussed in the white papers under sections 111(b) and (d) of the Clean Air Act, including covering leaks from the distribution of natural gas.

Thank you for your consideration of this matter.

Sincerely,

FOR THE STATE OF NEW YORK

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Attorney General

/s/ Michael J. Myers
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cc: Joseph Goffman, Senior Counsel to the Assistant Administrator

ATTACHMENT 4

Senate Environment and Public Works Committee
Hearing entitled, "Nomination of Attorney General Scott Pruitt to be Administrator of the U.S. Environmental Protection Agency"
January 18, 2017
Questions for the Record for the Honorable E. Scott Pruitt

Senator Booker:

1. For many years I have worked with the EPA on the Passaic River superfund clean-up project in my home city of Newark. In 2016, the EPA announced an historic plan to remediate the Passaic River from toxic chemicals, PCBs, and other contaminants that resulted from the production of Agent Orange. The project will remove 3.5 million cubic yards of toxic sediment from the lower eight miles of the Passaic River in New Jersey—the largest environmental dredging project in the history of the federal Superfund program.
   a. If confirmed do you commit to make implementation of the Passaic River cleanup project a priority?
   b. If confirmed do you commit to carrying out the EPA Region II March 3, 2016 "Record of Decision" for the Lower 8.3 miles of the Lower Passaic River in a timely and efficient manner?

I am not familiar with the details of the remedy that has been selected for the Passaic River Superfund site, but if confirmed, I expect to make clean up of contaminated sites one of my priorities and will seek input from Congress and relevant stakeholders before taking action in this matter.

2. As the former Mayor of Newark, I have seen how low-income and minority communities living in close proximity to the port of Newark are exposed to high levels of air pollution resulting in serious health problems. Across the nation 13 million people—3.5 million of whom are children—live near major marine ports or rail yards. What is your plan to address the pressing environmental justice concerns regarding poor air quality near major seaports and other congested nodes in our nation's freight network? I have been a champion of the bipartisan Diesel Emissions Reduction Act (DERA) Program that helps replace diesel engines and helps make major sea ports and inland transportation hubs cleaner and more efficient. If confirmed can you commit to supporting the DERA program?

As I committed to you during the meeting in your office, I understand there are wide ranging variety of environmental justice issues affecting urban and rural America. In fact, as you will recall, I've committed to work with your office and visit impacted areas with you. I am also aware that the Diesel Emissions Reduction Act Program has received bipartisan support from

Senator Cardin:

1. Please provide your definition of EPA's "activist agenda" as stated on your professional biography on the State of Oklahoma's official website. Please provide a list of all environmental laws and regulations that you consider to comprise the federal agency's "activist agenda" and how each environmental law or regulation listed in response to this question meets this definition.

I firmly believe that the EPA has a vital role, but it must do so within the bounds of its legal authority. The actions undertaken by the Office of Attorney General have been out of concern that EPA had exceeded its legal authority in those specific actions, not out of animosity toward the mission of the Agency or any specific regulation or statute. Regulations that are not on solid legal foundation and that cannot survive judicial review will not result in environmental protections.

2. For what purpose other than to handle the State of Oklahoma's legal challenges against the EPA did you create the Federalism Unit and defund the Environmental Protection Unit?

The Federalism Unit within the Attorney General's Office serves to protect the State of Oklahoma's sovereign interests in our republican form of government, with a particular focus on issues related to the vertical and horizontal separation of powers demanded by our Constitution. It is headed by the Solicitor General. With regard to the environmental protection unit, it is misleading to say that it was "defunded." Consistent with the practice of every Attorney General save one, I determined that a standalone unit was operationally inefficient. I opted to combine the Environmental Protection Unit and the Consumer Protection Unit into a single unit called the "Public Protection Unit." The Public Protection Unit continued the work of the Environmental Protection Unit, and that work continues to this day, headed by the very same attorney who worked in the Environmental Protection Unit under the prior Attorney General.

3.Do you intend to create a Federalism Unit within the EPA similar to Oklahoma's? Explain why or why not.

My understanding is that the Department of Justice, working in coordination with the EPA Office of General Counsel, represents EPA in litigation, and would thus serve to protect such federalism related interests.

4.Would you support budget cuts to the EPA in similar scope (10% or higher) to those made to Oklahoma Department of Environmental Quality appropriations since FY2009[1]?

I am not familiar with Oklahoma Department of Environmental Quality's budget. I have no first-hand knowledge of EPA's development of its FY 2018 budget request. If confirmed, I look forward to working with EPA's budget staff and program offices and officials with the Office of Management and Budget on EPA's request. I will work to ensure that the limited resources appropriated to EPA by Congress are managed wisely in pursuit of that important mission and in accordance with all applicable legal authorities.

5.Of the lawsuits filed against the EPA in which you participated personally and substantially as Attorney General for Oklahoma, do you intend to recuse yourself from decision making regarding litigation in which you represented the State of Oklahoma as an adversarial party? Do you intend to recuse yourself for the entirety of each case?

As a lawyer, I am bound by the rules of professional conduct not to "switch sides" in any litigation in which I represented the State of Oklahoma, unless my former client gives its informed consent.

6.Do you believe the State of Oklahoma and the EPA should be regarded as the same or different "clients" for conflicts of interest purposes? Explain why or why not.

The State of Oklahoma and the federal government are separate sovereign authorities; representing one does not entail representing the other. In addition, while the State of Oklahoma has been my client as a lawyer during my service as Attorney General, if confirmed as EPA Administrator I will not be acting as a lawyer with clients.

7.The American Bar Association (ABA) Model Rules of Professional Conduct, Rule 1.1, Special Conflicts Of Interest for Former and Current Government Officers and Employees, Comment 5 discusses the balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. In the spirit of Rule 1.11, what previous lawsuits

[1] http://okpolicy.org/wp-content/uploads/2016_Budget_Highlights.pdf?997616#page=7&x42044

might affect your performance of the Administrator's professional functions on behalf of the EPA?

Because I will follow the guidance of ethics officials and my own professional responsibilities in determining whether and how to participate in a particular matter, I do not expect any previous lawsuits to adversely affect my performance as EPA Administrator if confirmed.

8.On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function. Please provide a list of federal lawsuits filed against the EPA in which you participated personally and substantially as Attorney General for Oklahoma.

As Attorney General of Oklahoma, I have participated personally and substantially in the following suits against the EPA:

- **EME Homer City Generation v. EPA, No. 12-1182 (U.S.S.C.)**
- **Michigan v. EPA, No. 14-46 (U.S.S.C.)**
- **Murray Energy Corp. v. EPA, Nos. 14-1112, 14-1151 (D.C. Cir.)**
- **Murray Energy Corp. v. EPA, Nos. 15-1385, 15-1392, 15-1490, 15-1491 & 15-1494 (D.C. Cir.)**
- **Oklahoma v. EPA, Nos.12–9526, 12–9527 (10th Cir.)**
- **Oklahoma ex rel. Pruitt v. EPA, No. 16-5038 (10th Cir.).**
- **Oklahoma ex rel. Pruitt v. McCarthy, No. 15-cv-369 (N.D. Okla.).**
- **Oklahoma v EPA, No, 13-cv-00726 (W.D. Okla.)**
- **West Virginia v. EPA, No. 14-1146 (D.C. Cir.)**
- **West Virginia v. EPA, No. 16-1264 (D.C. Cir.)**

9.Do you accept a screen is appropriate for EPA strategic decisions specific to those lawsuits in which you represented an adversarial party? Explain why or why not.

I will consult with relevant ethics officials and review relevant rules of professional conduct to determine whether a screen is appropriate in a particular matter.

10.Comment 5 discusses a lawyer who moves between different government entities. When a lawyer has been employed by one government agency and then

moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. Do you believe two government agencies—the State of Oklahoma and the EPA—should be regarded as the same or different "clients" for conflicts of interest purposes? Explain why or why not.

As explained above, the State of Oklahoma and the federal government are separate sovereign authorities. While the State of Oklahoma was my client as a lawyer, if confirmed as EPA Administrator I will not be acting as a lawyer with clients.

11.How might the spirit of Rule 1.11's conflicts of interest provisions apply if those government entities were adversarial parties to a lawsuit?

If two government entities are adversarial parties to a lawsuit, then under ABA Model Rule 1.11 a lawyer's previous representation of one entity in the litigation will preclude his later representation of the other entity in the same litigation, unless the former client gives its informed consent. As explained above, if confirmed as EPA Administrator I will not be acting as a lawyer with clients.

12.ABA Rule 1.7 Conflict Of Interest: Current Clients provides that a "lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if the representation of one client will be directly adverse to another client; or there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." In the spirit of Rule 1.7, do you reasonably believe that you will be able to provide competent and diligent leadership to the EPA, an agency you "don't like" and have sued several times? Explain why or why not.

I will provide diligent and competent leadership to the EPA if confirmed as Administrator. As I explained in my testimony to the Committee, I am a firm believer in the EPA's mission to protect the environment and look forward to the opportunity to lead the agency to help provide our future generations with a better and healthier environment.

13.Please explain how your litigation position in each case is or is not at odds with the mission of the EPA, to protect human health protect human health and the environment—air, water, and land.

The EPA's mission is defined by the laws passed by Congress granting it the authority to act. Any action by the EPA that exceeds the authority granted to it by Congress, by definition, cannot be consistent with the Agency's mission. In each case filed against the EPA, in the view of the State of Oklahoma, the EPA had acted in excess of the authority granted to it by Congress.

14.Do you accept that EPA, state, local and tribal agencies work together to ensure compliance with environmental laws passed by Congress, state legislatures and tribal governments?

I agree it is essential for the federal government, state governments, and tribal governments to work together to provide the environmental protection that our laws demand and that the American people deserve. As I explained in my testimony to the Committee, I strongly support cooperative federalism. If confirmed, I will make every effort to partner with the EPA's counterparts in state, local, and tribal governments to further these goals.

15.In 2005, former Attorney General Drew Edmondson filed a federal lawsuit in 2005 seeking to prohibit the spreading of chicken waste over land in the Illinois River Basin in northeastern Oklahoma. Companies named in *State of Oklahoma v. Tyson Foods Inc.* (No. 4:05-cv-00329) include Tyson Foods Inc., Tyson Poultry Inc., Tyson Chicken Inc., Cobb-Vantress Inc., Cal-Maine Foods Inc., Cargill Inc., Cargill Turkey Production L.L.C., George's Inc., George's Farms Inc., Peterson Farms Inc., Simmons Foods Inc., Cal-Maine Farms Inc. and Willow Brook Foods Inc. On December 9, 2015, the State of Oklahoma filed brief amici curiae along with 21 other states in support of the petitioners in *American Farm Bureau Federation v. EPA* (No. 15-599). The *Tyson Foods* defendants did not participate in the Bay TMDL lawsuit, and the American Farm Bureau was not a party to the Oklahoma suit. However, Tyson Foods Inc., headquartered in Springdale, Arkansas—the largest poultry producing company in the world—is a member of the Arkansas Farm Bureau. Do you accept that the American Farm Bureau, a national organization, represents the interests of the Arkansas Farm Bureau and its members, including Tyson Foods? Explain why or why not.

It is my understanding that the American Farm Bureau Federation is a distinct corporate entity from the Arkansas Farm Bureau, which is a distinct corporate entity from Tyson Foods. Accordingly, I do not believe one can ignore corporate form and conflate the American Farm Bureau Federation with either the Arkansas Farm Bureau or Tyson Foods. I observe that the Pennsylvania Farm Bureau filed suit against EPA in the challenge to the Chesapeake Bay TMDL on its own behalf, notwithstanding the fact that American Farm Bureau Federation also was a plaintiff.

16.In 2013, despite the lack of a verdict in the *Tyson Foods* case, you added the State of Oklahoma to the American Farm Bureau/poultry industry backed lawsuit

Ranking Member Carper:

1.Please list all public speeches or presentations you have made that included references to any issue related to energy or the environment since 1998, and please provide copies (written, audio, or video) of any such speeches or presentations. Please also indicate whether you received compensation for any such speech or presentation (whether stipend, travel, lodging expenses, or other form of remuneration) along with the name of the entity that provided such compensation and the amount thereof.

Please see attached list of speeches and enclosed copies of speeches in response to this request.

2. Please provide a list of the skills and experiences you bring to the EPA Administrator position and why you believe that you would be a good fit for the position.

I am a licensed attorney with significant experience in constitutional law, the Administrative Procedure Act, and Environmental Protection Agency administered statutes. This body has recognized my expertise in EPA related matters on several occasions, inviting me to testify before this and other committees on matters relating to the EPA. My legal education and profession has trained me to ask probing questions and think critically regardless of the subject.

3. Please define the Environmental Protection Agency (EPA)'s mission and the role you believe that sound science plays in fulfilling that mission.

The mission of EPA is to protect human health and the environment. Where Congress directs the EPA to act based upon scientific findings, the EPA should rely on well-reasoned, and sound, scientific findings.

4. In a 2006 article in The Oklahoman, you were described as someone that "believes in negotiating, but not compromising." Do you feel this continues to be an accurate description of you? If so, why? Do you agree with President Nixon's articulation of the principal roles and functions of the EPA? If you do not agree, please explain the aspects with which you disagree and why.

Based on the limited information provided in the question, I am uncertain about the article to which the question refers. The content and context of

the article and quote are not readily apparent. However, if confirmed as Administrator, I will take my responsibility to protect human health and the environment for all Americans with the highest possible dedication and commitment in accordance with the legal authorities established by Congress. I have a record of working on a bipartisan basis.

5. Do you think it is constitutional for Congress to direct EPA to set national standards that protect public health? Is it constitutional for Congress to do that even if the pollution only harms citizens of a single state?

The constitutionality of laws enacted by Congress depends on the particulars of the particular law, and will typically be decided by a court. Courts have generally recognized that Congress has the authority to create the EPA and vest certain powers in it.

6. Mr. Pruitt, your official biography on the website of the Oklahoma Attorney General's office says that you are "...a leading advocate against the EPA's activist agenda." The EPA, the agency you have been nominated to lead, has the critical mission "to protect human health and the environment" for all Americans. When you sued the EPA over the Good Neighbor Rule (Cross-state Rule), how did that protect human health and the environment for downwind states?

I firmly believe that the EPA plays an important role in addressing interstate water and air quality issues, but it must do so within the bounds of its legal authority. The actions undertaken by the Office of Attorney General challenging the Cross State Air Pollution Rule related to whether EPA had properly accounted for and allocated pollution from upwind states, as mandated by Congress. Regulations that are not on solid legal foundation and that cannot survive judicial review will not result in environmental protections.

7. You've been part of numerous lawsuits against the EPA – against clean air, clean water and climate regulations. However, you also have stated you are for clean air and clean water. Can you name one Clean Air Act regulation – not a voluntary or grant program – that is on the books today that you do support?

I firmly believe that the EPA plays an important role, especially as it relates to cross-state air and water pollution, but EPA must do so within the bounds of its legal authority as provided by Congress. Regulations that are not on solid legal foundation and that cannot survive judicial review will not result in environmental protections.

8. Are there any other EPA regulations that are on the books today that you do support?

I have not conducted a comprehensive review of existing EPA regulations. As Attorney General, I have brought legal challenges involving EPA regulations out of concern that EPA has exceeded its statutory authority based on the record and law in that matter.

9. President-elect Donald Trump has said repeatedly—at least half a dozen times—on the campaign trail that he would starve the EPA of funding or completely eliminate the agency. In March last year, the President-elect stated in reference to the EPA:

"We are going to get rid of it in almost every form. We're going to have little tidbits left but we're going to take a tremendous amount out,"

After the election, the President-elect didn't seem to change his tune. President-elect Trump stated two days after the election again in reference to the EPA:

"Environmental protection, what they do is a disgrace; every week they come out with new regulations,"

You also have a history attacking the agency. Please tell us why we should disregard the President-elect's statement on the EPA, disregard your actions and only believe your words that you will support clean air and clean water laws?

As I testified, I support the EPA's mission to protect human health and the environment. If confirmed, I will faithfully execute the environmental laws enacted by Congress.

10. As Administrator, will you take into account the true costs of air pollution including the adverse health and environmental impacts on states that are adversely affected by upwind pollution sources?

As I stated at the hearing, costs are important in the rulemaking process and the Courts have recognized that important factor. The Clean Air Act prescribes when costs should be considered and to what extent in a

Senator Markey:

1. There is tremendous diversity across states in this country, and occasionally states have differences of opinion on how to approach a problem. One of the roles of the federal government is to be an arbiter among states.
- What is your philosophy on how interstate pollution conflicts should be handled?
- Should a state be able to pollute a river for which another state relies on for drinking water?
- What is the EPA's role in resolving interstate pollution conflicts?
- How would you determine when EPA should be involved in interstate pollution disputes?

As I testified in the hearing, I have pursued opportunities to address interstate environmental quality matters. One of the examples I have highlighted is the work that Arkansas Attorney General Dustin McDaniel and I took to address an enforceable water quality standard between Arkansas and Oklahoma. I have also discussed how Texas should be responsible when air quality issues affect Oklahoma and my experience with that. When negotiations among and between states breakdown EPA has a role to set environmental standards. However, that is should be a last course of action instead of the first. I believe environmental statutes are designed with states as a primary implementer. Environmental statutes envision that states have the delegated enforcement and primacy to implement and enforce environmental statutes. Only when that is not happening or when negotiations between and among states breakdown should EPA determine a dispute and only after attempting to assist states negotiate a local solution. I am fond of saying that we need national standards and neighborhood solutions. I think that should shape the work of the EPA.

2. During the hearing, you repeatedly underscored the need to make regulation "regular" for regulated entities.
- How do you reconcile that goal with the mission of EPA, which is "to protect human health and the environment"?
- If confirmed as EPA Administrator will your highest priorities be to protect human health and the environment?

As I testified, I believe in the rule of law and that process matters. I do not view these as being contrary to EPA's mission to protect human health and the environment.

11. You have pursued at least twenty legal actions against the EPA on clean water, clean air and climate change related regulations, including multiple lawsuits that are ongoing. You have additionally criticized the EPA and its scientists on a range of scientific facts and regulations that aim to protect public health.

- Please identify EPA regulations or standards that you do support in their current form.
- In many of your legal actions and activities as Oklahoma AG, you have endorsed positions or signed letters that were drafted by oil and gas industry paid lobbyists. Please identify areas in which your views differ significantly from those of the oil and gas industry?

When negotiations among and between states breakdown EPA has a role to set environmental standards. However, that should be a last course of action instead of the first. I believe environmental statutes are designed with states as a primary implementer. Environmental statutes envision that states have the delegated enforcement and primacy to implement and enforce environmental statutes. Only when that is not happening or when negotiations between and among states breakdown should EPA determine a dispute and only after attempting to assist states negotiate a local solution. I am fond of saying that we need national standards and neighborhood solutions. I think that should shape the work of the EPA. As I also testified at the hearing, when it was appropriate to pursue legal actions or settlement negotiations specifically with the oil and natural gas industry I have done so. When considering new regulations on oil and natural gas production and practices, I have joined other co-regulators in Oklahoma advocating those changes.

12.Your Ethics Agreement states that 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."

- Why does this language assume that you "will" seek authorizations for all such instances?

- Why is your recusal limited to a one-year period, when in some cases the "particular matters" will not be resolved within that timeframe?

- Will you commit to recusing yourself from participating in all such particular matters, without requesting or receiving a waiver, until the matter is fully resolved? If not, why not?

- These 'particular matters' are all litigation in which your Ethics Agreement contemplates you switching from plaintiff in your capacity as Attorney General of Oklahoma (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 response to the lawsuit you filed). Why do

you not believe this creates an unresolvable conflict of interests that makes it impossible for you to properly, lawfully and ethically represent the interests of the EPA, while simultaneously upholding your professional duty to your former client, the State of Oklahoma?

My Ethics Agreement was drafted in close consultation with ethics experts at the Office of Government Ethics and EPA ethics officials, and reflects a diligent effort to ensure that I seek authorization before participating in any matter involving specific parties in which I know the State of Oklahoma is a party or represents a party for one year after my resignation as Oklahoma Attorney General. I believe you may be misreading the language in my Ethics Agreement regarding prior authorization. If, during the relevant time period, I would like to consider participating in a particular matter involving specific parties in which I know the State of Oklahoma is a party or represents a party, I will seek advance authorization to do so. With respect to my professional obligations as a member of the bar, I am not permitted to "switch sides" as counsel in any matter in which I participated as a lawyer. The standards that would apply to me as EPA Administrator are different, however, as I will not be representing the EPA as a lawyer if I am confirmed.

13. During the hearing, you refused to unequivocally recuse yourself from litigation that you brought against the EPA, repeatedly stating that you would follow the direction of agency ethics officials' guidance in this area on a case-by-case basis. Isn't it true that if you are confirmed, the agency ethics officials that you are referring to will report to you, and this reporting relationship could be perceived to have the potential to influence the guidance they provide you with? In light of this, will you commit to the modification of your Ethics Agreement, using your own discretion and authority to do so and prior to any vote on your confirmation, in order to provide more clarity about your intentions for recusal related to each matter involving specific parties in which the State of Oklahoma is a party? If not, why not?

My Ethics Agreement was drafted in close consultation with ethics experts at the Office of Government Ethics and EPA ethics officials, and reflects a diligent effort to ensure I comply with all applicable federal ethics rules. I will abide by the commitment I made in that letter. I am confident in the former staff of the EPA and have no reason to believe they will give me anything other than their best advice on ethics matters. Moreover, not all officials who may consider a request for authorization to participate in a matter will necessarily report to me. Before participating in matters involving specific parties in which I am concerned where there may be a question regarding my impartiality, I would expect, where they deem it appropriate, that EPA ethics officials may consult with ethics experts at OGE before making a recommendation.

14.I am attaching a January 17, 2017 letter from Citizens for Responsibility and Ethics in Washington (CREW) and a January 18, 2017 letter from The Campaign Legal Center (CLC), both sent to the EPA Designated Agency Ethics Official, for the record and for your review. The CREW letter references several factors related to your refusal to unequivocally recuse yourself from participating in any of these matters as EPA Administrator that would cause a reasonable person with knowledge of the relevant facts "to question his [your] impartiality in these matters" and "to question the integrity of the agency's programs and operations." The CLC letter states that "the plan described in his [your] ethics agreement is insufficient to avoid actual or apparent conflicts of interest, and would cause members of the public to question his impartiality in the conduct of his [your] duties, contrary to his [your] obligation to "ensure that every citizen can have complete confidence in the integrity of the Federal Government.""

- The CREW letter states that ethics regulations demand your recusal from participating personally and substantially as Administrator in particular matters involving specific parties in which the State of Oklahoma is a party, even if the State of Oklahoma withdraws from the matter. Do you agree to make such a recusal for each such matter, even if the State of Oklahoma withdraws from the matter? If not, why not?

- The CREW letter states that "there would be serious 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." Do you agree to recuse yourself for the full course of each matter involving specific parties in which the State of Oklahoma is a party? If not, why not?

- The CREW letter states that any waiver request you might make from recusal from any of these matters "should be denied based on consideration of the relevant factors listed under" 5 C.F.R. 2635.502(d). Do you agree not to request a waiver from recusal from any such matter? If not, why don't you agree with the analysis of the factors listed in the regulations as they apply to your past litigation history against the Agency that CREW described in the letter should result in a denial of the waiver request?

As discussed above, my Ethics Agreement was drafted in close consultation with ethics experts at the Office of Government Ethics and EPA ethics officials, and reflects a diligent effort to ensure I comply with all applicable federal ethics rules. If confirmed, I will ask relevant federal ethics officials to fully review the issues raised in the CREW letter and, if appropriate, take them into account in determining the proper legal course of action in particular instances.

15.Some of the legal cases that you brought against the agency remain open, and there may be legal decisions that require EPA regulatory action as they are resolved; for example, a court could uphold the EPA regulation and require it to be enforced, or a court could direct such a regulation's revision. Since such regulatory actions would be a direct consequence of the litigation, any conflict of interests associated with your participating in the legal matter should extend to any EPA regulatory or enforcement action taken as a result of court action on the litigation. Do you agree to recuse yourself without waiver and for the entirety of your tenure at the EPA from all such regulatory or enforcement actions that are taken as a result of court action on a specific legal matter from which you were recused? If not, why not?

As EPA Administrator I will recuse from participation in litigation in matters in which I represented the State of Oklahoma, unless I receive informed consent from the State of Oklahoma and the permission of relevant federal ethics officials. It is my understanding that recusal obligations do not extend to regulatory rulemaking of general applicability, which does not create a conflict under applicable rules.

16.If you are confirmed, you will also have the ability to accomplish through *regulation* as EPA Administrator what you have been seeking to accomplish through *litigation* as Attorney General. For example, instead of waiting for a court to decide whether to grant your lawsuit's request to overturn EPA's smog standard, you could start to write a regulation to do just that on your very first day on the job. Will you commit to recuse yourself from working on the revision or elimination of any *regulation* regarding issues on which you have sued the EPA? If not, why not?

It is my understanding under federal ethics rules that regulatory rulemaking of general applicability does not create a conflict.

17. I am also attaching, for the record and for your review, the Ethics Agreement signed by Carol Browner, former EPA Administrator during the Clinton Administration. In her Ethics Agreement, she agreed to recuse herself from participating "personally and substantially in any EPA matter which involves the State of Florida as a specific party and in which I was personally and substantially involved as Secretary, Department of Environmental Regulations, State of Florida". I note that this agreement was not limited to one year in duration and not subject to waivers. I am also attaching, for the record and for your review, the Obama Administration Ethics Pledge that each nominee agreed to uphold, which states, in part, "I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts." If the response to any part of questions 2, 3 or 4 is no, please

also explain why in light of the stronger Ethics Agreements and pledges made by past EPA Administrators?

I am not familiar with the facts and circumstances surrounding Ms. Browner's Ethics Agreement. In my Ethics Agreement, which was drafted in close consultation with ethics experts at the Office of Government Ethics and EPA ethics officials, I agreed to abide by federal regulations that require my recusal from particular matters involving specific parties in which the State of Oklahoma is a party for a period of one year after my resignation as Attorney General, unless I receive a waiver. I will abide by the commitment in that letter, in addition to any other obligations imposed by the Trump Administration as well as my obligations as a member of the bar.

18. In addition to your participation in specific litigation and regulatory matters that raise conflicts of interests, there may be pending enforcement matters at EPA in which donors to you or your political action committees are the subjects. For example, records indicate that Tyson Foods has been the subject of an EPA Clean Air Act enforcement action[3] and reportedly "faces an ongoing criminal investigation by the EPA for its release of toxic pollutants into waterways".[4] Do you commit to recusing yourself from participation in any enforcement matter in which the subject is an entity that has previously made a donation to you or any of your political action committees? If not, why not?

I will consult with relevant federal ethics officials to determine whether to participate in a particular matter.

19. *Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138 (D.C. Cir. 2015) stated that "Decisionmakers violate the Due Process Clause and must be disqualified . . . when they act with an 'unalterably closed mind.'" One of your filings stated that the agency's record "does not support EPA's findings that mercury, non-mercury HAP metals, and acid gas HAPs pose public health hazards." Do you have an "unalterably closed mind" on the question of whether mercury and acid gas HAPs pose public health hazards? If not, please explain your current view on this question.

As I stated in my testimony to the committee, all legal positions that I took in my capacity as Attorney General for the State of Oklahoma were in my capacity as an advocate. If confirmed as Administrator, I will consider all

[3] https://www.epa.gov/enforcement/tyson-foods-inc

[4] http://www.meatpoultry.com/articles/news_home/Business/2016/08/Tyson_investors_call_for_envir.aspx?ID=%7B4E28BCD7-045D-489C-8A41-48A6DDDBE99F%7D&cck=1

matters presented to me with an open mind and will work to reach conclusions that are reflected in the administrative record of each matter and that comport with Congress's intent in enacting the Act.

20. Section 301(a) of the Clean Air Act prohibits the Administrator from delegating authority over many regulatory proceedings. To the extent that you are recused from participating in such decisions, who could lawfully make them?

If I am recused from participating in a matter, the Federal Vacancies Reform Act and other federal law provide a mechanism for another EPA official to perform such functions in an acting capacity. Under current policy, the EPA Deputy Administrator would typically serve this function.

21.Each case in which you litigated on behalf of your former client requested that the court compel EPA to take a specific action; for example, one pending suit asks a court to compel EPA to maintain the ozone standard at 75 ppb instead of lowering it to 70 ppb. A court may direct EPA to take specific actions as these cases are resolved, which will require changes to EPA regulations. Moreover, as EPA Administrator, you could simply direct the Agency to amend its regulations to do the very thing your lawsuit asked a court to do in the first place. This also creates an unresolvable conflict of interests.

- Will you recuse yourself, without waiver and for the entirety of your tenure as EPA Administrator, from any agency proceedings that a) directly result from the resolution of or b) are related to the "particular matters" that your Ethics Agreement agrees you should be recused from? If not, why not, and why do you not believe that such agency proceedings would be covered by your recusal under the applicable Standards of Ethical Conduct for Employees of the Executive Branch?

As EPA Administrator I will recuse from participation in litigation in matters in which I represented the State of Oklahoma, unless I receive informed consent from the State of Oklahoma and the permission of relevant federal ethics officials. I understand that this does not extend to regulatory rulemaking of general applicability, which would not create a conflict under applicable rules.

22. Our oceans are essential for life, and much of what happens on land ultimately ends up in our oceans. There are many ways in which our actions on land can both positively and negatively affect marine life and the marine environment. Under the Marine Protection, Research and Sanctuaries Act (MPRSA), the EPA ensures that harmful substances are not dumped into the

Senator Whitehouse:

1.Estuaries are important coastal habitats the sustain unique wildlife and plant species, serve as a nurseries for commercially important fish, buffer coastal communities from coastal storms, and filter water as it flows into the ocean. The EPA manages a network of 28 estuaries of national significance around the country. Last Congress, the National Estuary Program (NEP) was reauthorized through 2021 (Public Law No.114-162) in a bipartisan effort and charged with providing grants to support projects that address a number of problems facing estuarine and coastal environments, including seagrass habitat loss, harmful algal blooms, invasive species, and sea level rise. Coming from a non-coastal state, please describe in detail how you will acquaint yourself with 1) the NEP, and 2) coastal issues the NEP helps address.

If confirmed, I would expect to be briefed by EPA staff on the relevant statutory authority and any EPA programs established pursuant to this authority.

2. Each NEP must institute a Comprehensive Conservation and Management Plan (CCMP) to guide management and conservation decisions at the NEP. The effects of climate change on estuaries (i.e., saltwater inundation, increased rainfall-driven runoff, warming waters) are included in these CCMPs. Would you direct the NEPs to disregard the consequences of climate change in the CCMPs and other decision-making reports and tools?

If confirmed, I would expect to be briefed by EPA staff on the relevant statutory authority and any EPA programs established pursuant to this authority. If confirmed, I will follow all as enacted by Congress.

3. The Climate Ready Estuaries program coordinates with the NEP to educate managers on how to assess the effects of climate change on U.S. estuaries. It also provides recommendations and toolkits to help design climate change adaptation and risk identification capabilities. Will you direct the Climate Ready Estuaries program to remove any materials, cancel any webinars or presentations, or stop its coordinated work on climate change with the NEPs?

I am not familiar with the details of the specific program referenced in your question. If confirmed, I would expect to be briefed by EPA staff on the relevant statutory authority and any EPA programs established pursuant to this authority.

4.Marine debris is a growing problem around the world, with plastic debris being the most troublesome component due to its pervasiveness and persistence in the marine environment. The EPA is currently a co-chair of the federal Interagency Marine Debris Coordinating Committee. Under your direction, will the EPA to maintain a leadership role on the committee? How will you continue EPA's

88. As Attorney General you have played a major rule challenging EPA's Clean Power Plan and seven other major rules protecting the public from air pollution, water pollution, and toxic threats. Professional ethics rules prohibit attorneys from changing sides, as you would be doing if confirmed. Federal ethical guidelines specifically require that a public official should not act on a matter if a reasonable person who knew the circumstances of the situation could legitimately question his or her fairness. Will you commit to recusing yourself from substantive matters that include EPA's climate rules, its mercury and air toxics rules, its most recent clean water rule, and others related to the eight pending cases you have against EPA as an Attorney General?

It is my understanding that recusal obligations do not extend to regulatory rulemaking of general applicability, which does not create a conflict under applicable rules. With respect to my professional obligations as a member of the bar, I am not permitted to "switch sides" as counsel in any matter in which I participated as a lawyer. The standards that would apply to me as EPA Administrator are different as I would not be representing the EPA as a lawyer. Nonetheless, in any matters involving specific parties where I believe that my impartiality may be questioned, I will consult with relevant federal ethics officials to determine whether to participate in a particular matter and provide them with all relevant facts.

89.You have taken credit for the lawsuit State of Oklahoma et al. v. Mahard Egg Farm. What was the date on which the complaint in that case was filed? What are the dates of the allegations in the case? Had any Oklahoma state agencies taken any steps to investigate that matter before you became Attorney General? If so, please specify the agencies, their roles investigating the case, and the dates on which they were taken. Did the Oklahoma Attorney General's office take any steps to investigate that matter before you became Attorney General? If so, please specify what was done and when. Please indicate the date on which the Attorney General's office first contacted defendant(s) in this matter.

As I have testified, it was a lawsuit that I initiated together with the State of Texas and the EPA. The complaint was filed on May 23, 2011. The consent decree was entered into on August 10, 2011. There was no case when I took office, but the matter had been investigated by the Office of Attorney General, the Oklahoma Department of Agriculture, the EPA, and the State of Texas. I do not know the first date that the Office of Attorney General first contacted the defendants in that matter.

90.Have you ever met or spoken with Richard "Rick" Berman, who has been affiliated with Center for Consumer Freedom? If so, please describe the substance and dates of your communications with him. Did you or the Attorney General's Office during your tenure ever receive communications of any sort from

ATTACHMENT 5

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 *et al.* v. EPA	No. 15-1267 (D.C. Cir.)
Murray Energy, *et al.* v. EPA	No. 15-3751 (6th Cir.)
Murray Energy, *et al.* 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 *ex rel.* Pruitt v. EPA	No. 15-cv-00381 (10th Cir.)
Oklahoma *ex rel.* Pruitt v. EPA appeal pending *sub nom*, State of Oklahoma *ex rel.* Hunter, No. 16-5039 (10th Cir.)	No. 4:15-cv-381 (N.D. Okla.)
In Re 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, *et al.* 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

ATTACHMENT 6

Administrator Pruitt
@EPAScottPruitt

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THE DAILY CALLER

Scott Pruitt Explains Why He Sued EPA So Many Times: 'They Deserved It'

Posted By Michael Bastasch On 1:13 PM 05/11/2017 In | No Comments

Environmental Protection Agency Administrator Scott Pruitt said he sued the agency he heads so many times while Oklahoma attorney general because "they exceeded their statutory authority."

"They deserved it and they deserved it because they exceeded their statutory authority, they exceeded their constitutional authority," Pruitt told WDAY's Rob Port Wednesday.

Pruitt was hammed by Democrats and environmental activists during the confirmation process for suing the EPA at least a dozen times while representing Oklahoma. Pruitt's recused himself from litigation he brought against the Obama administration.

"When they got outside their lane, they got sued and they got stopped," Pruitt said during the WDAY interview, not backing down from his record of suing EPA.

Pruitt sued EPA about a dozen times while Oklahoma AG, including filing suits on regulations he's now reviewing, including the Clean Power Plan (CPP), the "waters of the U.S." rule (WOTUS) and the Mercury and Air Toxics Standards (MATS).

Trump ordered EPA in March to review regulations that "potentially burden the development or use of domestically produced energy resources," including the CPP. EPA later disclosed in a court filing they were also reviewing MATS.

The president ordered EPA and the U.S. Army Corps of Engineers to rewrite the WOTUS rule in a "manner consistent with the opinion of Justice Antonin Scalia in Rapanos v. United States."

But Pruitt wasn't the only attorney general to sue the Obama EPA. Dozens of states sued EPA over the CPP, WOTUS and MATS. Pruitt was part of a 27-state coalition suing the CPP and a 28-state coalition suing over WOTUS.

Twenty states sued EPA to have the MATS rule overturned. Pruitt's been consistent in saying he filed these suits because he saw these rules as federal overreach.

"They used the power of Washington, D.C. to coerce, to walk all over the states," Pruitt told WDAY.

Pruitt wants states to play a larger role in environmental regulation. Pruitt recently approved North Dakota's plan to create and administer its own implement and enforce its own carbon sequestration program.

"North Dakota is going to be the primary regulator of that," Pruitt said, adding the state had been trying to create its own program for four years.

Follow Michael on Facebook and Twitter

ATTACHMENT 7

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]

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[1] For a full discussion of the post-employment restrictions, see OGE DAEOgram 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 DAEOgram 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 se t 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 deci de 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

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[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 Feder al 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 t hough the la w 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 part ies (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.

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[10] As noted above, OGE's imparti ality 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.