

Risk Policy Report

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Critics Float Legal Theories To Challenge Pruitt's Science Advisor Policy

House Democrats and a Columbia University law professor are detailing possible legal arguments that could be used to challenge Administrator Scott Pruitt's controversial new directive barring scientists who are receiving an EPA research grant from serving on one of its scientific advisory committees.

In a Nov. 3 letter to Pruitt, top leaders of the House science and energy and commerce committees charged that the policy appears to violate the requirements of the Federal Advisory Committee Act (FACA), which is generally intended to ensure that advisory committees are balanced, as well as conflict of interest regulations set by the General Services Agency and the Office of Government Ethics (OGE).

And Michael Burger, executive director of the Sabin Center for Climate Change Law at Columbia University, says in a Nov. 3 blog post that Pruitt's new policy "runs counter to existing conflict-of-interests law, and is on its face arbitrary and capricious, in violation of the Administrative Procedures Act."

He urged scientists who are currently on EPA advisory panels and may be subject to the directive not to step down from any of the advisory panels or withhold their applications to any of the panels before "Pruitt's policy [is] subject to judicial review, and EPA forced to defend its indefensible position in court."

Pruitt's Oct. 31 directive "Strengthening and Improving Membership on EPA Federal Advisory Committees," generally holds that "no member of an EPA federal advisory committee be currently in receipt of EPA grants, either as principal investigator or co-investigator, or in a position that otherwise would reap substantial direct benefit from an EPA grant," though the principle does not apply to state, tribal or local government agency recipients of EPA grants.

Pruitt and his supporters have defended the directive, arguing that EPA grant recipients have a conflict of interest in favor of regulation. But it has drawn strong opposition from many others, who say it unnecessarily precludes dozens of top academic scientists from advising the agency while allowing many industry scientists — who have their own conflicts of interest — to serve.

EPA has already applied the policy to the suite of appointees who Pruitt has tapped to replace advisers whose terms ended this year for EPA's Science Advisory Board (SAB), Clean Air Scientific Advisory Committee (CASAC) and Board of Scientific Counselors (BOSC).

The list of new appointees, which the agency formally released Nov. 3, draws heavily from state and industry groups. The lists appear unchanged from new CASAC and SAB membership lists that *Inside EPA* obtained and published Oct. 30. BOSC's new chairman is Paul Gilman, chief sustainability officer for waste-to-energy giant Covanta, who served as EPA's research chief during the George W. Bush administration.

Many critics are also concerned because the administrator is applying the policy to currently serving advisers whose terms may not end until 2018 or 2019, which will force them to choose between staying on the advisory panels or giving up their EPA grants.

During his Oct. 31 announcement, Pruitt indicated that staff would contact all existing members — about 20 are receiving EPA funding currently, a spokesman tells *Inside EPA* — and ask whether they intended to forgo the funding or resign their positions on the board.

That has prompted charges from some critics that Pruitt is "purging" advisers.

In his blog post, Burger explains that members of EPA's advisory committees are appointed as "special government employees," subject to the Ethics in Government Act, which he notes prohibits them "from participating in any particular matter that will have a direct and predictable effect on their financial interests," per U.S. Code 18 section 208. Burger quotes the U.S. Office of Government Ethics' definitions of these statutory terms.

Burger argues that "rulemakings establishing toxicological or environmental standards — the sorts of things on which EPA's scientific advisory committees give non-binding advice — might qualify as particular matters, in some circumstances, to the extent that they regulate a discrete industry. Similarly, a standard coming out of EPA might have a direct and predictable effect on regulated entities, and those that own stock in or are employed by them. They don't have a 'close causal' link to scientists working in universities or in independent centers."

Critics of Pruitt's policy have argued that it will have the biggest impact on academic scientists or those at non-profit or independent centers because they are most likely to seek funding from EPA or other government agencies. Even

if such a case could be made, Burger argues that the policy still fails for two additional reasons.

“First, a scientist serving on an advisory committee can only be prohibited from holding or acquiring such a ‘financial interest’ if the interest would ‘cause a reasonable person to question the impartiality and objectivity with which agency programs are administered,’ or else by an individual determination that the financial interest creates a ‘substantial conflict,’” which Burger argues cannot be the case.

“Second, these scientists would qualify in almost every instance for an exemption articulated for exactly this situation — that is, an exemption for employment interests of special Government employees serving on advisory committees.”

Under provision 5 2640.203(g) “of OGE’s regulations, a scientist ‘serving on an advisory committee...may participate in any particular matter of general applicability where the disqualifying financial interest arises from his non-Federal employment or non-Federal prospective employment, provided that the matter will not have a special or distinct effect on the employee or employer other than as part of a class.’ That is precisely the situation here. The people Pruitt is trying to exclude from serving on committees advising on environmental standards are specifically exempt from the purported conflicts of interests Pruitt has implicitly invoked.”

Further, Burger argues that the directive can be directly challenged under the Administrative Procedures Act because of the “inherent contradiction in excluding scientists who receive EPA funding but including scientists who receive funding from companies subject to EPA regulations, the rule is on its face both arbitrary and capricious. The total reversal of longstanding policy on criteria for membership in scientific advisory committees at EPA, the new policy’s inconsistency with similar criteria used by other agencies that rely on science to formulate standards and policies, and the lack of any coherent explanation will all also weigh against the directive in a court of law.” — *Maria Hegstad*
