



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

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Request for a Limited Waiver from Section 1, Paragraph 6 of Executive Order 13770

FROM: James Payne *JP 6-8-20*
Deputy General Counsel for Environmental Media and Regional Law Offices,
and Designated Agency Ethics Official

THROUGH: Mandy M. Gunasekara *mg 6/8/20*
Chief of Staff

TO: Scott F. Gast
Senior Counsel and Special Assistant to the President
The White House

This memorandum requests a limited waiver from Section 1, paragraph 6 of Executive Order 13770 (January 28, 2017) (Ethics Pledge) for Adam Gustafson, Deputy General Counsel, at the United States Environmental Protection Agency (EPA). Prior to his appointment as Deputy General Counsel, Mr. Gustafson was a partner at Boyden Gray & Associates and a federally registered lobbyist. EPA is not requesting any waiver regarding Mr. Gustafson's prior lobbying activities. Mr. Gustafson began service at EPA on March 29, 2020 and received his initial ethics training on April 1, 2020.

EPA requests this limited waiver to allow Mr. Gustafson to participate in specific party matters, including *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir.), notwithstanding a particular former client, the Competitive Enterprise Institute (CEI), being a party. The limited waiver will allow Mr. Gustafson to participate in specific party matters in which CEI is a party, provided he did not participate personally and substantially in the matter previously with CEI or any other party.

The *American Lung Association* litigation challenges EPA's 2019 Affordable Clean Energy Rule, which replaces EPA's 2015 Clean Power Plan and establishes emission guidelines for states to develop plans to address greenhouse gas emissions from existing coal-fired power plants. Mr. Gustafson did not previously participate in this litigation on behalf of CEI or any

other client. His expertise and comprehensive understanding of Clean Air Act (CAA) regulation and litigation are crucial for EPA, including for this case. The previous political Deputy General Counsel with CAA expertise started in January 2017 and departed in December 2019. Mr. Gustafson was hired because of his extensive CAA expertise. He will abide by the rest of the Ethics Pledge obligations. Mr. Gustafson's expertise is needed to counsel and advise the Administrator and senior leadership on behalf of the Agency, including for this case which is particularly important to the priorities of the Administration.

BACKGROUND

On January 28, 2017, President Trump signed Executive Order 13770, "Ethics Commitments by Executive Branch Appointees," which includes an Ethics Pledge. The Ethics Pledge imposes ethic requirements beyond federal ethics laws and regulations and attorney bar obligations. All individuals appointed to political positions on or after January 20, 2017 are required to sign the Ethics Pledge, which sets forth the "former client"¹ restriction at Section 1, paragraph 6:

I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts.

Mr. Gustafson signed the Ethics Pledge on April 10, 2020. Thus, Mr. Gustafson would require a waiver to work on any particular matter involving a former client such as the Competitive Enterprise Institute. Section 3 of Executive Order 13770 allows the President or his designee to grant a waiver of any restriction contained in the Ethics Pledge.

AFFORDABLE CLEAN ENERGY (ACE) RULE LITIGATION

The previous Administration issued the Clean Power Plan (CPP) on October 23, 2015, and it was quickly challenged by numerous entities. *State of West Virginia v. EPA*, No. 15-1363 (D.C. Cir.). The 2015 CPP was then stayed by the U.S. Supreme Court, keeping it from going into effect. On October 10, 2017, following a review as directed by President Trump's Energy Independence Executive Order, EPA proposed to repeal the 2015 CPP.

After determining that the 2015 CPP exceeded EPA's statutory authority under the Clean Air Act, EPA proposed the Affordable Clean Energy (ACE) Rule on August 21, 2018, to reduce greenhouse gas emission from existing coal-fired electric utility generating units and power plants. This new rule, finalized on June 19, 2019, replaces the 2015 CPP and establishes emission guidelines for states to develop plans to address greenhouse gas emissions from existing coal-fired power plants. The ACE Rule was also challenged in suits by a number of parties. *American Lung Association v. EPA*, No. 19-1140 (D.C. Cir.). Mr. Gustafson did not participate in this litigation on behalf of CEI or any other client.

¹ A "former client" is defined as "any person for whom the appointee served personally as agent, attorney, or consultant within the 2 years prior to the date of his or her appointment, but excluding instances where the service provided was limited to a speech or similar appearance. It does not include clients of the appointee's former employer to whom the appointee did not personally provide services." Executive Order 13770, Section 2(i).

ANALYSIS

A graduate of the University of Virginia and Yale Law School, Mr. Gustafson clerked for judges on the Ninth Circuit and the D.C. Circuit before entering private practice. Prior to becoming a partner at Boyden Gray & Associates, he was an associate at Cooper & Kirk where he specialized in appellate litigation. While at Boyden Gray & Associates, Mr. Gustafson represented States, environmental groups, biofuel producers, agricultural interests, and public policy organizations, on air quality and automotive regulations and other Clean Air Act matters. He has argued Clean Air Act appeals in the U.S. Court of Appeals for the D.C. Circuit and testified before Congress on Clean Air Act regulation. Through this work, Mr. Gustafson gained extensive experience in CAA regulation and litigation.

During the two-year period prior to his federal appointment, Mr. Gustafson provided legal services to the Competitive Enterprise Institute and represented this entity in the litigation related to EPA's 2015 CPP. Those proceedings were dismissed shortly after EPA finalized the ACE Rule in 2019. Of importance is that Mr. Gustafson's Clean Air Act-related representation of CEI was limited to the CPP litigation (*West Virginia v. EPA*), and neither he nor his former firm provided legal services to CEI regarding the ACE Rule or related litigation (*American Lung Association v. EPA*).

In addition to serving as the chief legal advisor to EPA and implementing the nation's environmental laws, the Office of General Counsel also represents the Agency in court challenges to agency actions. In the position of Deputy General Counsel, Mr. Gustafson must be able to provide legal counsel and vital input into the Agency's defense of such challenges, including the ACE Rule litigation. His invaluable knowledge and experience with Clean Air Act regulation and litigation are of great importance in advocating the interests of the Agency in defending the ACE Rule and advising the General Counsel and Administrator, especially given the recent departure of OGC's previous political appointee in the role of Deputy General Counsel specializing in the CAA. Consistent with paragraph 6 of the Ethics Pledge, to date Mr. Gustafson has not participated in the ACE Rule litigation while at EPA because his former client CEI is one of a number of parties to this litigation. He has no continuing financial interest with CEI, nor does he have any financial interest in the outcome of this case.

The ACE Rule empowers states to continue to reduce emissions while providing affordable and reliable energy for all Americans. Mr. Gustafson's participation in this important specific party matter, including decisions the Agency makes to defend the ACE Rule, will be of importance to the Administrator and senior leadership. The case involves nationally significant air issues and Administration interests.

REQUEST FOR A LIMITED WAIVER

For the reasons set forth above, EPA respectfully requests a limited waiver of the provisions of Section 1, paragraph 6 of the Executive Order to enable Adam Gustafson to effectively carry out his duties as Deputy General Counsel and to advance the interests of the Agency. Although a main focus of this waiver request is *American Lung Association v. EPA*,

No. 19-1140 (D.C. Cir.), there could potentially be other specific party matters involving CEI where Mr. Gustafson's expertise is needed for similar reasons as described above. Thus, this request also encompasses any such cases arising at EPA where CEI is a party and Mr. Gustafson did not previously participate personally and substantially while serving as an attorney for CEI or any other party. If granted, Mr. Gustafson would be allowed to participate in those specific party matters, including meetings or communications related to such cases where CEI is present. However, he will remain recused from those specific party matters in which his former client is a party if he had himself participated personally and substantially previously. He will otherwise fully comply with the requirements imposed by the President's Ethics Pledge (including Section 1, paragraph 7) and with all applicable federal ethics laws and regulations, as well as his own attorney bar obligations.

Please feel free to contact the EPA Chief of Staff, Mandy Gunasekara, at (202) 564-6999 or Gunasekara.Mandy@epa.gov, or me at (202) 564-0212 or Payne.James@epa.gov if you have any questions.