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

DEC 28 2017

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Impartiality Determination to Participate in Certain Matters Involving the State of Texas

FROM: Kevin S. Minoli KSM
Designated Agency Ethics Official and
Acting General Counsel

TO: Anne Idsal
Regional Administrator
Region 6

As the Regional Administrator for the United States Environmental Protection Agency (EPA) Region 6, you seek permission to participate in specific party matters involving the State of Texas. Within the last year, prior to being selected for this position, you served as Chief Clerk and Deputy Land Commissioner for the Texas General Land Office (TX GLO).

Under President Trump's Ethics Pledge, political appointees are prohibited from participating in specific party matters in which their former employer or former client is a party. However, state government is excluded under the definition of "former employer."[1] Therefore, the Ethics Pledge does not apply to your State of Texas employment. But since federal ethics rules do not contain a similar exclusion for state government, those rules do apply to your employment with the State of Texas.

I understand that you are not vested in the defined benefit plan with the State of Texas. As such, you do not have a financial conflict of interest pursuant to 18 U.S.C. § 208. However, what remains is an impartiality concern. The applicable ethics rules are set forth in the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, specifically Subpart E, "Impartiality in Performing Official Duty." Upon assuming the position of Regional Administrator, you will have a "covered relationship" with the State of Texas pursuant to 5 C.F.R. § 2635.502(b)(1)(iv). For one year from the date you resigned from the TX GLO, absent

[1] *See* Exec. Order 13770, Section 2(j), which provides that "'former employer' does not include … State or local government."

an impartiality determination from me, you cannot participate in any specific party matter in which the State of Texas is a party or represents a party if that matter is likely to have a direct and predictable effect upon the State or if the circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality. *See* 5 C.F.R. § 2635.502(a).

Federal ethics regulations permit federal employees to participate in matters that might raise impartiality concerns when the interest of the federal government in the employee's participation outweighs concern over the questioning of the "integrity of the agency's programs and operations." 5 C.F.R. § 2635.502(d). The factors that the Agency takes into consideration are:

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

As Regional Administrator, you are the leader of your Region and part of the Agency's political team. Your area of responsibility includes Texas, as well as Arkansas, Louisiana, New Mexico, Oklahoma, and 66 federally-recognized tribes. In your role as Regional Administrator, you are expected to communicate freely with the states in your region, including Texas, and you will be asked to participate in discussions and meetings related to particular matters that affect the State. Because I conclude that the interest of the United States Government in your participation outweighs any concerns about your impartiality, I am authorizing you to participate as Regional Administrator in particular matters that involve the State of Texas with the following limitation: you must recuse yourself from participation in EPA specific party matters if you participated personally and substantially in the same specific party matters while employed with the TX GLO. In making this determination, I have taken the following factors into consideration:

Nature of the relationship involved – Since March 2015, you have served as the Chief Clerk for the TX GLO, which is a Texas state agency responsible for managing state lands and the Texas coast, among other things. As Chief Clerk you oversaw all budget and expenditure matters and initiated the TX GLO's reorganization efforts to optimize business functions and provide cost savings for taxpayers. You served in this role for over two years, but I note that you previously served as General Counsel for TX GLO and also worked for the state environmental agency, the Texas Commission of Environmental Quality (TCEQ). Sensitivities regarding your impartiality will necessarily revolve around those issues in which you participated personally and substantially for the State of Texas in all of your previous roles. But, for purposes of the federal

impartiality standards, we are focused only on your "covered relationship" with your previous employer from the last year, the TX GLO. I also note that states share responsibility with EPA in protecting human health and the environment. With respect to many of our statutes, EPA has directly delegated states with regulatory and enforcement authority. In fact, EPA, through its regions, works closely and directly with state governmental entities on a continuing and frequent basis.

Nature and importance of the employee's role – Texas constitutes a significant portion of your portfolio as the leader of your region since your area of responsibility covers Arkansas, Louisiana, New Mexico, Oklahoma, Texas, and 66 federally-recognized tribes. In your role as Regional Administrator, you are expected to communicate freely with states, including Texas.

Sensitivity of the matter – We anticipate that there will be specific party matters in which you did not participate personally and substantially for the TX GLO that will rise to your level of attention, merit your participation and raise nationally significant issues.

Difficulty of reassigning the matter to another employee – Your participation as Regional Administrator in such matters will be of importance to the Administrator, and therefore, in the Agency's interests. In these situations, it may not be appropriate to reassign the matter to another employee.

Under this limited authorization, you are authorized to participate in new or future specific party matters that involve the State of Texas, but not on the very same specific party matters on which you worked on personally and substantially while employed by the TX GLO. This "cooling off" period with the State of Texas will last for one year from the date you left the TX GLO. If the Agency determines that we have a compelling reason for your participation as an EPA official on any of those same specific party matters that you participated in personally and substantially, then you, your Deputy Regional Administrator or Regional Counsel may ask OGC/Ethics to reconsider the factors and information listed above on a case-by-case basis along with additional relevant details before determining whether to authorize your participation. You must continue to recuse yourself from those matters in which you had previously participated unless OGC/Ethics first determines that the Agency's interest in your participation outweighs any impartiality concern and authorizes you to participate.

Nothing in this impartiality determination precludes you from making additional adjustments to your duties, such as voluntarily recusing from other matters if necessary. To that end, I understand that you will not participate in any particular matter involving specific parties that are still pending with EPA that you worked on personally and substantially while at TCEQ. You are cognizant of your attorney bar rules that prohibit you from participating in any matter that is the same as or substantially related to the same specific party matter that you previously participated in personally and substantially, unless your bar provides for and you first obtain informed consent and notify OGC/Ethics.

If you have any questions regarding this determination, or if a situation arises in which you need advice or clarification, please contact Justina Fugh at fugh.justina@epa.gov or (202) 564-1786, or any member of your regional ethics team.

cc: Sam Coleman, Deputy Regional Administrator, Region 6
Jim Payne, Regional Counsel, Region 6
Ben Harrison, Deputy Regional Counsel, Region 6
Jan Gerro, Regional Ethics Counsel, Region 6
Terry Sykes, Regional Ethics Counsel, Region 6
Justina Fugh, Senior Counsel for Ethics