



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

OFFICE OF  
GENERAL COUNSEL

**MEMORANDUM**

SUBJECT: Recusal Statement

FROM: Melissa Hoffer **Melissa A. Hoffer**  
Acting General Counsel

Digitally signed by  
Melissa A. Hoffer  
Date: 2021.08.17  
19:01:06 -04'00'

TO: Michael S. Regan  
Administrator

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 obligation 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 13989 and the Biden Ethics Pledge that I signed, as well as my own attorney bar obligations.

*OBLIGATIONS UNDER EXECUTIVE ORDER 13989 AND THE IMPARTIALITY PROVISIONS*

Pursuant to Section 1, Paragraph 2 of Executive Order 13989, political appointees are subject to additional ethics obligations with respect to their former employers. Because my former employer is the **Commonwealth of Massachusetts**, however, I am advised by OGC/Ethics that the additional restrictions contained in the Executive Order regarding former employers do not apply to me. The definition of “former employer” in the Executive Order excludes state governments.<sup>1</sup> Therefore, OGC/Ethics has confirmed that I am not subject to the additional Executive Order restrictions regarding former employers.

I understand that I nonetheless have a “covered relationship” with my former employer for the purposes of the federal impartiality standards. Unless I first sought and obtained approval from an ethics official, I would not be permitted to participate in any specific party matter in which my former employer was a party or represented a party. On January 19, 2021, EPA’s Alternate Designated Agency Ethics Official issued a limited impartiality determination to permit me, upon joining EPA, to participate in discussions and meetings related to policy

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<sup>1</sup> See Executive Order 13989 (1/20/2021) Section 2, Paragraph k.

decisions about litigation, given the change in administration. Provided that I did not work on the underlying merits of any of the cases, I was authorized to make policy decisions regarding pending litigation, including specific party matters in which the Commonwealth of Massachusetts was a party or intervenor, even if I had previously participated personally and substantially. *See* attachment 1. On February 2, 2021, EPA's Alternate Designated Ethics Official issued an impartiality determination authorizing me to participate in new or future specific party matters that involve the Commonwealth of Massachusetts, but not any of the very same specific party matters on which I worked personally and substantially. *See* attachment 2.

#### *ATTORNEY BAR OBLIGATIONS*

Pursuant to my obligations under applicable bar rules, I recognize that I am obliged to protect the confidences of my former employers/clients. I also understand that I cannot participate in any matter that is the same as the specific party matter that I participated in personally and substantially previously, unless my bar provides for and I first obtain informed consent and notify OGC/Ethics. I have received such consent to participate in a matter in connection with the Merrimack Generation Station in New Hampshire that I worked on previously. *See* attachment 3. The list of cases from which I am personally recused and will therefore not participate is included as attachment 4.

#### *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. I will remain vigilant and notify OGC/Ethics immediately should my financial situation change.

#### *DIRECTIVE AND CONCLUSION*

To avoid my participating in any of the matters from which I am recused, please refer those matters to the attention of **Jim Payne, Deputy General Counsel for Environmental**

**Media and Regional Law Offices**, without my knowledge or involvement. In the event that my circumstances change, e.g., my financial interests or my covered relationships, then I will consult with OGC/Ethics and update my recusal statement accordingly.

cc: Dimple Chaudhary, Deputy General Counsel for Nationwide Resource Protection Programs  
Marianne Engelman-Lado, Deputy General Counsel for Environmental Initiatives  
Jim Payne, Deputy General Counsel for Environmental Media and Regional Law Offices  
Elise Packard, Deputy General Counsel for Operations  
OGC Associates and Directors  
Regional Counsels  
Daniel Conrad, Acting Associate Deputy General Counsel

Attachments



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

OFFICE OF  
GENERAL COUNSEL

Ms. Melissa A. Hoffer



By email to: [REDACTED]

Dear Ms. Hoffer:

In anticipation of your joining the United States Environmental Protection Agency (EPA) as the Principal Deputy General Counsel on or about January 20, 2021, you have asked if you would be permitted to participate in making policy decisions regarding specific party matters in which the Commonwealth of Massachusetts is a party or intervenor. Based on your request and the information available to us, the EPA generated the enclosed list of cases.

Within the last year, you have served as the Chief of the Energy and Environment Bureau of the Office of the Massachusetts Attorney General. We understand that you participated personally and substantially in a number of these cases or supervised others who participated personally and substantially in these particular matters that involve Massachusetts as a specific party.

Upon your swearing in as a federal employee, you will have a “covered relationship” with the Commonwealth of Massachusetts pursuant to 5 C.F.R. § 2635.502(b)(iv) and, for one year, must be mindful to avoid an appearance of a loss of impartiality in the performance of your official EPA duties. You do not have any significant financial interest in the Commonwealth of Massachusetts, so the Office of General Counsel does not determine that you had any conflicting financial interest. What remains is an impartiality concern.

Federal ethics regulations permit federal officials 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). These factors 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.

Since we have already determined that you have no substantial conflicting financial interest arising from your employment with Massachusetts, we turned to the six impartiality factors listed in 5 C.F.R. § 2635.502(d), taking each one into careful consideration.

We noted that your prior employment was with a State rather than a private entity. Generally, States share responsibility with EPA in protecting human health and the environment. In fact, with respect to many of our statutes, EPA has directly delegated regulatory and enforcement authority to states. That said, we also appreciate that, in some situations, States are directly regulated by this Agency.

We are mindful of the fact that the position description for the Principal Deputy General Counsel includes "First Assistant" duties for the General Counsel under the Vacancies Reform Act of 1998, 5 U.S.C. § 3345. We therefore considered the interests of the United States Government in a senior political appointee's ability to make policy decisions as to whether or not to continue to pursue current litigation, particularly at the onset of a new administration in the absence of a confirmed General Counsel or Administrator. Although we recognize that you face bar restrictions limiting your ability to participate in these cases substantively, we determined that your participation is not related to the underlying merits of any case but rather you would be making policy decisions only.

After careful consideration of the relevant factors, we conclude that the interest of the federal government outweighs any concerns about a loss of impartiality in your ability to participate in the enclosed list of particular matters that may affect or involve the Commonwealth of Massachusetts as a party and in which you may have participated personally and substantially. After joining the EPA as Principal Deputy General Counsel, you will be permitted to participate in discussions and meetings related to the policy decisions related to these cases. We remind you, however, not to participate in the merits of the cases nor to reveal any client confidences.

Please feel free to contact me or Jim Payne, Designated Agency Ethics Official, if you have any further questions. I can be reached at [fugh.justina@epa.gov](mailto:fugh.justina@epa.gov) or (202) 564-1786; Jim can be reached at [payne.jim@epa.gov](mailto:payne.jim@epa.gov) or (202) 564-0212.

Sincerely yours,

Justina Fugh

Digitally signed by Justina  
Fugh  
Date: 2021.01.19  
18:45 38 -05'00'

Justina Fugh

Director, Ethics Office and

Alternate Designated Agency Ethics Official

enclosure

**LIST OF CASES IN WHICH MASSACHUSETTS IS A PARTY OR INTERVENOR**  
**PENDING IN EPA'S OFFICE OF GENERAL COUNSEL**

**Commonwealth of Massachusetts**

Defendant Intervenor:

- *Wisconsin v. EPA*, D.C. Cir, 16-1406 - petition for review of EPA's Final Rule titled "Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS" 81 Fed. Reg. 74,504 (October 26, 2016)
- *Competitive Enterprise Institute v. EPA*, D.C. Cir. 20-1145 - petition to review "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks" Fed. Reg. 24174-25278 (April 30, 2020)
- *Murray Energy v. EPA*, 16-1127 D.C. Cir. - petition for review of EPA's final action entitled "Supplemental Finding that it is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units at 81 Fed. Reg. 24,420 (April 25, 2016)
- D.C. Cir. 16-1430 (defend EPA medium and heavy-duty truck GHG standards)

Intervenor:

- *League of United Latin American Citizens (LULAC), et al. v. EPA*, 9<sup>th</sup> Cir. 17-71636 - Challenge to March 29, 2017 order denying PANNA/NRDC FFDCA petition
- *North Dakota v. EPA*, D.C. Cir. No.15-1381 - EGU GHG 111(b)

Petitioner

- D.C. Cir. 19-1230 (SAFE CA waiver )
- *New York et. al. v. Wheeler et. al.*, S.D.N.Y. 19-11673 - Challenge to the rule repealing the 2015 definition of "waters of the United States" under the CWA and reinstating the prior regulatory definition.
- *New York et. al. v. EPA*, D.C. Cir. 17-1273 - petition for review of EPA's final action titled "Response to the December 9, 2013, Clean Air Act Section 176A Petition From Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island, and Vermont," 82 Fed. Reg. 51,238 (November 3, 2017)
- *New York et. al. v. EPA*, D.D.C. 1:18-cv-00773 - for failure to establish guidelines for standards of performance for methane emissions from existing oil and gas operations
- *New York et. al. v. EPA*, D.C. Cir. 18-xxxx - petition for review of EPA's notice entitled "Protection of Stratospheric Ozone: Notification of Guidance and a Stakeholder Meeting Concerning the Significant New Alternatives Policy (SNAP) Program," 83 Fed. Reg. 18,431 (April 27, 2018)
- *New York et. al. v. Wheeler et. al.*, 9<sup>th</sup> Cir. 19-71982 - Petition for review of "Chlorpyrifos; Final Order Denying Objections to March 2017 Petition Denial Order"
- *New York et. al. v. EPA*, D.C. Cir. 19-1165 - petition for review of EPA's final agency action entitled "Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations," published at 84 Fed. Reg. 32,520 (July 8, 2019)
- *New York et. al. v. EPA*, D.C. Cir 20-1437 - petition for review of EPA's final action titled "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act; Final Actions on Petitions for Reconsideration" at 85 Fed. Reg. 55,286 (Sept. 4, 2020)
- *New York et. al. v. EPA*, S.D.N.Y. 1:21-cv-00252 - for failure to approve or disapprove Good Neighbor state implementation plans for the 2015 ozone NAAQS for 6 states (IN, KY, MI, OH, TX, WV)

- *New York et. al. v. EPA*, S.D.N.Y. 1:16-cv-07827 - Failure to Act on their Petitions Under Clean Air Act Section 176A
- *California et. al. v. EPA*, D.C. Cir. Case No. 21-XXXX – petition for review of final agency action entitled “Control of Air Pollution from Airplanes and Airplane Engines: GHG Emission Standards and Test Procedures,” published at 86 Fed. Reg. 2,136 (Jan. 11, 2021).
- *California et. al. v. Wheeler et. al.*, N.D. Cal. 3:20cv03005 – NWPR
- *California et. al. v. EPA*, N.D. Cal. 3:17-cv-06936; 4:17-cv-06936 - for Failure to Issue Designations for 2015 Ozone National Ambient Air Quality Standards
- *California et. al. v. EPA*, D.C. Cir. 20-1357 - Petition for review challenging the Oil & Gas Policy Rule: “Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review” 85 Fed. Reg. 57,018 (Sept. 14, 2020)
- *California et. al. v. EPA*, D.C. Cir. 21-1014 - petition for review of EPA's final action entitled “Review of the National Ambient Air Quality Standards for Particulate Matter,” published at 85 Fed. Reg. 82,684 (Dec. 18, 2020)
- *Commonwealth of Massachusetts et. al v. EPA*, 3:03-CV-984 D. Conn. - Failure to list CO2 as a criteria pollutant
- *Commonwealth of Massachusetts et. al v. EPA*, D.C. Cir. 20-1221 - Petition for Review of EPA’s National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Reconsideration of Supplemental Finding and Residual Risk and Technology Review at 85 Fed. Reg. 31,286 (May 22, 2020) (aka MATS)
- *New Jersey et. al. v. EPA*, S.D.N.Y. 1:20-cv-01425 - for Failure to Perform Nondiscretionary Duty to Promulgate Federal Implementation Plans for the Good Neighbor Provision Requirements for the 2008 Ozone NAAQS
- *American Lung Association v EPA*, D.C. Cir No. 19-1440 – ACE litigation
- D.C. Cir. No. 20-1145
- N.D. Cal. No. 19-cv-03807 (TSCA asbestos reporting)
- Ninth Cir. No. 20-73276 (methylene chloride risk evaluation)
- N.D. Cal. No. 20-cv-04869 (limiting state authority re Section 401 water quality certifications)
- MA-led amicus in support of challenge to WOTUS, D-Mass 12/20 (do not have docket no.)

### **Massachusetts Department of Environmental Protection**

#### **Defendant:**

- *Alderson v. EPA et. al.*, 1:10-cv-10793 (appears dismissed but displayed as active?)
- *PSD Appeal No. 14-02*, E.A.B.- PSD permit issued by Massachusetts DEP
- *Brooks v. EPA et. al.*, 1<sup>st</sup> Cir. 14-2252, petition for review of Notice of Decision To Issue a Clean Air Act PSD Permit for Salem Harbor Redevelopment Project
- *Rauseo v. Army Corps of Engineers et. al.*, D. Mass. 1:17-cv-12026-NMG - Failure to exercise jurisdiction over filled wetlands

#### **ADDITIONAL CASES:**

- *Greenroots, Inc. and Conservation Law Foundation v. EPA*, (District of Massachusetts, Case No. 1:21-cv-10065) (Mass is not a party but the case involves some complaints filed with ECRCO against Mass agencies.)
- Intervenor, Newmont USA Limited v. EPA, No. 04-1069 (Challenge to 2002 NSR reform rule treatment of fugitive emissions)
- Petitioner, State of New York v. EPA, No. 20-1022 (Challenge to 2019 RMP Rule) (consolidated under Air Alliance Houston v. EPA, No. 19-1260)

Added 1/21/21: GAS PROCESSORS ASSOCIATION V. EPA, 11-1023, D.C. Cir.



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

February 2, 2021

OFFICE OF  
GENERAL COUNSEL

**MEMORANDUM**

**SUBJECT:** Impartiality Determination to Participate in Certain Matters Involving the Commonwealth of Massachusetts

**FROM:** Justina Fugh, Alternate Designated Agency Ethics Official and Director, Ethics Office

Justina Fugh

Digitally signed by Justina Fugh  
Date: 2021.02.02 00:03:39 -05'00'

**TO:** Melissa Hoffer  
Acting General Counsel

As the Acting General Counsel of the United States Environmental Protection Agency (EPA), you seek permission to participate in specific party matters involving the Commonwealth of Massachusetts. Within the last year, prior to being selected for this position, you served as the Chief of the Energy and Environment Bureau with the Massachusetts Attorney General's Office.

On January 20, 2021, you were appointed to the position of EPA's Principal Deputy General Counsel. The Acting Administrator approved that appointment on January 28, 2021. Based upon your appointment as the first assistant to the EPA General Counsel, you automatically became the Acting EPA General Counsel as a matter of law under 5 U.S.C. § 3345(a)(1). An incoming Principal Deputy General Counsel, appointed to that position after the General Counsel vacancy arises, may automatically serve in an acting capacity. *See* Designation of Acting Associate Attorney General, 25 Op. O.L.C. 177, 179 (2001).

Under President Biden'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."<sup>1</sup> Therefore the Ethics Pledge does not apply to your Massachusetts employment. Federal ethics rules, however, do not contain a similar exclusion for state government, so those rules do apply to your prior employment with the Commonwealth of Massachusetts.

What remains is an impartiality concern under the federal ethics rules 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." You have a "covered

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<sup>1</sup> *See* Exec. Order 13989, Section 2(k), which provides that "'former employer' does not include...State or local government."



relationship” with the Commonwealth of Massachusetts under 5 C.F.R. § 2635.502(b)(1)(iv). For one year from the date your employment with the Attorney General’s Office terminated, absent an impartiality determination from me, you cannot participate in any specific party matter in which the Commonwealth of Massachusetts is a party or represents a party 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 we take 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 Acting General Counsel, you are the chief legal advisor to the Agency and part of the Agency’s political leadership. In your current role as Acting General Counsel, and in your role as Principal Deputy General Counsel if you revert back within a year, you are expected to communicate freely with states, and you will be asked to participate in discussions and meetings related to particular matters that affect the Commonwealth of Massachusetts. 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 part of your official EPA duties in particular matters that involve the Commonwealth of Massachusetts with the following limitation: you must recuse yourself from participation in specific party matters in which you participated personally and substantially while employed with the Attorney General’s Office.

In making this determination, I have taken the following factors into consideration:

Nature of the relationship involved – Since 2015, you have served as the Chief of the Energy and Environment Bureau with the Massachusetts Attorney General’s Office. In this role, you oversaw the Bureau’s attorneys on matters including prosecuting civil and criminal enforcement of environmental laws, energy policy, ratepayer advocacy, defensive cases, and affirmative advocacy. Sensitivities regarding your impartiality will necessarily revolve around the issues in which you participated personally and substantially for the Attorney General’s Office. 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 – We have determined that you do not have any significant financial interest in the Commonwealth of Massachusetts, so you do not have any conflicting financial interest.

Nature and importance of the employee's role – As the Acting General Counsel, you are the chief legal advisor to the Agency. Among other things, OGC lawyers provide legal counsel to EPA policymakers, shape national legislation affecting the environment, and provide legal support for the issuance of permits, the approval of environmental programs, and the initiation and litigation of enforcement actions. As Acting General Counsel, or as Principal Deputy General Counsel if you should revert back within a year, you are expected to communicate freely with states, including Massachusetts.

Sensitivity of the matter – We anticipate that there may be specific party matters in which you did not participate personally and substantially for the Massachusetts Attorney General's Office 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 part of your official duties as Acting General Counsel, or as Principal Deputy General Counsel if you should revert back to those duties within the year, in such matters will be of importance to the Acting Administrator and the confirmed Administrator and, therefore, is 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 Commonwealth of Massachusetts, but not on the very same specific party matters on which you worked on personally and substantially while employed by the Massachusetts Attorney General's Office. If the Agency determines that it has 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. Unless and until you receive written authorization, you must continue to recuse yourself from those matters in which you had previously participated while OGC/Ethics considers whether the Agency's interest in your participation outweighs any impartiality concern.

You are also cognizant of your attorney bar rules that prohibit you from participating in any matter that is the same 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. On January 19, 2021, I issued you an impartiality determination allowing you to participate in discussions and meetings related to the policy decisions for those cases that may affect or involve the Commonwealth of Massachusetts and in which you may have participated personally and substantially. However, you were reminded not to participate in the merits of those cases nor to reveal any client confidences.

While I have issued you this determination to interact with the Commonwealth of Massachusetts with the limitation described above, you may wish to make adjustments to your duties to not participate in a particular matter that involves Massachusetts. 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 OGC/Ethics 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 me at [fugh.justina@epa.gov](mailto:fugh.justina@epa.gov) or (202) 564-1786.

cc: Dimple Chaudhary, Deputy General Counsel for Nationwide Resource Protection  
Jim Payne, Deputy General Counsel for Environmental Media and Regional Law Offices  
Elise Packard, Deputy General Counsel for Operations Programs  
Daniel H. Conrad, Acting Associate Deputy General Counsel