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

JAN - 3 2018

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

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

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

TO: Cathy Stepp
Regional Administrator
Region 5

As the Regional Administrator for the United States Environmental Protection Agency (EPA) Region 5, you seek permission to participate in specific party matters involving the State of Wisconsin. Within the last year, prior to being selected for this position, you served as Secretary of the Wisconsin Department of Natural Resources.

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 Wisconsin 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 Wisconsin.

I understand that you have a defined benefit plan with the State of Wisconsin. As such, you have a financial conflict of interest pursuant to 18 U.S.C. § 208. Under this criminal statute, you cannot participate personally and substantially in any particular matter that will affect the State's ability or willingness to honor its contractual obligations with respect to your state retirement interests. In the Agency's experience, it is unlikely that you as the Regional Administrator will be in any position to affect the State's ability or willingness to pay these benefits to its retirees. I do not expect, then, that 18 U.S.C. § 208 will prohibit you from carrying out your official EPA duties.

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

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 Wisconsin pursuant to 5 C.F.R. § 2635.502(b)(1)(iv). For one year from the date you resigned from the Wisconsin Department of Natural Resources, absent an impartiality determination from me, you cannot participate in any specific party matter in which the State of Wisconsin 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 Wisconsin, as well as Indiana, Illinois, Michigan, Minnesota and Ohio. In your role as Regional Administrator, you are expected to communicate freely with the states in your region, including Wisconsin, 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 Wisconsin 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 Wisconsin Department of Natural Resources. In making this determination, I have taken the following factors into consideration:

Nature of the relationship involved – Since 2011, you have served as the Secretary for the Wisconsin Department of Natural Resources, which is the third largest agency in Wisconsin. In

this significant leadership role, you led the state's environmental agency responsible for state enforcement and protection of wildlife, fisheries, state parks, trail, forests and environmental permitting. Sensitivities regarding your impartiality will necessarily revolve around the issues in which you participated personally and substantially for the Department of Natural Resources. 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.

Effect of the matter upon your financial interest – I have concluded that there is only a remote possibility that any of EPA's actions will affect the State's ability or willingness to honor its contractual obligations to pay benefits to its retirees. Your actions as the Regional Administrator will not affect any pay-outs you may receive from your retirement plan.

Nature and importance of the employee's role – Wisconsin constitutes a significant portion of your portfolio as the leader of your region since your area of responsibility covers Indiana, Illinois, Michigan, Minnesota, Ohio and Wisconsin. In your role as Regional Administrator, you are expected to communicate freely with states, including Wisconsin.

Sensitivity of the matter – We anticipate that there will be specific party matters in which you did not participate personally and substantially for the Wisconsin Department of Natural Resources 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 Wisconsin, but not on the very same specific party matters on which you worked on personally and substantially while employed by the Wisconsin Department of Natural Resources. This "cooling off" period with the State of Wisconsin will last for one year from the date you left the Department of Natural Resources for those specific party matters that you did not participate in personally and substantially. You have voluntarily agreed not participate in any specific party matter involving Wisconsin in which you had previously participated. 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.

While I have issued you this determination to interact with the State of Wisconsin with the limitation described above, please note that you may wish to make adjustments to your duties to not participate in a particular matter that involves Wisconsin. Nothing in this impartiality determination precludes you from making additional adjustments to your duties, such as voluntarily recusing from other matters, although you are advised to confer with your Regional Counsel should such a circumstance arise.

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 your regional ethics team.

cc: Ed Chu, Acting Deputy Regional Administrator, Region 5
Leverett Nelson, Regional Counsel, Region 5
Ann Coyle, Regional Ethics Counsel, Region 5
Justina Fugh, Senior Counsel for Ethics