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

JAN 11 2018

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

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

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

TO: David Ross
Assistant Administrator
Office of Water

As the Assistant Administrator for the United States Environmental Protection Agency's (EPA) Office of Water, 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 Wisconsin Assistant Attorney General and Director of the Environmental Protection Unit for the Wisconsin Department of Justice.

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 both defined benefit and defined compensation plans 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 Assistant Administrator for Water 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

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

U.S.C. § 208 will prohibit you from carrying out your official EPA duties.

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 Assistant 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 Justice, 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.

In reviewing these factors, I have concluded that the interest of the United States Government in your participation outweighs any concerns about your impartiality and I am authorizing you to participate as Assistant Administrator for Water 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 Justice. In making this determination, I have taken the following factors into consideration:

<u>Nature of the relationship involved</u> – Since May 2016, you have served as the Wisconsin Assistant Attorney General and Director of the Environmental Protection Unit for the Wisconsin Department of Justice. In this role, you were responsible for managing the environmental litigation unit which represents the Wisconsin Department of Natural Resources and the State of Wisconsin in federal and state court, defending agency decisions, prosecuting environmental enforcement cases, and providing legal and policy advice on environmental and natural resource

issues. You served in this role for over one year, but I note that you previously worked in the Wyoming Attorney General's Office as a Senior Assistant Attorney General and a member of the Water and Natural Resources Division. In Wyoming, you were responsible for representing the Water Quality Division of the Wyoming Department of Environmental Quality in all environmental and natural resources legal matters. Sensitivities regarding your impartiality will necessarily revolve around those issues in which you participated personally and substantially 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 Wisconsin Department of Justice. 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.

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 Assistant Administrator will not affect any pay-outs you may receive from your retirement plans.

Nature and importance of the employee's role – As the Assistant Administrator for Water, you are responsible for advising the Administrator in matters pertaining to the implementation of various water-related statutes to ensure safe drinking water, the restoration and maintenance of oceans, watersheds and their aquatic ecosystems to protect human health, support economic and recreational activities, and provide healthy habitat for fish, plants and wildlife. OW frequently works with state and local governments to provide guidance, specify scientific methods and data collection requirements, perform oversight and facilitate communications. In the role of Assistant 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 Justice 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 Assistant Administrator for Water 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 Justice. This "cooling off" period with the State of Wisconsin will last for one year from the date you left the Wisconsin Department of Justice. 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 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 the Wyoming Attorney General's Office. 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.

cc: Dennis Lee Forsgren, Jr., Deputy Assistant Administrator
Justina Fugh, Senior Counsel for Ethics