

December 17, 2018

Attention: Docket ID No. EPA-HQ-OAR-2017-0483

Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration

Re: Comments on the Environmental Protection Agency's proposed weakening of rules governing methane emissions from oil and natural gas facilities

I. Introduction

On April 27, 2018, the Environmental Protection Agency (EPA), submitted a proposal to weaken methane emission regulations to the Office of Information and Regulatory Affairs (OIRA) for review.¹ On September 9, 2018, OIRA completed its review of this proposed rule.² On September 11, 2018, EPA announced the proposed rule.³ The proposed rule would water down requirements in 2016 new source performance standards (NSPS)⁴ mandating oil and gas companies to monitor their facilities for fugitive methane emissions and to repair any facilities where emissions are detected.

In this comment, we lay out four arguments why the proposed rule should be withdrawn: (1) former EPA Administrator Scott Pruitt, under whom the proposal was developed, possessed an inalterably closed mind about regulations limiting methane emissions and climate change; (2) Pruitt's involvement in the rulemaking violates federal regulations governing impartiality; (3) it is arbitrary and capricious; and (4) it is an effective delegation of agency rulemaking authority to a regulated industry.

First, the proposed rule is impermissibly tainted by Pruitt's involvement because he possessed an inalterably closed mind with respect to limiting methane emissions from oil and gas facilities in particular, and climate change in general. The evidence for Pruitt's inalterably closed mind on these issues is overwhelming. It falls into four categories: (1) his deep and wide financial ties to the fossil fuel industry, which has mounted an aggressive campaign opposing rules limiting methane emissions; (2) his history as Oklahoma Attorney General of suing EPA to block the 2016 NSPS for oil and gas facilities that the proposed rule seeks to weaken; (3) his numerous

¹ OIRA Conclusion of EO 12866 Regulatory Review, Office of Information and Regulatory Affairs, <https://www.reginfo.gov/public/do/eoDetails?rrid=128039>

² *Id.*

³ The proposed rule was published in the Federal Register on October 15, 2018. *See*, Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration, Federal Register Vol. 83, No. 199 (Oct. 15, 2018), pg. 52056, <https://www.gpo.gov/fdsys/pkg/FR-2018-10-15/pdf/2018-20961.pdf>

⁴ Oil and Natural Gas Sector: Emissions Standards for New, Reconstructed, and Modified Sources, Federal Register Vol. 81, No. 107 (June 3, 2016), pg. 35824, <https://www.gpo.gov/fdsys/pkg/FR-2016-06-03/pdf/2016-11971.pdf>

efforts as EPA Administrator to limit or delay requirements to reduce methane emissions from oil and gas facilities; and (4) his numerous statements casting doubt on methane regulations and climate science.

Second, given that the proposed rule seeks to accomplish essentially the same thing as the suit to block the 2016 NSPS for oil and gas facilities in which Pruitt was himself a petitioner, part 2635 of the Code of Federal Regulations, subpart E governing impartiality in performing official duties should apply.⁵ Pruitt's involvement as Oklahoma Attorney General in litigation opposing the 2016 NSPS for oil and gas facilities means that he could not have been impartial in rulemaking seeking to weaken these standards and therefore should have recused himself.

Pruitt's tawdry tenure leading EPA ended when he resigned on July 6, 2018, more than two months after the proposed rule was received by the Office of Information and Regulatory Affairs (OIRA) for review. The proposed rule was therefore necessarily developed under Pruitt's tenure, so the fact that he was no longer Administrator when EPA announced it does not in any way lessen the taint that stems from his involvement.

Third, the proposed rule is arbitrary and capricious because both EPA and OIRA failed to engage in reasoned decision making. The proposed rule does not provide a sufficiently detailed justification explaining why it decided to reverse course and substantially weaken the 2016 NSPS for oil and gas facilities, nor does it sufficiently account for the cost of the increased methane emissions it acknowledges will result from its implementation. Lastly, it appears that OIRA staff overruled EPA career staff's technical expertise resulting in an even weaker rule that would result in substantially higher methane emissions.

Finally, we argue that the proposed rule is effectively an adoption of industry proposals to weaken the 2016 NSPS for oil and gas facilities. As such, the proposed rule qualifies as an effective delegation of EPA rulemaking authority to the fossil fuel industry that has captured it.

II. Facts

A. **Pruitt Has Raised Significant Political Money from the Industry with a Direct Stake in the Outcome of this Rulemaking**

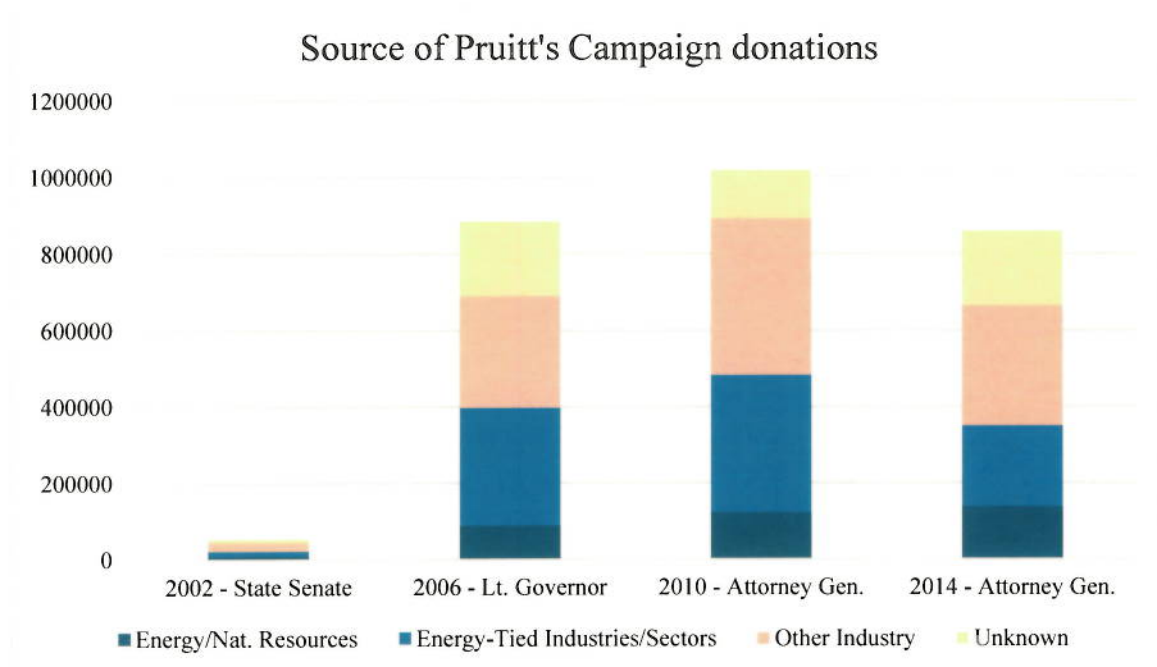
Pruitt's political career has been underwritten by the energy industry, the industry most affected by the proposed rule. In his four campaigns for elected office in 2002, 2006, 2010, and 2014, Pruitt collected more than \$350,000 from corporations and individuals in the energy and natural resources sector, or 13 percent of total campaign contributions he received (and 15 percent of campaign contributions that can be tied to a particular industrial or other sector).⁶ By way of comparison, campaign contributions made by the energy and natural resources industry averaged

⁵ Code of Federal Regulations section 2635.501, https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=06f812f26e7ed9f364bb87944757b912&rgn=div5&view=text&node=5:3.0.10.10.9&idn_o=5#sp5.3.2635.e

⁶ Follow the Money, <https://www.followthemoney.org/entity-details?eid=6583668>. Note that the total Pruitt's campaign received is actually \$2,813,197 because a total of \$229,984 listed as donated to his 2014 re-election campaign of OK AG was carried forward from previous campaigns.

just three percent of total contributions made to state attorney general candidates across the country since 2000.⁷

In addition to contributions directly tied to the energy industry, Pruitt also received considerable financial support from industries closely linked to the energy industry: “legal services and lobbying” that advocate for the energy industry and “general business” and “construction” that service the energy sector. Pruitt’s campaigns also received donations from political action committees (PACs) and issue advocacy groups that were at least partially funded by the energy industry.⁸



Including all of these categories, the energy sector and industries and groups associated with it gave over \$1,250,000 to Pruitt’s campaigns, 44 percent of the total and 55 percent of total donations that can be tied to a particular industrial or other sector.

Tellingly, contributions from the energy industry to Pruitt’s 2014 re-election campaign actually increased by 13 percent compared to 2010 contributions, despite the fact that in 2014, Pruitt ran unopposed in both the primary and general elections. Contributions from almost every other sector fell in 2014, as might normally be expected when a candidate is running without opposition.

Industry support for Pruitt went beyond direct contributions to his campaigns.⁹ In Pruitt’s 2010 campaign for attorney general, an outside group by the name of the Republican State Leadership

⁷ Calder Burgam, “Energy Interests Power Pruitt,” Follow the Money (Jan. 17, 2017), <https://www.followthemoney.org/research/blog/energy-interests-power-pruitt/>

⁸ Follow the Money, <https://www.followthemoney.org/entity-details?eid=6583668>

⁹ Prior to 2015, Oklahoma limited contributions to candidates for state office to \$5,000. See, State Limits on Contributions to Candidates, National Conference of State Legislatures, http://www.ncsl.org/Portals/1/documents/legismgt/Limits_to_Candidates_2012-2014.pdf. This limit

Committee (RSLC) spent \$150,000 on his behalf.¹⁰ The U.S. Chamber of Commerce, long a deep-pocketed foe of action on climate change¹¹, was RSLC's largest donor, donating almost \$4 million to the group. Devon Energy, an Oklahoma-based oil and gas company, contributed \$350,000 and was a top ten donor to the RSLC in 2010.¹²

Pruitt wasn't only on the receiving end of spending by outside groups. He and his supporters created PACs to expand his influence and provide other avenues for him to direct fossil fuel and industry money to like-minded politicians. Run by Pruitt, the Oklahoma Strong Leadership PAC raised roughly \$400,000 during the 2016 election cycle, almost 20 percent of which came from energy interests.¹³ Liberty 2.0, a super PAC created by Pruitt's supporters,¹⁴ raised approximately \$450,000 during the 2016 election cycle, over a third of which came from energy interests.¹⁵ Of its nine largest donors, four are in the energy industry including the second largest donor, Murray Energy, which gave \$50,000.¹⁶

During this period, Pruitt also served as a chairman of the Republican Attorney Generals Association (RAGA) and was on its executive committee. Under Pruitt's leadership, RAGA raised an enormous amount of money for its 527 outside spending organization from the U.S. Chamber of Commerce and the energy industry. During the 2014 and 2016 election cycles, the Chamber was by far the largest donor to RAGA's 527, giving the organization over \$4 million. Koch Industries (almost \$500,000), the American Coalition for Clean Coal Electricity (more than \$300,000), Murray Energy (\$250,000), the American Fuel and Petrochemical Manufacturers (almost \$200,000), the American Petroleum Institute (API), and Devon Energy (\$125,000) were all among the largest donors to RAGA's 527 during this period.¹⁷

Pruitt's deep ties to the energy industry did not simply dissolve once he left Oklahoma to run the EPA. During his nomination process, the America Rising super PAC, which has received large donations from fossil fuel interests,¹⁸ funded a campaign in support of his confirmation.¹⁹ This campaign included ads targeting Democratic senators and a ConfirmPruitt.com website.²⁰

drove larger contributions to outside spending groups organized under section 527 and 501(c)(4) of the Internal Revenue Code.

¹⁰ Paul Monies, "Outside groups make ad push in final days of campaigns," *The Oklahoman* (Oct. 31, 2010), <http://newsok.com/article/3509737>

¹¹ Alyssa Katz, "The Influence Machine: The U.S. Chamber of Commerce and the Corporate Capture of American Life," pgs. 111 – 127, Spiegel & Grau (2015)

¹² Open Secrets, https://www.opensecrets.org/527s/527cmtedetail_contribs.php?ein=050532524&cycle=2010

¹³ Open Secrets, <https://www.opensecrets.org/pacs/lookup2.php?strID=C00572198&cycle=2016>

¹⁴ Alex Guillén, "Energy executives, secret nonprofit raise money to back Pruitt," *Politico* (Jan. 6, 2017) <https://www.politico.com/story/2017/01/scott-pruitt-epa-nonprofit-backers-233306>

¹⁵ Open Secrets, <https://www.opensecrets.org/pacs/lookup2.php?cycle=2016&strID=C00572917>

¹⁶ Open Secrets, <https://www.opensecrets.org/pacs/pacgave2.php?cycle=2016&cmte=C00572917>

¹⁷ Open Secrets, https://www.opensecrets.org/527s/527cmtedetail_contribs.php?cycle=2014&ein=464501717

¹⁸ Open Secrets, <https://www.opensecrets.org/pacs/pacgave2.php?cmte=C00542902&cycle=2014>

¹⁹ Eliana Johnson, "Conservatives target red-state Democrats to speed Trump's nominations," *Politico* (Dec. 21, 2016), <https://www.politico.com/story/2016/12/trump-nominations-red-state-democrats-232890>

²⁰ An archived version of this website is available at <http://web.archive.org/web/20170217193132/http://confirmpruitt.com/>

B. Pruitt's Official Actions as Oklahoma Attorney General Were in Lock-Step with his Political Donors' Interests

As Oklahoma Attorney General and EPA Administrator, Pruitt used his official position to execute the agenda of his industry political patrons. This was true with respect to a host of environmental issues, including for the 2016 NSPS for oil and gas facilities. Given this history, there is no doubt that the proposed rule reflects industry's wishes.

As Attorney General of Oklahoma, Scott Pruitt sued the EPA 14 times.²¹ In each case, he supported an industry attack on an EPA rulemaking. In at least one case, it would appear that Pruitt's decision to sue was directly influenced by the energy industry. Documents uncovered from public records requests to the Oklahoma Attorney General's Office show that the American Fuel and Petrochemical Manufacturers, a major donor to Pruitt, gave him template language for a petition and urged him to sue the federal government over the Renewable Fuel Standard. The trade association noted that "this argument is more credible coming from a state."²² Pruitt followed the group's suggestion and sued.²³

With respect to the 2016 NSPS for oil and gas facilities, Pruitt joined 13 other states in suing EPA to block the standards.²⁴ But states were not the only parties to sue over this rule; a total of 23 oil and gas industry trade associations also sued.²⁵ At least four of these associations gave political campaign contributions to Pruitt and/or to outside spending groups associated with him: API (\$200,000),²⁶ the Ohio Oil and Gas Association (\$50,000),²⁷ the Oklahoma Independent

²¹ "Pruitt v. EPA: 14 Challenges of EPA Rules by the Oklahoma Attorney General," *The New York Times* (Jan. 14, 2017), <https://www.nytimes.com/interactive/2017/01/14/us/politics/document-Pruitt-v-EPA-a-Compilation-of-Oklahoma-14.html>

²² Oklahoma AG Releases 7,564 Pages in Response to CMD Request, Center for Media and Democracy (Feb. 22, 2017), <https://www.exposedbycmd.org/Scott-Pruitt-Missing-Emails>

²³ *Id.*

²⁴ *West Virginia v. EPA*, Case No. 16-1264 (D.C. Cir. 2016), <https://www.documentcloud.org/documents/3290872-Pruitt-v-EPA-a-Compilation-of-Oklahoma-14.html>

²⁵ The trade associations that sued were The Independent Petroleum Association of America, the American Exploration & Production Council, the Domestic Energy Producers Alliance, the Eastern Kansas Oil & Gas Association, the Illinois Oil & Gas Association, the Independent Oil and Gas Association of West Virginia, the Indiana Oil and Gas Association, the International Association of Drilling Contractors, the Kansas Independent Oil & Gas Association, the Kentucky Oil & Gas Association, the Michigan Oil and Gas Association, the National Stripper Well Association, the North Dakota Petroleum Council, the Ohio Oil and Gas Association, the Oklahoma Independent Petroleum Association, the Pennsylvania Independent Oil & Gas Association, the Texas Alliance of Energy Producers, the Texas Independent Producers & Royalty Owners Association, the West Virginia Oil and Natural Gas Association, the Western Energy Alliance, GPA Midstream Association, American Petroleum Institute (API), the Texas Oil and Gas Association, and the Interstate Natural Gas Association of America

²⁶ Open Secrets, https://www.opensecrets.org/527s/527cmtedetail_donors.php?url=527cmtedetail_donors.php%3Fcycle%3D2014%26ein%3D464501717&cname=american+petroleum+institute&ein=464501717&cycle=2014

²⁷ Open Secrets, https://www.opensecrets.org/527s/527cmtedetail_donors.php?url=527cmtedetail_donors.php%3Fcycle%3D2010%26ein%3D050532524&cname=oil&ein=050532524&cycle=2010

Petroleum Association (\$6,000),²⁸ and the West Virginia Oil and Natural Gas Association (\$5,000).²⁹

Pruitt's fealty to the energy industry on the issue of methane emissions was not limited to suing EPA. Pulitzer Prize-winning reporting by the *New York Times* in 2014 uncovered that Attorney General Pruitt used official letterhead to press the case of Devon Energy, one of his biggest donors, before EPA. Devon claimed EPA was overestimating the amount of methane emissions generated by natural gas drilling. The company's lawyers drafted a letter on this subject, sent it to Pruitt's office, which then cut and pasted it onto official state government stationery with only a few word changes and sent it to Washington over Pruitt's signature.³⁰

C. Pruitt's Official Actions as EPA Administrator Were in Lock-Step with his Political Donors' Interests

Once Pruitt was confirmed as EPA Administrator, his pattern of taking official actions in order to benefit his donors in the oil and gas industry continued. This was particularly true with respect to methane regulations, where the relationships Pruitt established through his political activities as Attorney General continued to pay off for his oil and gas industry donors once he became EPA Administrator.³¹ Under Pruitt, EPA repeatedly sought to weaken, repeal, or delay initiatives and rules aimed at monitoring and reducing methane emissions from oil and gas facilities.

Within weeks of Pruitt's assuming control of EPA, the agency withdrew its request that oil and gas companies provide it with detailed information regarding methane emissions at facilities they operate.³²

On June 5, 2017, EPA announced a three-month delay of the implementation of the 2016 NSPS for oil and gas facilities as well as its intention to reconsider the standards.³³ One week later,

²⁸ Follow the Money, [https://www.followthemoney.org/show-me?dt=1&c-t-eid=6583668&d-cci=33#\[1\]gro=d-eid](https://www.followthemoney.org/show-me?dt=1&c-t-eid=6583668&d-cci=33#[1]gro=d-eid)

²⁹ Open Secrets, https://www.opensecrets.org/527s/527cmtedetail_donors.php?url=527cmtedetail_donors.php%3Fcycle%3D2014%26ein%3D464501717&cname=gas&ein=464501717&cycle=2014

³⁰ Eric Lipton, "Energy Firms in Secretive Alliance with Attorneys General," *The New York Times* (Dec. 6, 2014), <https://www.nytimes.com/2014/12/07/us/politics/energy-firms-in-secretive-alliance-with-attorneys-general.html>

³¹ It is important to note that movement through the revolving door is not linear, but circular. While Pruitt was able to be of service to his fossil fuel industry patrons during his stint as EPA Administrator, the fossil fuel industry has apparently now become of service to Pruitt as it has been reported that Pruitt is in talks to work for a major coal mining company, Alliance Resource Partners. See, Lisa Friedman, Hiroko Tabuchi, and Eric Lipton, "Scott Pruitt, Former E.P.A. Chief, Is in Talks for His Next Job: Coal Consultant," *The New York Times* (Sept. 12, 2018), <https://www.nytimes.com/2018/09/12/climate/pruitt-coal-consulting.html>

³² EPA Withdraws Information Request for the Oil and Gas Industry, U.S. Environmental Protection Agency (March 2, 2017), <https://www.epa.gov/newsreleases/epa-withdraws-information-request-oil-and-gas-industry>

³³ Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Grant of Reconsideration and Partial Stay, Federal Register Vol. 82, No. 106 (June 5, 2017), pg. 25730, <https://www.gpo.gov/fdsys/pkg/FR-2017-06-05/pdf/2017-11457.pdf>

EPA released a proposal to stay emissions requirements in the 2016 NSPS for oil and gas facilities for two years.³⁴

Environmental groups sued to block EPA's three-month delay of the 2016 NSPS for oil and gas facilities; oil and gas industry trade associations including Pruitt donor API intervened to support EPA's delay. On July 3, 2017, the U.S. Court of Appeals for the District of Columbia Circuit vacated EPA's three month stay.³⁵ On July 7, 2017, EPA filed a motion asking the D.C. Circuit not to require it to immediately begin enforcing the 2016 NSPS for oil and gas facilities.³⁶ On July 31, 2017, the D.C. Circuit denied EPA's motion and ordered it to begin enforcing the rule.³⁷

In March of 2018, EPA amended the 2016 NSPS for oil and gas facilities to specify that methane leaks did not have to be repaired during unscheduled or emergency shutdowns.³⁸

Throughout this period, EPA also refused to develop and issue new rules for methane emissions from existing sources in the oil and gas sector, contrary to its obligation to do so under the Clean Air Act (CAA).³⁹ In April of 2018, 15 states and the city of Chicago sued EPA for its failure to promulgate new rules for methane emissions from existing oil and gas facilities.⁴⁰

Collectively, these decisions are estimated to save oil and gas companies – many of them donors to Scott Pruitt and/or outside spending groups affiliated with him – hundreds of millions of dollars.⁴¹

Pruitt's repeated efforts to weaken, delay, or repeal methane regulations took place against a backdrop of a seemingly endless series of meetings with the energy industry. Although he was barred from political fundraising during his time as EPA Administrator by the Hatch Act, Pruitt maintained his close contacts with the energy industry. In just his first few months on the job,

³⁴ Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements, https://www.epa.gov/sites/production/files/2017-06/documents/oil_and_gas_2-year_stay_frn2.pdf

³⁵ *Clean Air Council v. Pruitt*, Case No. 17-1145 (D.C. Cir. 2017), [https://www.cadc.uscourts.gov/internet/opinions.nsf/a86b20d79beb893e85258152005ca1b2/\\$file/17-1145-1682465.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/a86b20d79beb893e85258152005ca1b2/$file/17-1145-1682465.pdf)

³⁶ EPA's Motion to Recall the Mandate, *Clean Air Council v. Pruitt*, Case No. 17-1145 (D.C. Cir. 2017), https://www.edf.org/sites/default/files/content/epa_request.pdf

³⁷ July 31, 2017 Order, *Clean Air Council v. Pruitt*, Case No. 17-1145 (D.C. Cir. 2017), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20170731_docket-17-1145_order.pdf

³⁸ Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Amendments, Federal Register Vol. 83, No. 48 (March 12, 2018), pg. 10628, <https://www.gpo.gov/fdsys/pkg/FR-2018-03-12/pdf/2018-04431.pdf>

³⁹ Section 111(b) of the Clean Air Act requires EPA to establish "standards of performance" for emissions of air pollutants from new and modified stationary sources. These are known as "new source performance standards" (NSPS). When EPA establishes performance standards for new sources in a particular source category, in this case oil and gas facilities, EPA is also required under section 111(d) to publish guidelines for controlling emissions from existing sources in that same source category.

⁴⁰ Complaint, *New York v. Pruitt*, Case 1:18-cv-0073 (D.C. Dist. 2018), https://ag.ny.gov/sites/default/files/methane_complaint.pdf

⁴¹ Hiroko Tabuchi and Eric Lipton, "How Rollbacks at Scott Pruitt's E.P.A. Are a Boon to Oil and Gas," *The New York Times* (May 20, 2017), https://www.nytimes.com/2017/05/20/business/energy-environment/devon-energy.html?_r=0

Pruitt met with more than 40 energy interests; five of these are petitioners in litigation challenging the 2016 NSPS for oil and gas facilities and many others are members of one or more of the trade associations challenging the standards. During this same period of time, Pruitt met with almost no environmental groups.⁴²

D. Pruitt's Public Statements Have Been in Lock-Step with his Political Donors' Interests

Suing to block the 2016 NSPS for oil and gas facilities is not the only way in which Pruitt, in his capacity as Oklahoma Attorney General, expressed his profound opposition to rules limiting methane emissions at oil and gas facilities. In 2012, Pruitt wrote a piece entitled "The Methane Myth," in which he described EPA as a "wayward federal agency arbitrarily using unsubstantiated, inaccurate, and flawed data to achieve a specific policy objective" and its efforts to regulate methane emissions from oil and gas facilities as an "attack we can't ignore."⁴³ He also stated that he "strongly support[s] energy producers" and characterized methane emissions from leaks at oil and gas facilities as a "nonexistent" problem.⁴⁴

In addition to specifically attacking EPA's authority to regulate methane emissions from oil and gas facilities, Pruitt repeatedly called into question EPA's general authority to regulate carbon emissions under the CAA. For example, at a 2014 conference hosted by the climate denying American Legislative Exchange Council (ALEC), Pruitt stated, "We have an EPA that is engaged in rulemaking, proposed rulemaking, that seeks to exert itself in a way that the [CAA] doesn't authorize at all."⁴⁵ He has also argued that the CAA was never intended to regulate carbon emissions and was instead "set up to address local and regional air pollutants."⁴⁶ Of

⁴² "Who is E.P.A. Administrator Scott Pruitt Meeting With? A Detailed Schedule," *The New York Times* (Oct. 3, 2017), <https://www.nytimes.com/interactive/2017/10/03/us/politics/document-Pruitt-Sked-and-McCarthy-Sked.html>. These included: the National Association of Manufacturers, Duke Energy, the Edison Electric Institute, the National Rural Electric Cooperative Association, BP, Chevron, the American Petroleum Institute, the National Stripper Well Association, the Oklahoma Independent Petroleum Association, the Domestic Energy Producers Alliance, the American Gas Association, FirstEnergy, Consol Energy, Associated Electric Cooperative, the National Association of Royalties Owners, the National Mining Association, Big Rivers Electric Corporation, Kansas Electric Power Cooperative, South Texas Electric Cooperative, Central Missouri Electric Cooperative, Hoosier Energy Rural Electric Cooperative, Seminole Electric Cooperative, Deseret Power Electric Cooperative, Arizona G&T Cooperatives, Central Electric Power Cooperative, Georgia Transmission Corporation, Sho-Me Power Electric Cooperative, N.W. Electric Power Cooperative, Kentucky Association of Electric Cooperatives, North Dakota Association of Rural Electric Cooperatives, Minnkota Power Cooperative, North Central Electric Cooperative, Central Power Electric Cooperative, Basin Electric Cooperative, the Southern Company, Alliance Resource Partners, ExxonMobil, American Fuel & Petrochemical Manufacturers, the Portland Cement Association, Royal Dutch Shell, and Contura Energy.

⁴³ E. Scott Pruitt, "The Methane Myth," *Public Utilities Fortnightly* (July 2012), <https://www.fortnightly.com/fortnightly/2012/07/methane-myth?page=0%2C0>

⁴⁴ *Id.*

⁴⁵ Scott Pruitt at 2014 ALEC Annual Meeting, <https://www.youtube.com/watch?v=K12PCuBjFgI>

⁴⁶ Transcript of Reuters Interview with EPA Administrator Scott Pruitt, Reuters (July 11, 2017), <https://www.reuters.com/article/us-usa-epa-pruitt-text/transcript-of-reuters-interview-with-epa-administrator-scott-pruitt-idUSKBN19X01Z>

course, the Supreme Court ruled otherwise in *Massachusetts v. EPA*,⁴⁷ holding that the EPA may regulate carbon emissions as a pollutant under the CAA.

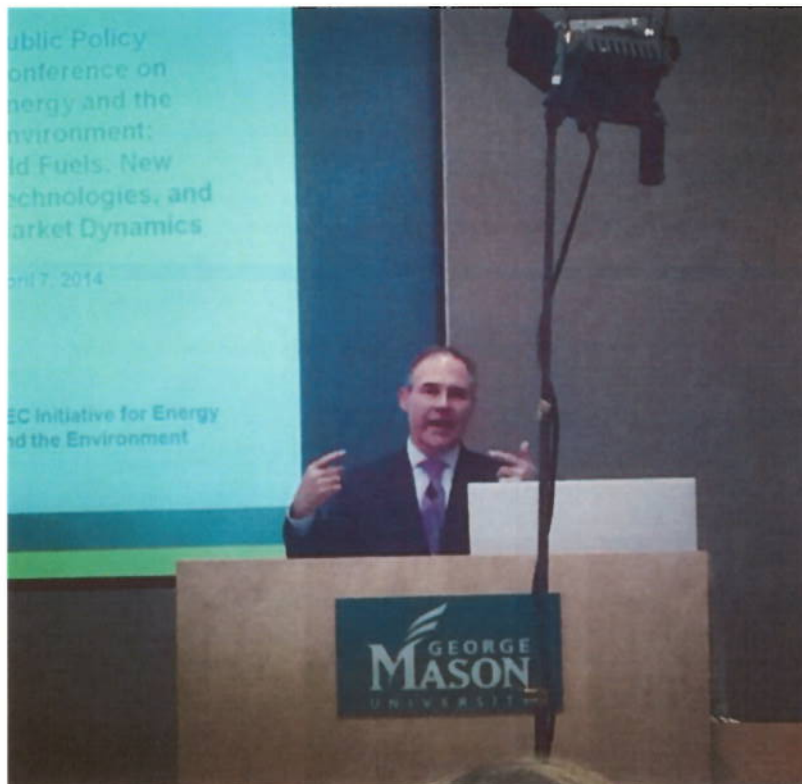
Pruitt is also a well-known climate denier, having repeatedly questioned the accepted science of climate change. For example, in 2016, he wrote in *The National Review* that “[the climate change] debate is far from settled. Scientists continue to disagree about the degree and extent of global warming and its connection to the actions of mankind.”⁴⁸ But Pruitt’s climate denialism wasn’t limited to op-eds and quotes to the press. He was also a frequent guest at conferences organized by climate-denying groups like the Heritage Foundation and the Texas Public Policy Foundation. Of course, these climate-denying groups also receive much of their funding from the energy industry and those tied to it.⁴⁹ At these conferences, Pruitt often joined guest lineups featuring prominent climate deniers and industry-funded scientists, some of whom gave presentations purporting to make “the moral case for fossil fuels.”⁵⁰ Consistent with this affinity for climate denial, his Oklahoma Attorney General Instagram account shows him participating in a panel entitled “the War on Carbon” at the Koch-funded George Mason University School of Law (since renamed the Antonin Scalia School of Law).

⁴⁷ *Massachusetts v. EPA*, 549 U.S. 497 (2007)

⁴⁸ Scott Pruitt & Luther Strange, “The Climate-Change Gang,” *The National Review* (May 17, 2016), <https://www.nationalreview.com/2016/05/climate-change-attorneys-general/>

⁴⁹ Global Warming Skeptic Organizations, Union of Concerned Scientists, <https://www.ucsusa.org/global-warming/solutions/fight-misinformation/global-warming-skeptic.html#.WmeTlainG70>; Texas Public Policy Foundation, DeSmog Blog, <https://www.desmogblog.com/texas-public-policy-foundation>

⁵⁰ EPA Administrator Pruitt to Join Crossroads, Texas Public Policy Foundation (Nov. 30, 2017), https://www.texaspolicy.com/press_release/detail/media-advisory-update-epa-administrator-pruitt-to-join-crossroads



agscottpruitt

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agscottpruitt It was a wonderful opportunity speaking at the George Mason University of Law on the Collateral Damage in the War on Carbon Panel Discussion today. @masonLEC



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Pruitt's climate denial isn't just a thing of the past, however. It continued after he was confirmed as EPA Administrator. In March 2017, Pruitt denied that carbon dioxide emissions were a primary contributor to global warming, stating "I think that measuring with precision human activity on the climate is something very challenging to do and there's tremendous disagreement about the degree of impact, so, no, I would not agree that [carbon dioxide] is a primary contributor to the global warming that we see."⁵¹ And in February 2018, Pruitt asked if climate change "necessarily is a bad thing."⁵²

E. The Fossil Fuel Industry Capture of EPA Extends Beyond Pruitt

While Pruitt's ties to the fossil fuel industry were perhaps the most widely reported due to his former position atop EPA, he is far from the only member of the EPA leadership team to have deep professional and/or financial ties to the industry. Under President Trump, EPA has been stocked with officials close to the energy industry.

Bill Wehrum, the Assistant Administrator for EPA's Office of Air and Radiation (the office in which the proposed rule was developed), is a longtime lawyer for the fossil fuel industry. He has repeatedly sued EPA to block clean air rules, and has represented API, a petitioner against the 2016 NSPS for oil and gas facilities, as well as American Fuel and Petrochemical Manufacturers,

⁵¹ Coral Davenport, EPA Chief Doubts Consensus View of Climate Change, *The New York Times* (March 9, 2017), https://www.nytimes.com/2017/03/09/us/politics/epa-scott-pruitt-global-warming.html?_r=0

⁵² Dino Grandoni, Brady Dennis, and Chris Mooney, "EPA's Scott Pruitt asks whether global warming 'necessarily is a bad thing,'" *The Washington Post* (Feb. 8, 2018), https://www.washingtonpost.com/news/energy-environment/wp/2018/02/07/scott-pruitt-asks-if-global-warming-necessarily-is-a-bad-thing/?utm_term=.d9df426593e5

Chevron, ExxonMobil, Koch Companies, Koch Industries, Phillips 66, the Utility Air Regulatory Group (UARG), Duke Energy, and Dominion Resources, among other energy concerns.⁵³ Like Pruitt, Wehrum apparently doesn't believe that the CAA was intended to regulate GHG emissions, *Massachusetts v. EPA* notwithstanding.⁵⁴

EPA Acting Administrator Andrew Wheeler, who replaced Pruitt atop EPA, was a longtime lobbyist for energy interests.⁵⁵ Most notably, Wheeler represented Murray Energy, whose CEO, Bob Murray, authored an "Action Plan" advocating for the withdrawal EPA's "endangerment finding" providing it with the authority to regulate carbon emissions under the CAA.⁵⁶ Murray circulated his "Action Plan" to Vice President Mike Pence, Pruitt, Secretary of Energy Rick Perry, and others. Wheeler even accompanied Murray to lobby Perry on this action plan.⁵⁷



Caption: Perry (head of the table) meets with Murray (third from right) and Wheeler (far right)

⁵³ See Appendix I

⁵⁴ Q&A With Hunton & Williams' Bill Wehrum, *Law360* (May 6, 2013), <https://www.law360.com/articles/427231/q-a-with-hunton-williams-bill-wehrum>

⁵⁵ Steven Mufson, "Scott Pruitt's likely successor has a long lobbying history on issues before the EPA," *The Washington Post* (July 5, 2018), https://www.washingtonpost.com/business/economy/epas-acting-administrator-has-long-lobbying-record-on-issues-before-the-agency/2018/07/05/a591cd40-6a6b-11e8-bea7-c8eb28bc52b1_story.html?utm_term=.02987956d928

⁵⁶ Action Plan for the Administration of President Donald J. Trump, Bob Murray (March 1, 2017), <https://www.nytimes.com/interactive/2018/01/09/climate/document-Murray-Energy-Action-Plan.html>

⁵⁷ Kate Aronoff, "Exclusive Photos Contradict Murray Energy CEO's Claim He Had 'Nothing To Do with' Rick Perry's Coal Bailout, *In These Times* (Dec. 6, 2017), http://inthesetimes.com/features/murray_energy_trump_doe_coal_industry_grid_plan.html

Beyond Wehrum and Wheeler, who will oversee methane-related rulemakings now that Pruitt is gone, EPA leadership is stocked with officials closely tied to the fossil fuel industry. For example, EPA Office of Enforcement and Compliance Assurance (OECA) Deputy Assistant Administrator Patrick Traylor is a former lobbyist and lawyer for energy interests Dominion Energy, Koch Industries, and TransCanada,⁵⁸ while the head of EPA's Office of Research and Development, David Dunlap is a former executive at Koch Industries.⁵⁹ In fact, Pruitt reached out to the fossil fuel industry to help staff EPA. Weeks after becoming EPA Administrator, he reportedly made a "plea" to top executives at API to help him identify oil industry leaders he could hire as regional EPA Administrators.⁶⁰

Pruitt also sought to fill EPA's Science Advisory Board (SAB) with individuals recommended by fossil fuel interests; among the many industry-connected people he chose for the SAB were Merlin Lindstrom of Phillips 66 and Larry Monroe, a retired executive at Southern Company.⁶¹

The oil and gas industry also repeatedly lobbied EPA political appointees on methane regulations. For example, on July 18, 2017, representatives from API, Chevron, Anadarko Petroleum, and Hess met with Mandy Gunasekara, Wehrum's senior policy advisor, and others.⁶² On March 2, 2018, representatives from Conoco Phillips met with David Harlow, a senior counsel to Wehrum, who previously represented many energy interests as a lawyer at Hunton & Williams.⁶³

F. OIRA Ignored EPA Career Staff Expertise in Order to Tilt the Proposed Rule Even Further Towards Industry

On April 27, 2018, EPA submitted a draft of the proposed rule to OIRA for review. Almost from the start, it appears that OIRA pushed EPA career staffers to make changes to the draft proposal that would make it even more favorable to industry. These changes primarily focused on making the draft proposal's methane leak inspection requirements even less frequent, which would thereby result in increased methane emissions. EPA's original draft proposal would have resulted in 220,000 additional short tons of methane emissions;⁶⁴ the proposed rule issued after

⁵⁸ Kevin Bogardus, Corbin Hiar, and Arianna Skibell, "Enforcement pick shugs off conflict-of-interest concerns," *E&E News* (July 13, 2017), <https://www.eenews.net/stories/1060057347>

⁵⁹ Miranda Green, "Ex-Koch engineer to lead EPA office on scientific research," *The Hill* (Oct. 2, 2018), <https://thehill.com/policy/energy-environment/409532-ex-koch-engineer-to-lead-epa-office-on-scientific-research>

⁶⁰ Zahra Hirji, "EPA Chief Scott Pruitt Encouraged Oil Executives To Apply For Top Agency Jobs," *Buzzfeed News* (June 25, 2018), https://www.buzzfeed.com/zahrahiR.J.i/scott-pruitt-recruited-oil-executives-trump-hotel?utm_term=.jozV4jpZr3#.dvMR3kjomO

⁶¹ Sean Riley and Kevin Bogardus, "Boards add industry and state officials, drop scientists," *E&E News* (Nov. 3, 2017), <https://www.eenews.net/greenwire/2017/11/03/stories/1060065619>

⁶² July 18, 2017 EPA Meeting with API, <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0483-0008>

⁶³ March 2, 2018 EPA-DC Meeting with Conoco Phillips RE: Alaska Issue <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0483-0070>

⁶⁴ Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration Proposal Introductory Briefing for Interagency Working Groups, U.S. Environmental Protection Agency (May 2, 2018), pg. 8, [file:///C:/Users/dd86294/Downloads/Oil_and_Gas_Reconsideration_Proposal_2060-AT54_NPRM_20180425%20\(3\).pdf](file:///C:/Users/dd86294/Downloads/Oil_and_Gas_Reconsideration_Proposal_2060-AT54_NPRM_20180425%20(3).pdf)

OIRA review sees this number almost double to 380,000 short tons, reflecting the relaxed monitoring requirements sought by OIRA.⁶⁵

OIRA's campaign to even further weaken an already weak proposal and to override agency expertise is well-documented in the docket for this rulemaking. For example, on May 23, 2018, EPA career staff disagreed with OIRA's recommendations to further reduce the frequency of monitoring requirements and to redefine what it means to modify existing well sites so that modifications would not trigger emissions monitoring requirements for new and modified facilities.⁶⁶ OIRA also urged EPA to select the monitoring scheme that provided what OIRA characterized as the "highest net benefits." EPA career staff responded by noting that this option also resulted in the highest costs in the form of the "highest amount of foregone emission reductions."^{67, 68}

On June 7, 2018, EPA career staff again disagreed with OIRA's recommendations to further reduce the frequency of monitoring requirements. This time, OIRA proposed that EPA add an option for annual inspections at compressor stations, in addition to options envisaging quarterly inspections and semiannual (twice yearly) inspections. OIRA also recommended that the regulatory impact analysis accompanying the proposal consider the costs and benefits of even less frequent monitoring.⁶⁹ Career staff at EPA noted that there was no evidence to suggest that less frequent monitoring than it was proposing would qualify as the best system of emission reduction (BSER) as required under the CAA.⁷⁰

⁶⁵ Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration, Federal Register Vol. 83, No. 199 (Oct. 15, 2018), pg. 52059, <https://www.gpo.gov/fdsys/pkg/FR-2018-10-15/pdf/2018-20961.pdf>

⁶⁶ EO 12866 Interagency Comments on EPA draft proposed rule titled, "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration," <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0483-0073>

⁶⁷ *Id.*

⁶⁸ While EPA career staff correctly observed that OIRA's preferred monitoring scheme resulted in the highest costs in the form of foregone emissions reductions, it is important to note for context that these cost estimates were already dramatically underestimated because Pruitt revised the social cost of methane used by EPA to include only the domestic costs associated with climate change. Under this recalculation, EPA estimated the social cost of methane to be between \$53 (using a 7 percent discount rate) and \$170 (using a 3 percent discount rate) per metric ton of methane emissions in 2019. *See*, Regulatory Impact Analysis for the Proposed Reconsideration of the Oil and Natural Gas Sector Emission Standards for New, Reconstructed, and Modified Sources, U.S. Environmental Protection Agency, pg. 3-9, https://www.epa.gov/sites/production/files/2018-09/documents/oil_and_natural_gas_nsps_reconsideration_proposal_ria.pdf. The 2016 NSPS for oil and gas facilities calculated a global social cost of methane of \$1300 per metric ton in 2020 using a 3 percent discount rate. *See*, Regulatory Impact Analysis of the Final Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, U.S. Environmental Protection Agency, pg. 4-16, https://www3.epa.gov/ttn/ecas/docs/ria/oilgas_ria_nsps_final_2016-05.pdf. Pruitt's decision to reduce the social cost of methane results in underestimating the true cost of these foregone emissions reductions by as much as a factor of eight.

⁶⁹ Second Round EO 12866 Summary Comments EPA Oil and Gas Reconsideration, <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0483-0076>

⁷⁰ *Id.*

A July 18, 2018 email exchange between EPA career staff and the OIRA analyst reviewing the draft proposal suggests that OIRA “management,” presumably OIRA Administrator Neomi Rao and/or other political hires, was behind the push for less frequent monitoring. In these emails, an EPA career staffer wrote, “I gave you a rundown on our proposed lead option and the monitoring frequencies. You said you needed to discuss that with your management. Did you get a chance to do that before you left?” To which the OIRA analyst replied, “We still feel that annual monitoring for compressors and the other option 3 monitoring frequencies are the best option due to the reasons we explained on our call.”⁷¹ An August 14, 2018 email from EPA career staff to OIRA shows OIRA still pushing to reduce the monitoring frequency for compressor stations. This email also shows EPA career staff sending over memos, apparently at OIRA’s request, dealing with data provided by API and GPA Midstream, another oil and gas industry trade association.⁷²

An August 17, 2018 memo from OIRA to EPA career staff shows OIRA still pushing EPA career staff to relax monitoring frequency requirements, this time on the basis of a study from the Interstate Natural Gas Association of America (INGAA) purporting to show that more frequent inspections do not significantly reduce methane emissions. EPA career staff noted their disagreement with the INGAA study and provided a memo to OIRA explaining the technical problems with the INGAA study. OIRA ignored EPA career staff and continued to push for an annual monitoring option in the proposed rule.⁷³ When the proposed rule was finally announced, it included an option for annual monitoring for compressors as well as less frequent monitoring at other facilities, all as OIRA had repeatedly demanded.

Against this backdrop of OIRA pushing to weaken an already weak proposal to regulate the oil and gas industry, it is important to note that fossil fuel industry influence in the Trump Administration also extends to OIRA. Neomi Rao, the OIRA Administrator, spent much of her professional academic career as a professor at the George Mason University School of Law (now the Antonin Scalia School of Law), where she was the founder of the Center for the Study of the Administrative State. Both George Mason and the Center for the Study of the Administrative State have received multi-million dollar grants from entities associated with the Koch brothers.⁷⁴ The Koch brothers in turn own Koch Minerals and its subsidiary Koch Exploration, which as oil and gas producers, would financially benefit from weakening the 2016 NSPS for oil and gas facilities.

⁷¹ June 26 - July 18, 2018 OMB Interagency Reivew (sic) General Correspondence, <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0483-0081>

⁷² August 14, 2018 OMB Interagency Review Email from EPA to OMB with responses to comments, <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0483-0058>

⁷³ EO 12866 Summary Comments - EPA Oil and Gas Reconsideration, <https://www.regulations.gov/document?D=EPA-HQ-OAR-2017-0483-0055>

⁷⁴ Steve Eder, “Neomi Rao, the Scholar Who Will Help Lead Trump’s Regulatory Overhaul,” *The New York Times* (July 9, 2017), <https://www.nytimes.com/2017/07/09/business/the-scholar-who-will-help-lead-trumps-assault-on-rules.html>

III. Legal Argument

The proposed rule is illegal for four reasons. First, it is irreparably tainted due to the fact that it was developed under the tenure of former EPA Administrator Pruitt, who possessed an inalterably closed mind with respect to regulating methane emissions at oil and gas facilities. Second, it is tainted by the fact that Pruitt's involvement in its development violated his duty of impartiality under the Ethics in Government Act. Third, it is arbitrary and capricious as it is not the product of reasoned decision-making. And fourth, it constitutes an illegal delegation of regulatory authority to private interests, in this case the oil and gas industry.

A. **The Proposed Rule Is Tainted by Pruitt's Inalterably Closed Mind**

Pruitt may no longer be running EPA, but the proposed rule was developed under his tenure. Indeed, it was received by OIRA more than two months before Pruitt left EPA.⁷⁵ Any analysis of the legality of the proposed rule must therefore consider Pruitt's role in developing it.

Those interested in a rulemaking "have a right to a fair and open proceeding; that right includes access to an impartial decisionmaker."⁷⁶ A regulator should be disqualified from a rulemaking "when there has been a clear and convincing showing that the [regulator] has an unalterably closed mind on matters critical to the disposition of the proceeding."⁷⁷

Pruitt's years long, industry-funded campaign against regulations limiting methane emissions from the oil and gas sector is clear and convincing evidence of an inalterably closed mind. His deep industry ties and history of doing industry's bidding combined with his own legal combat against the 2016 NSPS for oil and gas facilities and his rich record of making highly critical statements about efforts to study, measure, and regulate methane emissions from oil and gas facilities as well as about the CAA's statutory authority to regulate carbon emissions make a clear and convincing showing of his inalterably closed mind on these subjects.

Pruitt's history of engaging in climate denial and consorting with people and groups that promote climate denial also demonstrates his mind was closed during the rulemaking process. The purpose of the proposed rule is to reduce carbon emissions in order to help combat climate change, so if Pruitt didn't accept the overwhelming scientific consensus that human-caused carbon emissions are driving climate change, then he could not approach the instant rulemaking process with anything but an inalterably closed mind, incapable of reasonably interpreting the overwhelming scientific expertise on this subject.

The public has "a right to a fair and open proceeding; that right includes access to an impartial decisionmaker."⁷⁸ Allowing the regulatory process to be guided by those who are incapable of adjusting their positions in the face of evidence and arguments amassed during the rulemaking process would make that statutory process irrelevant. Regulators must be able to look at the evidence and arguments objectively if they are to issue regulations that serve our nation's best interests. It is abundantly clear that as EPA Administrator, Pruitt was incapable of doing this.

⁷⁵ RIN No. 2060-AT67, Office of Information and Regulatory Affairs, available at <https://www.reginfo.gov/public/Forward?SearchTarget=RegReview&textfield=2060-AT67>

⁷⁶ *Association of National Advertisers v. FTC*, 627 F.2d 1151, 1174 (D.C. Cir. 1979); see also *Lead Industries Association v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980)

⁷⁷ *Ass'n of Nat'l Advertisers, Inc.*, 627 F.2d at 1170.

⁷⁸ *Id.* at 1174.

Rather than adjust his position in the face of overwhelming scientific, technological, and economic evidence, Pruitt clung to his position that the 2016 NSPS for oil and gas facilities needed to be replaced with a *de minimis* regulatory scheme that would result in substantially increased methane emissions. His involvement in the instant rulemaking process makes a mockery of the regulatory process and any methane-related rulemaking in which he was involved should be withdrawn.

B. Pruitt's Participation in the Instant Rulemaking Violated His Duty of Impartiality under the Ethics in Government Act

Pruitt's participation in the instant rulemaking also violates part 2635 of the Code of Federal Regulations, subpart E⁷⁹ governing impartiality in performing official duties.⁸⁰ These rules apply to official duties a government official may undertake regarding a "particular matter."⁸¹ According to the Office of Government Ethics, a rulemaking is not generally considered a "particular matter" and therefore normally falls outside the purview of these rules.⁸² However, this is an extreme case that warrants an exception to the general rule.

Pruitt has already acknowledged the ethical problems associated with his continued involvement in court cases to which he was a party as Oklahoma Attorney General. Pruitt's ethics memo states that he will not participate in any active cases in which Oklahoma is involved in order "to avoid even the appearance of any impropriety under federal ethics or professional responsibility obligations."⁸³ That included being recused from litigation to block the 2016 NSPS for oil and gas facilities.

Pruitt's participation in this rulemaking creates the same appearance of impropriety that necessitated his recusal from that litigation. The rulemaking covers the same subject matter, raises the same legal issues, and involves the same parties as the litigation. No reasonable person could conclude from Pruitt's previous work as Oklahoma Attorney General against the rule that he would approach his rulemaking responsibilities as EPA Administrator with any degree of impartiality.

Consider the parties involved. Four of the industry petitioners in the litigation challenging the 2016 NSPS for oil and gas facilities donated more than \$250,000 to Pruitt and his affiliated political action committees. Five of the industry petitioners in the litigation challenging the 2016 NSPS for oil and gas facilities met with Pruitt in just his first several weeks as EPA Administrator. Industry petitioners and their member companies met with Pruitt's political hires and submitted documents and data to career staff urging a *de minimis* rule with watered-down monitoring requirements.

⁷⁹ Code of Federal Regulations section 2635.501, https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=06f812f26e7ed9f364bb87944757b912&rgn=div5&view=text&node=5:3.0.10.10.9&idn_o=5#sp5.3.2635.e

⁸⁰ Office of Government Ethics Memorandum of October 4, 2006, https://www.oge.gov/Web/OGESites/All+Advisories/C10C6B23AC67F74685257E96005FBDD7/%24FILE/do-06-02_9.pdf?open

⁸¹ *Id.*

⁸² *Id.*

⁸³ E. Scott Pruitt, Memorandum: My Ethics Obligations (May 4, 2017), pg. 3, https://www.eenews.net/assets/2017/05/05/document_pm_06.pdf

The Pruitt-initiated rulemaking to weaken the 2016 NSPS for oil and gas facilities exists to accomplish what Pruitt’s litigation challenging the 2016 NSPS for oil and gas facilities had not, and what his industry patrons desire: replacement of the serious methane leak monitoring and repair requirements embodied in the 2016 NSPS for oil and gas facilities replaced with a fig leaf regulatory scheme that would allow all parties to pay lip service to the imperative of reducing methane leaks all while continuing to allow large amounts of leaked methane emissions to enter the atmosphere.

C. The Proposed Rule Is Arbitrary and Capricious

The Administrative Procedure Act⁸⁴ permits courts to set aside agency actions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”⁸⁵ In determining whether an agency action was “arbitrary and capricious, the courts look to several factors, whether: “(1) the agency ‘relied on factors which Congress has not intended it to consider,’ (2) the agency ‘failed to consider an important aspect of the problem,’ (3) the agency explained its decision in a way ‘that runs counter to the evidence,’ or (4) the action ‘is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.’”⁸⁶

Courts have also held that a rule is arbitrary and capricious if the promulgating agency did not “genuinely engage in reasoned decision making”⁸⁷ or if it did not “articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”⁸⁸

While judicial review of agency actions is usually “exceedingly deferential,”⁸⁹ when, given the totality of the circumstances, the agency appears not to have engaged in reasoned decision-making, a rule should be invalidated.

“The scope of review under the “arbitrary and capricious” standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the 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.” In reviewing that explanation, we must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”⁹⁰

⁸⁴ 5 USC §500 *et seq.*

⁸⁵ 5 USC §706(2)(a)

⁸⁶ *Mendoza v. Secretary, Department of Homeland Security*, 851 F.3d 1348, 1353 (11th Cir. 2017) (quoting *Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d 1257, 1264 (11th Cir. 2009))

⁸⁷ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970)

⁸⁸ *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 US 29, 43 (1983), quoting *Burlington Truck Lines, Inc. v. United States*, [371 U. S. 156, 168](#) (1962)

⁸⁹ *See, e.g., Fund for Animals v. Rice*, 85 F.3d 535, 541 (11th Cir. 1996)

⁹⁰ *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 US 29, 43 (1983), quoting *Burlington Truck Lines, Inc. v. United States*, [371 U. S. 156, 168](#) (1962) and *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, *supra*, at [419 U. S. 285](#). *See also, Massachusetts v. EPA* (constraining EPA’s discretion and subjecting the agency’s deferral of a decision to hard look review)

This heightened level of scrutiny calls on a court to “intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a ‘hard look’ at the salient problems, and has not genuinely engaged in reasoned decision-making.”⁹¹ These concerns are epidemic for the proposed rule.

Additionally, courts have found that it is appropriate to more closely scrutinize regulatory decisions that constitute an abrupt change in course. If an agency makes such a regulatory U-turn, it must “provide a more detailed justification than would suffice for a new policy [...] when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy. [...] It would be arbitrary and capricious to ignore such matters.”⁹² “An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past.”⁹³

Recently, the United State District Court for the District of Montana rejected a Trump administration regulatory U-turn for exactly these reasons.⁹⁴ That case is instructive here.

In 2015, the Obama administration denied a permit for the construction of the Keystone XL pipeline. That decision detailed how the pipeline was not consistent with climate change-related foreign policy considerations, and explained why 2015 was a critical time for climate action given rising carbon emissions and international movement towards limiting emissions. The Trump administration reversed that decision in 2017 without addressing either of these issues. The Montana court held this was arbitrary and capricious, writing, “[t]he [State] Department’s 2017 conclusory analysis that climate-related impacts from Keystone subsequently would prove inconsequential and its corresponding reliance on this conclusion as a centerpiece of its policy change required the Department to provide a ‘reasoned explanation.’ The Department instead simply discarded prior factual findings related to climate change to support its course reversal.”⁹⁵

This rulemaking is similarly based on conclusory statements about climate change. The 2016 NSPS for oil and gas facilities predicated its existence on reducing the methane emissions that are one of the main drivers of climate change. The rule features an extensive discussion of how it is an integral part of the government’s strategy to combat climate change, including its connection to EPA’s determination that methane emissions endanger public health and welfare, how it builds on existing regulations for oil and gas facilities, how it fits into the government’s

⁹¹ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 844-5 (D.C. Cir. 1970). In *Greater Boston Television Corp.*, the biggest “danger signal” that caused the court to give an agency’s actions a “hard look” was the fact that the chair of the Federal Communications Commission (FCC) had had potentially improper contacts with an executive at one of companies competing for a broadcast license to be attributed by the agency. Other “danger signals” that courts have held to trigger heightened scrutiny of agency actions include “abrupt shifts in policy” and “where the agency has demonstrated undue bias towards particular private interests.”

⁹² *FCC v. Fox Television Stations*, 566 U.S. 502, 515 – 16 (2009)

⁹³ *Id.* at 537 (Kennedy, J., concurring).

⁹⁴ *Indigenous Environmental Network v. U.S. Dep’t. of State*, Case No. 4:17-cv-00031 (D. Mont. 2018)

⁹⁵ *Id.*

climate action plan, methane strategy, and methane reduction targets.⁹⁶ The rule also includes a detailed discussion of the negative effects of climate change and how methane emissions play a role in climate change.⁹⁷

The proposed rule makes no effort to rebut any of these findings. Indeed, it features almost no mention of climate at all.⁹⁸ Quite simply, EPA provides no explanation for the regulatory U-turn the proposed rule embodies, nor does it attempt to explain why its prior conclusions about climate change and methane emissions were incorrect. As such, the proposed rule is arbitrary and capricious under both the *Fox Television Stations* and *Indigenous Environmental Network* decisions.

A full review of the technical deficiencies of the proposed rule is beyond the scope of this comment. But even a basic review shows that in an effort to achieve a result sought by the oil and gas industry, EPA engaged in a sham decision-making process lacking any rational connection between the facts and the choices made. In this process, it was ably aided by OIRA, which demanded an even weaker rule more favorable to the oil and gas industry.

EPA concedes that the proposed rule would result in considerably higher methane emissions. It has also intentionally underestimated the costs associated with the additional carbon pollution that would be generated by the proposed rule by using a social cost of methane approximately eight times lower than the one used in the 2016 NSPS for oil and gas facilities. And the social cost of methane used in the 2016 rule was already a low estimate. A recent survey of experts in the field yielded a mean social cost of carbon (SCC) approximately six times greater than the one used in the 2016 rule.⁹⁹ And recent peer-reviewed research has yielded SCC estimates even higher still.¹⁰⁰ What's more, the proposed rule does not in any way address the conclusions of the recently released National Climate Assessment, which finds that climate change will have devastating effects on the U.S. economy.¹⁰¹

Courts have also held that while they “must defer to an agency's expertise, [they] must do so only to the extent that the agency utilizes, rather than ignores, the analysis of its experts.”¹⁰² In cases where agency expertise is ignored, the rule will be arbitrary and capricious. In the instant case, the docket is ripe with examples of OIRA ignoring and overruling EPA career staff with

⁹⁶ Oil and Natural Gas Sector: Emissions Standards for New, Reconstructed, and Modified Sources, Federal Register Vol. 81, No. 107 (June 3, 2016), pg. 35830, <https://www.gpo.gov/fdsys/pkg/FR-2016-06-03/pdf/2016-11971.pdf>

⁹⁷ *Id.* at 35833-40.

⁹⁸ The few mentions of climate change in the proposed rule are limited to brief passages acknowledging that relaxing monitoring and repair requirements will result in foregone climate benefits.

⁹⁹ Robert Pindyck, “The Social Cost of Carbon Revisited,” pg. 28, National Bureau of Economic Research (Nov. 2016), <http://web.mit.edu/rpindyck/www/Papers/SCCRevisitedNov2016.pdf>. Social cost of methane estimates can be derived from social cost of carbon estimate by multiplying the social cost of carbon by the warming potential of methane, which is between 28 and 36 according to EPA.

¹⁰⁰ Katherine Ricke, et al., “Country-level social cost of carbon,” *Nature Climate Change* 8 (Sept. 2018), pgs. 895 – 900, <https://www.nature.com/articles/s41558-018-0282-y#ref-CR3>

¹⁰¹ Fourth National Climate Assessment, Volume II: Impacts, Risks, and Adaptation in the United States, <https://nca2018.globalchange.gov/>

¹⁰² *Defenders of Wildlife v. Babbitt*, 958 F.Supp. 670, 685 (D.C. Cir. 1997)

respect to the appropriate frequency of inspections that should qualify as BSER.¹⁰³ This is precisely the situation that led the *Defenders of Wildlife* court to strike down the rulemaking at issue in that case as arbitrary and capricious.

The obvious conclusion to the above record is that EPA and OIRA did not in fact care about the facts or expert analysis. They cared about the results that the oil and gas industry wanted: the replacement of the 2016 NSPS for oil and gas facilities with a rule requiring only infrequent inspections. The factual record laid out in this comment details precisely the sort of “danger signals” the courts have found to warrant “hard look” review. Potentially improper contacts between regulators and regulated industries,¹⁰⁴ “abrupt shifts in policy,”¹⁰⁵ and “undue bias towards particular private interests”¹⁰⁶ are all present in this tawdry tale of industry capture. Based on this record, no court could plausibly conclude that EPA “genuinely engaged in reasoned decision making”¹⁰⁷ nor conclude that EPA could “articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”¹⁰⁸ The proposed rule is therefore arbitrary and capricious and should be withdrawn.

D. The Proposed Rule and Accompanying Regulations are an Illegal Delegation of EPA Rulemaking Authority to a Regulated Industry

Just as an agency rulemaking will be set aside if a court determines that it was arbitrary and capricious, an agency rulemaking should be invalidated if a court finds that the agency delegated its rulemaking authority to one or more private interests, because Congress “cannot delegate regulatory authority to a private entity.”¹⁰⁹ “Although objections to delegations are “typically presented in the context of a transfer of legislative authority from the Congress to agencies, [...] the difficulties sparked by such allocations are even more prevalent in the context of agency delegations to private individuals.”¹¹⁰

While it is clear that an agency may not *explicitly* delegate its rulemaking authority to private interests, an agency that *implicitly* delegates its rulemaking authority to private interests raises the same concerns. An agency is effectively captured by the private interests it regulates when

¹⁰³ Notably, BSER is a technical determination to be made by EPA and is not subject to cost-benefit analysis as OIRA claimed, and cost is only one of nine factors to be considered when determining BSER. These nine factors include whether, and by what date, the standards are (1) achievable through a (2) system of emission reduction, whether that system is the (3) best that EPA has determined to be (4) adequately demonstrated, the (5) cost of those standards, any resulting (6) non-air quality health and environmental impacts, (7) energy requirements, the (8) amount of air pollution reduced by the standards, and how the standard may drive (9) technological innovation. *See*, 80 Fed. Reg. 64,510, 64,538

¹⁰⁴ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 844-5 (D.C. Cir. 1970)

¹⁰⁵ *United Church of Christ v. FCC*, 707 F.2d 1413, 1425 (D.C. Cir. 1983)

¹⁰⁶ *NRDC v. SEC*, 606 F.2d 1031, 1050 (D.C. Cir. 1979)

¹⁰⁷ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970)

¹⁰⁸ *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 US 29, 43 (1983), quoting *Burlington Truck Lines, Inc. v. United States*, [371 U. S. 156, 168](#) (1962)

¹⁰⁹ *Ass'n of American Railroads v. USDOT*, 721 F.3d 666, 670 (D.C. Cir. 2013) rev'd on other grounds

¹¹⁰ *Id.*, quoting *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1143 (DC Cir. 1984).

its “regulation is . . . directed away from the public interest and toward the interest of the regulated industry’ by ‘intent and action’ of industries and their allies.”¹¹¹

As described above, the proposed rule was the product of a process that was effectively delegated to industry. EPA and OIRA ultimately acquiesced to industry’s repeated demands for infrequent monitoring and repair requirements.

In addition to the fact that the proposed rule adopts industry’s position while ignoring the public interest and minimizing the benefits of reduced GHG emissions, there is also abundant evidence that EPA political staff essentially took direction from the fossil fuel industry with respect to this rulemaking. The fossil fuel industry had open access to EPA and senior EPA officials overseeing this rulemaking were consulting with them on it. Senior EPA and OIRA officials were closely tied to the fossil fuel industry and had a long history of hostility towards rules designed to reduce greenhouse gas emissions including rules designed to limit methane emissions from the oil and gas sector, particularly on behalf of industry donors who bankrolled their political careers or industry clients they represented as lawyers or lobbyists prior to joining the Trump administration.

We are not the only ones to conclude that the Trump EPA has been captured by industry. A recently published article in the *American Journal of Public Health* finds that EPA is exhibiting many signs of regulatory capture.¹¹² The authors of this article examined EPA actions from December 2016 through June 2017 and they interviewed 45 current and retired EPA employees. Among their findings pointing to regulatory capture:

- “Appointees have deep ties with industries.”
- “Significant policy changes at the EPA favor businesses and industry, while probably incurring considerable health and environmental consequences.”
- “Pruitt has regularly championed the interests of regulated industries, while rarely affirming environmental and health protections.”
- “Pruitt dismissed many members of the EPA’s Science Advisory Board and its Board of Scientific Counselors, created a new rule preventing EPA-funded scientists from serving on those boards, and—for the first time in agency history—allowed lobbyists on scientific advisory boards.”
- “Pruitt’s own meetings and schedule . . . are almost exclusively with company and trade organizations and rarely with environmental, public health, or citizen groups.”¹¹³

The extreme and well-documented regulatory capture of the Trump EPA is evidence that it has effectively delegated its authority to the industries that have captured it, in particular, the fossil fuel industry. There is no substantive difference between an agency explicitly telling a company

¹¹¹ Lindsey Dillon, *et al.*, “The Environmental Protection Agency in the Early Trump Administration: Prelude to Regulatory Capture,” *American Journal of Public Health* (April 2018), <https://ajph.aphapublications.org/doi/10.2105/AJPH.2018.304360>, quoting, Daniel Carpenter, editor, *Preventing Regulatory Capture: Special Interest Influence and How to Limit It*, pg. 73, Cambridge University Press (2014)

¹¹² Lindsey Dillon, *et al.*, “The Environmental Protection Agency in the Early Trump Administration: Prelude to Regulatory Capture,” *American Journal of Public Health* (April 2018)

¹¹³ *Id.*

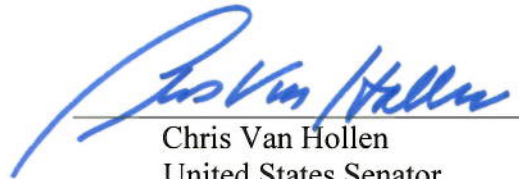
or industry to write a rule for it, and an agency telling a company or industry that it will write whatever rule the company or industry wants. Like Scott Pruitt's Devon Energy letter, the substance is all industry, whatever the letterhead, and the public interest is ignored. That is not lawful under well-established principles of administrative law.

For the foregoing reasons, we, the undersigned United States Senators, respectfully urge EPA to withdraw this proposed rule.

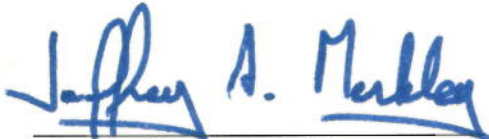
Sincerely,



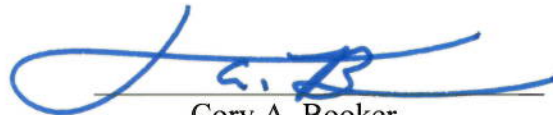
Sheldon Whitehouse
United States Senator



Chris Van Hollen
United States Senator



Jeffrey A. Merkley
United States Senator



Cory A. Booker
United States Senator



Kirsten Gillibrand
United States Senator



Edward J. Markey
United States Senator

Appendix I

MEMORANDUM

SUBJECT: Recusal Statement

FROM: William L. Wehrum
Assistant Administrator

TO: Andrew R. Wheeler
Acting Administrator



9-17-18

I have previously consulted with the Office of General Counsel/Ethics (OGC/Ethics) and been advised about my ethics obligations. This memorandum formally notifies you of my continuing obligations to recuse myself from participating personally and substantially in certain matters in which I have a financial interest, or a personal or business relationship. I also understand that I have obligations pursuant to Executive Order 13770 and the Trump Ethics Pledge that I signed, as well as my own bar obligations.

FINANCIAL CONFLICTS OF INTEREST

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

I have consulted with OGC/Ethics and been advised that I do not currently have any financial conflicts of interest but will remain vigilant and notify OGC/Ethics immediately should my financial situation change.

OBLIGATIONS UNDER EXECUTIVE ORDER 13770

Pursuant to Section 1, Paragraph 6 of the Executive Order, I understand that I am prohibited from participating in any particular matter involving specific parties in which my former employer, **Hunton & Williams LLP** (now Hunton Andrews Kurth LLP), or any former client to whom I provided legal services during the past two years, is a party or represents a party. I understand that my recusal lasts for two years from the date that I joined federal service.

I have been advised by OGC/Ethics that, for the purposes of this pledge obligation, the term "particular matters involving specific parties" is broadened to include any meetings or other communication relating to the performance of my official duties, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties. I am further advised that the term "open to all interested parties" means five or more parties.

RECUSAL LIST In effect until November 12, 2019	
FORMER EMPLOYER: Hunton & Williams LLP (now Hunton Andrews Kurth LLP)	
FORMER CLIENTS: ¹	
Agrium Inc.; Agrium U.S. Inc.; Nu-West Industries, Inc. American Forest & Paper Association American Fuel & Petrochemical Manufacturers American Petroleum Institute B10 Litigation Coalition Brick Industry Association CEMEX USA, Inc. Champion Power Equipment, Inc. Chemical Safety Advocacy Group (CSAG) Chevron Corporation Diageo Dominion Resources Services, Inc. Duke Energy Corporation Enbridge, Inc. Evonik Corporation ² ExxonMobil Corporation Flint Hills Resources, LP GPA Midstream Association (formally known as Gas Processors Association)	General Electric Company Georgia-Pacific LLC Kinder Morgan, Inc. Koch Companies Public Sector, LLC Koch Industries, Inc. Lehigh Hanson, Inc. Lowe's Companies, Inc. National Stone, Sand and Gravel Association Pfizer Inc. Phillips 66 Company Portland Cement Association Prinoth Ltd. Salt River Project Spectra Energy Corp. Sunflower Electric Power Corporation, Inc. Tile Council of North America Utility Air Regulatory Group Utility Water Act Group Whitaker Greer Company

¹ Two confidential clients are not listed. Both clients have a written confidentiality agreement expressly prohibiting disclosure.

² Includes but not limited to an ongoing settlement negotiation.

ATTORNEY BAR OBLIGATIONS

Pursuant to my obligations under my bar rules, I recognize that I am obliged to protect the confidences of my former clients. I also understand that I cannot participate in any matter that is the same as or substantially related to the same specific party matter that I participated in personally and substantially while in private practice, unless my bar provides for and I first obtain informed consent and notify OGC/Ethics. Attached is a list of cases I am recused from given my participation at Hunton Andrews Kurth LLP.

SCREENING ARRANGEMENT

In order to ensure that I do not participate in matters relating to any of the entities listed above or matters identified in the Attachment, I will instruct Josh Lewis, Chief of Staff, and Mandy Gunasekara, Principal Deputy Assistant Administrator, to assist in screening EPA matters directed to my attention that involve those entities. All inquiries and comments involving the entities or matters on my recusal list should be directed to Josh and Mandy without my knowledge or involvement until after my recusal period ends.

If Josh or Mandy determine that a particular matter will directly involve any of the entities or matters listed on my "specific party" recusal list, then they will refer it for action or assignment to another, without my knowledge or involvement. In the event that they are unsure whether an issue is a particular matter from which I am recused, then they will consult with OGC/Ethics for a determination. I will provide a copy of this memorandum to my principal subordinates with a copy to Justina Fugh, Senior Counsel for Ethics.

UPDATE AS NECESSARY

In consultation with OGC/Ethics, I will revise and update my recusal statement whenever warranted by changed circumstances, including changes in my financial interests, changes in my personal or business relationships, or any changes to my EPA duties. In the event of any changes to my recusal or screening arrangement, I will provide a copy of the revised recusal statement to OGC/Ethics.

Attachment

cc: Matthew Z. Leopold, General Counsel
Ryan Jackson, Chief of Staff
Mandy Gunesakara, Deputy Assistant Administrator
Clint Woods, Deputy Assistant Administrator
Elizabeth Shaw, Deputy Assistant Administrator
David Harlow, Senior Counsel
Josh Lewis, Chief of Staff
Kevin Minoli, Designated Agency Ethics Official
Justina Fugh, Senior Counsel for Ethics

William L. Wehrum
RECUSAL LIST – ATTORNEY BAR OBLIGATIONS

CASE NAME:	CITATION:
American Petroleum Institute v. EPA	No. 08-1277 (D.C. Cir.)
Environmental Integrity Project v. EPA	No. 08-1281 (D.C. Cir.) (consolidated with No. 08-1277)
Kinder Morgan CO2 Co., LP v. EPA	No. 09-1332 (D.C. Cir.)
Gas Processors Association v. EPA	No. 11-1023 (D.C. Cir.)
American Petroleum Institute, <i>et al.</i> v. EPA	No. 11-1309 (D.C. Cir.)
National Rural Electric Coop. v. EPA	No. 12-1208 (D.C. Cir.) (consolidated with No. 12-1163)
National Rural Electric Coop. v. EPA	No. 12-1352 (D.C. Cir.) (consolidated with No. 12-1346)
American Petroleum Institute v. EPA	No. 12-1405 (D.C. Cir.)
Gas Processors Association v. EPA	No. 12-1406 (D.C. Cir.) (consolidated with No. 12-1405)
American Petroleum Institute, <i>et al.</i> v. EPA	No. 12-1442 (D.C. Cir.)
American Petroleum Institute v. EPA	No. 13-1063 (D.C. Cir.) (consolidated with No. 11-1309)
American Petroleum Institute v. EPA	No. 13-1108 (D.C. Cir.)
Conservation Law Foundation, <i>et al.</i> v. EPA	No. 13-1233 (D.C. Cir.)
Sierra Club, <i>et al.</i> v. EPA	No. 13-1256 (D.C. Cir.) (consolidated with No. 16-1021)
American Petroleum Institute v. EPA	No. 13-1289 (D.C. Cir.) (consolidated with No. 13-1108)
PSEG Power LLC, <i>et al.</i> v. EPA	No. 14-1199 (D.C. Cir.) (consolidated with No. 13-1233)
Georgia-Pacific LLC v. EPA	No. 14-1267 (D.C. Cir.)
Gas Processors Association v. EPA	No. 15-1021 (D.C. Cir.) (consolidated with No. 15-1020)
American Petroleum Institute v. EPA	No. 15-1044 (D.C. Cir.) (consolidated with No. 13-1108)
American Petroleum Institute v. EPA	No. 15-1197 (D.C. Cir.)
Gas Processors Association v. EPA	No. 15-1473 (D.C. Cir.)
Sierra Club, <i>et al.</i> v. EPA, <i>et al.</i>	No. 15-1487 (D.C. Cir.)
Brick Industry Association v. EPA	No. 15-1492 (D.C. Cir.) (consolidated with No. 15-1487)
Sierra Club, <i>et al.</i> v. EPA, <i>et al.</i>	No. 16-1021 (D.C. Cir.)
American Fuel & Petrochemical, <i>et al.</i> v. EPA	No. 16-1033 (D.C. Cir.)
Air Alliance Houston, <i>et al.</i> v. EPA, <i>et al.</i>	No. 16-1035 (D.C. Cir.) (consolidated with No. 16-1033)
Brick Industry Association v. EPA	No. 16-1179 (D.C. Cir.) (consolidated with No. 15-1487)

American Petroleum Institute v. EPA	No. 16-1270 (D.C. Cir.) (consolidated with No. 13-1108)
American Petroleum Institute v. EPA	No. 16-1271 (D.C. Cir.)
American Petroleum Institute v. EPA	No. 16-1345 (D.C. Cir.) (consolidated with No. 16-1344)
Natural Resources Defense Council v. EPA	No. 16-1425 (D.C. Cir.)
Utility Air Regulatory Group v. EPA	No. 17-1088 (D.C. Cir.) (consolidated with No. 17-1085)