Message

From: ODea, Elise [odea.elise@epa.gov]
Sent: 1/26/2021 4:05:30 PM
To: Neugeboren, Steven [Neugeboren.Steven@epa.gov]; Wehling, Carrie [Wehling.Carrie@epa.gov]
CC: Kupchan, Simma [Kupchan.Simma@epa.gov]; Hughes, Krista [hughes.krista@epa.gov]; Wendelowski, Karyn [wendelowski.karyn@epa.gov]
Subject: RE: ethics next step - for immediate attention

Will do! And yes, it's all public information, but I will remove it. Thanks!

- -

Elise M. O'Dea
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Office of General Counsel
U.S. Environmental Protection Agency
(202) 564-4201

From: Neugeboren, Steven <Neugeboren.Steven@epa.gov>
Sent: Tuesday, January 26, 2021 11:01 AM
To: ODea, Elise <odea.elise@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>
Cc: Kupchan, Simma <Kupchan.Simma@epa.gov>; Hughes, Krista <hughes.krista@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>
Subject: RE: ethics next step - for immediate attention

Thank you Elise!

Since their recusal status is unclear, can you please resend with just stating the rule that is challenged, but not the status information? I know that is likely all public information but I'd prefer to leave that stuff out of this communication. Thanks!

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From: ODea, Elise <odea.elise@epa.gov>
Sent: Tuesday, January 26, 2021 10:26 AM
To: Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>
Cc: Kupchan, Simma <Kupchan.Simma@epa.gov>; Hughes, Krista <hughes.krista@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>
Subject: RE: ethics next step - for immediate attention

Hi Steve and Carrie,

Attached please find two documents listing the WOTUS cases that Melissa may participate in and the WOTUS cases that Dimple may participate in. I've also identified in each document which cases the other political is recused from (so that they can avoid discussing certain cases w/ each other). Please let me know if you would like me to make any changes to the documents or if you have any questions or concerns.

Also—I've flagged the recusals on the WOTUS district court litigation spreadsheet so that we can keep things straight on our end as well.

Thanks!
Elise

- -

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From: Wehling, Carrie <Wehling.Carrie@epa.gov>
Sent: Tuesday, January 26, 2021 8:12 AM
To: ODea, Elise <odea.elise@epa.gov>
Cc: Kupchan, Simma <Kupchan.Simma@epa.gov>; Hughes, Krista <hughes.krista@epa.gov>; Wendelowski, Karyn <wendelowski.karyn@epa.gov>
Subject: FW: ethics next step - for immediate attention

Elise -- Would you be able to do this without too much trouble? I'm assuming by prior employer he's referring just to Mass for Melissa and NRDC for Dimple.....
Let me know if you have concerns/questions about this.....
Thanks, Elise.
Carrie

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From: Neugeboren, Steven <Neugeboren.Steven@epa.gov>
Sent: Monday, January 25, 2021 5:42 PM
To: Messier, Dawn <Messier.Dawn@epa.gov>; Levine, MaryEllen <levine.maryellen@epa.gov>; McConkey, Diane <Mcconkey.Diane@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>
Subject: ethics next step - for immediate attention

Sharing Justina's response below which is complicated, so I called her and it and her message seemed orally pretty simple – that likely they CAN participate in any cases to which their prior employer was not a party. To help reach closure we agreed I would send her a list of the cases challenging the wotus and 401 rules to which their prior employers are not parties, and she would then forward that to melissa and dimple with her advice (I will review the email prior to its going to them).

So here is next steps:

Carrie and Diane – can you each have someone send me at their earliest convenience those case lists I can then forward to Justina – i.e., for each of them the WOTUS and 401 cases to which their prior employers are not a party. Please also list the case where Mass has filed amicus.

Thanks and let me know if you have any questions.

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From: Fugh, Justina <Fugh.Justina@epa.gov>
Sent: Monday, January 25, 2021 2:14 PM
To: Neugeboren, Steven <Neugeboren.Steven@epa.gov>
Cc: Wehling, Carrie <Wehling.Carrie@epa.gov>; Messier, Dawn <Messier.Dawn@epa.gov>
Subject: RE: an ethics welcome to Melissa Hoffer and Dimple Chaudhary

Hi Steve, Carrie and Dawn,
Often, I find it useful to just insert comments into the email itself, so see my comments in red below.
Justina

> As discussed, there is pending litigation in about 12 district courts challenging the WOTUS rule, and Massachusetts is a party to cases in California, New York and has filed an amicus brief in Massachusetts. NRDC is a party to cases in Massachusetts and So. Carolina. We discussed restrictions for them across the different cases and I've tried to capture what I took away from our conversation so can you please provide confirmation or clarification/correction.
> JUSTINA: To put the inquiry into our ethics vocabulary, these 12 cases are *particular matters involving specific parties*, also known as *specific party matters*. For our purposes, it doesn't matter that the subject matter of the specific party matter is a rulemaking, which is itself not a specific party matter. For ethics purposes, we focus on the "thing" at issue, which in this situation are those 12 separate cases.
>
> I'd like to ensure we understand the restrictions as soon as we are able as we are starting to prepare Monday for our first hot issues meeting with Melissa and Dimple this week. Thanks!
>
> **Melissa:**
>
> As explained in your email below, under her bar obligations, Melissa is precluded during her EPA tenure from participation in the two WOTUS cases to which Mass. is a party. In our call you explained that the "policy" decisions she may participate in pursuant to your impartiality determination include, for example, a policy decision not to defend the rule in litigation and requesting DOJ to seek abeyances in the cases for the Agency to reconsider its policy options. Your impartiality determination does not, however, permit her to participate in discussions of the litigation itself – e.g., deliberations on litigation strategy in light of such a policy decision, such as discussion whether to seek a remand, or other litigation options.
>
> Question - Do the restrictions as you describe them apply to a case in which Mass. has participated as amicus in D.Mass?
> JUSTINA: Assuming that MA was not a party to the case itself but filed an *amicus* brief only, then MA is not actually a party to the case. If the brief is filed by MA after she left the AG's office, then under the federal ethics rules ONLY, she might be permitted to work on it provided I grant an impartiality determination to allow her to work with MA during her one year cooling off period under the impartiality regulations. But if Melissa worked

on that *amicus* brief filing or if the case is similar to the MA cases she worked on, then she may have bar restrictions. Remember, she must always preserve her former clients secrets and abide by rule 1.11 that preclude the former government official from "switching sides" on the same specific party matter. In some jurisdiction, the bar refers to the "same or *substantially related* specific party matter," which is not a term that arises in federal ethics. We refer attorneys to their own bar counsel for clarification.

With regard to the WOTUS cases to which Mass. is ***not*** a party, you discussed the question under the federal ethics rules and Melissa's bar restrictions (as she is not subject to the Biden ethics pledge since she is form a state).
JUSTINA: Right. Melissa's federal ethics obligations are found in the rules about loss of impartiality at 5 CFR 2635.502(b)(1)(iv): for one year after leaving MA, she cannot work on any particular matter in which her former employer or client (MA) is a party or represents a party unless she first obtains a written impartiality determination from OGC/Ethics. Because her former employer/client is a state, she is not subject to the additional restriction period under the Biden ethics pledge. And she remains subject to her bar rules.

Under the federal ethics rules, you indicated that Melissa may participate in such cases, notwithstanding the similar nature of those cases to the ones Mass is a party to in terms of the rules being challenged and the legal issues in the case, but you may advise her, as a prudential matter, to get the consent of her former employer before doing so.
JUSTINA: Yep. The federal ethics rules in this regard are in place to ensure that a new employee's loyalty is to the US government, not to the former employer. That's why we want a "cooling off" period. That said, we understand that it may be in the Agency's interest to have our new employee interact directly with the former employer, so the federal ethics rules allow for an ethics official to consider the impartiality factors at 5 CFR 2635.502(d)(1)-(6) to nevertheless allow the new employee to do so. The complicating factor for lawyers are their bar rules that preclude switching sides. Unlike the DC Bar, the MA bar rule 1.11 permits the former attorney to obtain the "informed consent" of the former client. We don't provide bar advice, so we urge attorneys to consult bar counsel on their own.

Under her bar restrictions, I believe you said that she may be able to participate in those cases if she received the consent of her former employer, but you were going to check the relevant bar rules. I wasn't sure which state bar rules you would need to check (it seemed like the location of the case was relevant – the first paragraph above lists the jurisdictions of the cases to which Mass is a party and filed an amicus brief).
JUSTINA: She will always be obliged to adhere to her own bar rules. If a case is in federal court, then she may have to abide by the bar rules in that jurisdiction as those rules may apply. The rules in question are always the duty of loyalty to the former client and that pesky rule about former government officials at 1.11. Remember, in DC, our rule 1.11 does not allow for any informed consent.

Dimple

I don't have notes of discussion of the federal ethics rules, but I assume the answer for Dimple is the same as above for Melissa – she may participate in WOTUS cases to which NRDC is not a party (subject to a potentially your prudential advice to obtain the consent of her former employer).
JUSTINA: What I said about Dimple is that, because she is subject to the Biden ethics pledge, her federal ethics rules are subsumed. The Biden pledge makes us look back two years (not just one), starts the recusal clock when she starts at EPA (not when she last provided the service), and the cooling off period lasts for two years (not just one).

Under her bar restrictions, since no WOTUS cases are listed for below, I think you said they do not restrict her participate in those cases.
JUSTINA: Correct, so long as NRDC is not a party to that litigation.

However, per your email, under the Biden ethics pledge she may not participate in any of the WOTUS cases to which NRDC is party for two years.

JUSTINA: Correct, she can't work on any specific party matter in which NRDC is a party or represents a party. And the Biden pledge further says that she can't attend any meeting or engage in any communication with NRDC as part of her official duties unless the subject matter of the meeting a particular matter of general applicability AND the meeting itself is "open to all interested parties," which we interpret as at least 5 entities representing diverse interests.

I hope this helps, but I know that ethics issues (particularly when overlaid with an additional ethics pledge and bar restrictions) are not necessarily intuitive. So let us know if you need more clarification!
Justina

Justina Fugh | Director, Ethics Office | Office of General Counsel | US EPA | Mail Code 2311A | Room 4308 North, William Jefferson Clinton Federal Building | Washington, DC 20460 (for ground deliveries, use 20004 for the zip code) | phone 202-564-1786 | fax 202-564-1772

From: Neugeboren, Steven <Neugeboren.Steven@epa.gov>
Sent: Saturday, January 23, 2021 3:02 PM
To: Fugh, Justina <Fugh.Justina@epa.gov>
Cc: Wehling, Carrie <Wehling.Carrie@epa.gov>; Messier, Dawn <Messier.Dawn@epa.gov>
Subject: RE: an ethics welcome to Melissa Hoffer and Dimple Chaudhary

Justina- thanks for the conversation yesterday about some of the circumstances we are dealing with in water for WOTUS cases. As discussed, there is pending litigation in about 12 district courts challenging the WOTUS rule, and Massachusetts is a party to cases in California, New York and has filed an amicus brief in Massachusetts. NRDC is a party to cases in Massachusetts and So. Carolina. We discussed restrictions for them across the different cases and I've tried to capture what I took away from our conversation so can you please provide confirmation or clarification/correction.

I'd like to ensure we understand the restrictions as soon as we are able as we are starting to prepare Monday for our first hot issues meeting with Melissa and Dimple this week. Thanks!

Melissa:

As explained in your email below, under her bar obligations, Melissa is precluded during her EPA tenure from participation in the two WOTUS cases to which Mass. is a party. In our call you explained that the "policy" decisions she may participate in pursuant to your impartiality determination include, for example, a policy decision not to defend the rule in litigation and requesting DOJ to seek abeyances in the cases for the Agency to reconsider its policy options. Your impartiality determination does not, however, permit her to participate in discussions of the litigation itself – e.g., deliberations on litigation strategy in light of such a policy decision, such as discussion whether to seek a remand, or other litigation options.

Question - Do the restrictions as you describe them apply to a case in which Mass. has participated as amicus in D.Mass?

With regard to the WOTUS cases to which Mass. is ***not*** a party, you discussed the question under the federal ethics rules and Melissa's bar restrictions (as she is not subject to the Biden ethics pledge since she is form a state).

Under the federal ethics rules, you indicated that Melissa may participate in such cases, notwithstanding the similar nature of those cases to the ones Mass is a party to in terms of the rules being challenged and the legal issues in the case, but you may advise her, as a prudential matter, to get the consent of her former employer before doing so.

Under her bar restrictions, I believe you said that she may be able to participate in those cases if she received the consent of her former employer, but you were going to check the relevant bar rules. I wasn't sure which state bar rules you would need to check (it seemed like the location of the case was relevant – the first paragraph above lists the jurisdictions of the cases to which Mass is a party and filed an amicus brief).

Dimple

I don't have notes of discussion of the federal ethics rules, but I assume the answer for Dimple is the same as above for Melissa – she may participate in WOTUS cases to which NRDC is not a party (subject to a potentially your prudential advice to obtain the consent of her former employer).

Under her bar restrictions, since no WOTUS cases are listed for below, I think you said they do not restrict her participate in those cases.

However, per your email, under the Biden ethics pledge she may not participate in any of the WOTUS cases to which NRDC is party for two years.

Thanks so much for your help!

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From: Fugh, Justina <Fugh.Justina@epa.gov>
Sent: Thursday, January 21, 2021 9:12 PM
To: OGC HQ ADDs <OGC_HQ_ADDs@epa.gov>; OGC RCs and DRCs <OGC_RCs_and_DRCs@epa.gov>
Cc: Hoffer, Melissa <Hoffer.Melissa@epa.gov>; Chaudhary, Dimple <Chaudhary.Dimple@epa.gov>; Clarke, Victoria <clarke.victoria@epa.gov>; Griffo, Shannon <Griffo.Shannon@epa.gov>
Subject: an ethics welcome to Melissa Hoffer and Dimple Chaudhary

Hi there,
As you might expect, the OGC/Ethics Office is cheerfully up to our eyeballs in ethics issues for our incoming appointees. Not only are we thinking, as we always do, about financial conflicts of interest, but we are also weighing impartiality concerns with former employers and former clients, bar obligations and now an executive order on ethics commitments. We will be drafting recusal statements, but we typically wait until after we have a chance to review the financial disclosure reports. As many of you also file that wretched report, you know how much work that entails. So, before we can distribute signed recusal statements, here's how to navigate the likely recusal issues for Melissa Hoffer and Dimple Chaudhary.

MELISSA HOFFER

- Melissa is bound by her bar restrictions from sharing the confidences of her former client, the Commonwealth of Massachusetts, and from switching sides in litigation in which she previously participated or for which she provided supervision. With the attached impartiality determination, however, I authorized her to participate in making *policy* decisions about that litigation, such as whether or not to stay the proceedings. That impartiality determination included the list of cases from which she is recused because of her bar obligations. For her tenure at EPA, she will be recused from participation in these cases.

- For now and continuing for one year, she is recused from participation in any new specific party matter in which Massachusetts is a party or represents a party. Should we issue another impartiality determination, I will share that with you.

DIMPLE CHAUDHARY

- Dimple is bound by her bar restrictions from sharing the confidences of her former client, the Natural Resources Defense Council, and from switching sides in litigation in which she previously participated or for which she provided supervision or counsel. The cases from which she is recused are:

CASE NAME and/or SUBJECT MATTER	CITATION and/or DESCRIPTION:
Consent Decree Implementation of Agency's failure to issue a worst-case spill regulation for non-transportation-related-substantial-harm facilities	*Environmental Justice Health Alliance for Chemical Policy Reform, NRDC, et al. v. EPA*, Case No. 19-cv-2516, SDNY
Challenge to Methylene chloride rule	*Labor Council for Latin America, NRDC, et al. v. EPA*, Case No. 19-1042, 2d Cir.
Challenge to use of tetrachlorvinphos on pets	*NRDC v. Wheeler*, Case No. 20-72794, 9th Cir.
Provided individual counseling to plaintiffs in Flint water crisis	*Walters v. Flint, EPA, et al.*, Case No. 17-10164, E.D. Mich.

- Because Dimple's former employer is not a state or local government, she is further bound by Section 2 of the Biden Ethics Pledge. We cannot grant impartiality determinations for her. Instead, for two years, she cannot participate in any specific party matter in which NRDC is a party or represents a party. She may not attend any meeting nor have any communication with NRDC unless the communication relates to a particular matter of general applicability and participation in the event is open to all I interested parties. Dimple's recusal period with NRDC on any specific party matter (e.g., litigation, contracts, grants, speaking engagement) will last until after January 20, 2023.

If you have any questions about these general recusal areas, then please let me know.
Justina

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