

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE)
COUNCIL, INC.,)
)
Plaintiff,)
)
v.)
)
SCOTT PRUITT,)
in his official capacity as)
Administrator of the United States)
Environmental Protection Agency,)
)
Defendant.)
_____)

Civil Action No. 18-cv-613
ECF Case

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiff Natural Resources Defense Council (NRDC) brings this lawsuit to remedy the defendant’s unlawful action barring qualified scientists from serving on federal advisory committees at the Environmental Protection Agency (EPA). This final agency action, which came in the form of a directive adopted without public notice or comment, prohibits scientists who have won competitive EPA research grants— primarily scientists from academic, non-profit, and other independent institutions— from serving on any of EPA’s federal advisory committees. This action deprives these committees of the scientific and technical expertise provided by academic scientists. Many appointments to advisory committees subsequent to the directive have been

individuals who are employed by, or who have received funding from, the industries EPA is responsible for regulating. Defendant's directive is based on undefined and internally inconsistent concerns about "independence" and the supposed conflict-of-interest presented by "financial entanglements" with EPA. The result of the directive has been to remove qualified experts from EPA's advisory committees, to disqualify a larger body of experts from serving on those committees, and to skew the representation on the committees in favor of entities that may have financial interests in weakening regulations that protect the environment and public health.

2. EPA has established nearly two-dozen federal advisory committees. Many of these committees were created by legislation to provide expert advice to EPA on scientific and technical issues. For example, Congress mandated the establishment of EPA's Science Advisory Board, Clean Air Scientific Advisory Council, and Federal Insecticide, Fungicide, and Rodenticide Act Science Advisory Panel. *See* 42 U.S.C. § 4365(a); *id.* § 7409(d)(2)(A); 7 U.S.C. § 136w(d)(1).

3. Previous EPA Administrators have established federal advisory committees to provide recommendations on numerous other issues, including children's health, the environmental protection of rural communities, safe drinking water, and environmental justice.

4. Congress has also created various research programs to be administered by EPA, to provide the agency with scientific research relevant to environmental and

public health issues. *See, e.g.*, 15 U.S.C. § 2609; 33 U.S.C. § 1254; 42 U.S.C. § 7403.

Generally, EPA selects grant recipients through a competitive, peer-reviewed process.

Under EPA's established research grant processes, EPA cannot pre-select the recipient of the grant, or direct the particular conclusions that the research must support. EPA's primary research grant program has been praised for producing work of high scientific merit.

5. On October 31, 2017, EPA Administrator Scott Pruitt issued a directive, entitled "Strengthening and Improving Membership on EPA Federal Advisory Committees" (the Directive).¹ In this Directive, he announced several new requirements that EPA would apply "when establishing the membership" of federal advisory committees. First among these was "a requirement that no member of an EPA federal advisory committee be currently in receipt of EPA grants, either as principal or co-investigator, or in a position that otherwise would reap substantial direct benefit from an EPA grant." This restriction does not apply "to state, tribal, or local government agency recipients of EPA grants."

6. The Directive does not explain why EPA is now barring scientists working on competitive EPA research grants from serving on federal advisory committees. A Memorandum issued by EPA on the same day purports to "explain[] the principles

¹ Attached as Ex. A. It is also available at: https://www.epa.gov/sites/production/files/2017-10/documents/final_draft_fac_directive-10.31.2017.pdf.

underlying” the Directive, but states only that members of federal advisory committees “should avoid financial entanglements with EPA to the greatest extent possible” and that “[n]on-governmental and non-tribal members in direct receipt of EPA grants while serving on an EPA [federal advisory committee] can create the appearance or reality of potential interference with their ability to independently and objectively serve as a [federal advisory committee] member.”² The Memorandum does not explain why competitive research grants represent a “financial entanglement[,]” or, more importantly, offer any explanation as to why they “create the appearance or reality” of undermining the independence or objectivity of federal advisory committee members.

7. EPA has used this Directive to remove scientists employed by public and private universities and non-profit research institutions from its federal advisory committees. Many of those scientists have been replaced by individuals employed by, or who have received funding from, industries that EPA is responsible for regulating.

8. Administrator Pruitt failed to explain or substantiate his implication that academic scientists who have won EPA research grants are incapable of “independently and objectively” serving on agency advisory committees, or consider how excluding such scientists is consistent with statutory requirements that individuals appointed to advisory committees be qualified experts. He also failed to acknowledge that the

² Attached as Ex. B. It is also available at: https://www.epa.gov/sites/production/files/2017-10/documents/final_draft_fac_memo-10.30.2017.pdf.

Directive announces a change in EPA's longstanding policies for establishing advisory committees and conducting scientific peer reviews, and departs from the uniform policies and practices of other federal agencies. And in prohibiting recipients of competitive EPA grants from serving on advisory committees, Administrator Pruitt's Directive ignored EPA's obligations under the Federal Advisory Committee Act to ensure that federal advisory committees are fairly balanced and not subject to improper influence from special interests. The Directive thus constitutes arbitrary and capricious agency action, and it is invalid under the Administrative Procedure Act (APA).

9. Administrator Pruitt also did not submit the Directive, which has immediate legal effects, for public comment. The Directive thus failed to comply with the procedural requirements for rulemaking under the APA.

10. NRDC seeks an order vacating and setting aside the Directive, and an injunction prohibiting EPA from implementing it.

THE PARTIES

11. Plaintiff NRDC is a national, not-for-profit environmental and public-health advocacy organization with several million members and online activists. NRDC engages in research, policy analysis, communications, legislative work, and litigation to protect public health and the environment. NRDC's mission includes ensuring that federal regulatory initiatives are informed by the best available scientific research. NRDC maintains a Science Center which is staffed by experts in environmental science

and public health, operates a Science Fellows program for postdoctoral scientists, and provides guidance and resources for research and collaboration with other scientists and partners. Plaintiff brings this action on its own and on behalf of its members.

12. Defendant Scott Pruitt is the Administrator of EPA, and is EPA's highest-ranking official. He is charged with the supervision and management of all decisions and actions of the agency. Plaintiff sues Administrator Pruitt in his official capacity.

JURISDICTION AND VENUE

13. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

14. The Directive is final agency action subject to judicial review. 5 U.S.C. §§ 702, 704.

15. This Court has the authority to issue the requested declaratory and injunctive relief pursuant to 5 U.S.C. §§ 702 and 706, 28 U.S.C. §§ 2201-2202, and Federal Rule of Civil Procedure 57.

16. Venue is proper in the Southern District of New York because plaintiff NRDC resides in this judicial district, and has its principal place of business in this judicial district. 28 U.S.C. § 1391(c)(2), (e)(1).

STATUTORY AND REGULATORY FRAMEWORK

The Administrative Procedure Act

17. Under the APA, an agency must publish a notice of proposed rulemaking in the Federal Register and solicit public comment before adopting or repealing a rule, unless the agency “for good cause” finds that notice and comment are “impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b). The APA defines “rule making” as the “agency process for formulating, amending, or repealing a rule.” *Id.* § 551(5). The APA defines “rule” to include “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” *Id.* § 551(4).

18. A reviewing court shall “hold unlawful and set aside agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” *id.* § 706(2)(A), or that is “without observance of procedure required by law,” *id.* § 706(2)(D).

The Federal Advisory Committee Act

19. The Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, establishes operational and public disclosure requirements for federal advisory committees. FACA defines an advisory committee as “any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is . . . established by statute . . . or established or utilized by

one or more agencies in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government.” *Id.* § 3(2).

20. When federal agencies, including EPA, use advisory committees to produce advice or recommendations, they must ensure that “the membership of the advisory committee [] be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee,” and “assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee’s independent judgment.” *Id.* § 5(b)(2),(3); *see also id.* § 5(c). Regulations promulgated by the General Services Administration, 41 C.F.R. § 102-3.5 *et seq.*, similarly require that EPA ensure that the membership of its advisory committees is fairly balanced and free from improper special interest influence. *See id.* § 102-3.30(c).

FACTS

Federal Advisory Committees Utilized by EPA

21. EPA utilizes approximately twenty-three federal advisory committees. Many of its advisory committees also maintain several distinct subcommittees. For example, the Science Advisory Board maintains approximately seven standing committees, including committees on safe drinking water, radiation, and environmental economics. These committees provide the agency with advice and assistance on a range of issues, from regulation of pesticides and toxic chemicals, to pollution control and

remediation under the Clean Air Act and Clean Water Act, to environmental justice and sustainable community development.

22. Congress has also directed EPA to establish a number of advisory committees to provide expert advice and peer review of the science used by EPA in carrying out its statutory responsibilities.

a. The Environmental Research, Development, and Demonstration Authorization Act of 1978 directed EPA to establish the Science Advisory Board to advise on proposed regulations and other activities by EPA, and to provide expert advice and recommendations to Congress. 42 U.S.C. § 4365. Members of the Science Advisory Board must be “qualified by education, training, and experience to evaluate scientific and technical information on matters referred to the Board” *Id.* § 4365(b).

b. The Clean Air Act directed EPA to establish a federal advisory committee to review National Ambient Air Quality Standards promulgated under the Act. 42 U.S.C. § 7409(d)(2). This committee must be “composed of seven members including at least one member of the National Academy of Sciences, one physician, and one person representing State air pollution control agencies.” *Id.* § 7409(d)(2)(A). The Clean Air Act also directed the Administrator to establish “technical advisory committees composed of recognized experts in various aspects of air pollution to assist in the examination and evaluation of

research progress and proposals and to avoid duplication of research.”

Id. § 7403(a)(4).

c. The Toxic Substances Control Act (TSCA) directed EPA to establish a federal advisory committee “to provide independent advice and expert consultation, at the request of the Administrator, with respect to the scientific and technical aspects of issues relating to” the implementation of TSCA.

15 U.S.C. § 2625(o)(1)-(2). This committee “shall be composed of representatives of such science, government, labor, public health, public interest, animal protection, industry, and other groups as the Administrator determines to be advisable, including representatives that have specific scientific expertise in the relationship of chemical exposures to women, children, and other potentially exposed or susceptible subpopulations.” *Id.* § 2625(o)(3).

d. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) directed EPA to establish a federal advisory committee on pesticide use and regulation. 7 U.S.C. § 136w(d)(1). “Members of the panel shall be selected on the basis of their professional qualifications to assess the effects of the impact of pesticides on health and the environment. To the extent feasible to insure multidisciplinary representation, the panel membership shall include

representation from the disciplines of toxicology, pathology, environmental biology, and related sciences.” *Id.*³

e. The Clean Water Act directed EPA to “establish advisory committees composed of recognized experts in various aspects of pollution and representatives of the public to assist in the examination and evaluation of research progress and proposals and to avoid duplication of research.” 33 U.S.C. § 1254(a)(4).

23. Congress intended that EPA advisory committees providing scientific and technical advice be composed of individuals possessing scientific expertise. Even where Congress has specified that members of a committee should, in some cases, be drawn from interested constituencies, it has specified that those individuals should nevertheless possess relevant credentials and experience.

24. Previous administrations have defended the scientific and technical mission of EPA’s advisory committees from attempts to turn them into sources of policy advice drawn from interested constituencies. In 1982, President Reagan vetoed Senate Bill 2577, the “Environmental Research, Development, and Demonstration Act of 1983.” This bill “would mandate that the EPA Science Advisory Board membership include representatives from ‘States, industry, labor, academia, consumers, and the general

³ FIFRA also “established a Science Review Board to consist of 60 scientists who shall be available to the Scientific Advisory Panel to assist in reviews conducted by the Panel.” 7 U.S.C. § 136w(d)(2).

public.” S. Doc. 97-37, at 2 (1982). In issuing his veto, President Reagan noted that “[t]his requirement runs counter to the basic premise of modern scientific thought as an objective undertaking in which the views of special interests have no role. The purpose of the Science Advisory Board is to apply the universally accepted principles of scientific peer review to the research conclusions that will form the basis for EPA regulations, a function that must remain above interest group politics.” *Id.*

25. In 2015, President Obama issued a statement regarding the EPA Science Advisory Board Reform Act, a then-pending piece of legislation which, among other things, “would impose a hiring quota for [Science Advisory Board] members based on employment by a State, local, or tribal government as opposed to scientific expertise.” Statement of Administration Policy: H.R. 1029 – EPA Science Advisory Board Reform Act of 2015, Mar. 3, 2015.⁴ President Obama concluded that this provision “would negatively affect the appointment of experts and would weaken the scientific independence and integrity of the [Science Advisory Board],” and informed Congress that he would veto the bill if it were presented to him *Id.* The legislation failed in Congress, and was never presented to President Obama.

EPA’s Grant Programs

26. EPA has historically funded a robust program of scientific research by scientists who are employed by public and private universities, non-profit

⁴ Available at: <http://www.presidency.ucsb.edu/ws/?pid=109906>

organizations, hospitals, and other institutions independent of EPA. This extramural research is overseen by EPA's Office of Research and Development. The Office of Research and Development is not a regulatory or enforcement office, and its responsibilities relate to the oversight of scientific issues relevant to EPA's work.

27. EPA's extramural research grants are awarded to institutions, rather than to individual scientists. Generally, profit-making firms are not eligible to receive research grants from EPA.

28. EPA awards grants through a competitive process that includes peer review. Generally, EPA begins a grant competition by issuing a Request for Applications (RFA), in which EPA will call for research proposals on topics that EPA has determined to be of particular importance. Applications are next referred to a panel of outside peer reviewers, who score the proposals based on their scientific merit and responsiveness to the RFA. Subject matter experts within EPA then review high-scoring proposals, and EPA makes a final decision on which proposals will receive funding.

29. This grant-making process is similar to that used at national research institutions such as the National Science Foundation and the National Institutes of Health.

30. Through this process, EPA cannot pre-select the recipients of grants.

31. The National Academies of Science recently published a review of one of EPA's primary extramural research portfolios, the Science to Achieve Results (STAR)

programs. The review praised the program for having “high-quality procedures for priority-setting,” for “sponsor[ing] research of high scientific merit,” and for “produc[ing] research that contributes to public benefits.” Nat’l Acads. of Scis., Eng’g, & Med., *A Review of the Environmental Protection Agency’s Science to Achieve Results Program* 46, 63 (2017).⁵ The review specifically noted that conflict-of-interest issues “are checked and documented,” and that these checks occur “[a]t several points throughout the peer-review process.” *Id.* at 27. It concluded that “[t]he STAR program supports research that is aimed at improving decision-making, problem detection, and problem-solving; it is an important mechanism through which the nation can gain the knowledge needed to respond to [environmental] challenges.” *Id.* at 69.

32. EPA also operates various programs that make grants to state, local, and tribal government agencies. These grant programs support EPA’s initiatives in a variety of different areas, including air pollution control and remediation, brownfields reclamation, environmental education, and climate adaptation. Collectively, these grant programs issue hundreds of millions of dollars in grants to state, local, and tribal agencies, through a combination of competitive grants and grants awarded through statutory formulas.

⁵ Available at: <https://www.nap.edu/catalog/24757/a-review-of-the-environmental-protection-agencys-science-to-achieve-results-research-program>.

The October 31, 2017 Directive

33. On October 31, 2017, Administrator Pruitt issued the Directive, along with an accompanying Memorandum that, he claimed, set forth the reasoning underlying the Directive. The Directive was issued approximately one week after Mr. Pruitt appeared at the Heritage Foundation in Washington, D.C. During that appearance, Administrator Pruitt stated that “[i]f we have individuals who are on those boards, sometimes receiving money from the agency . . . that to me causes questions on the independence and the veracity and the transparency of those recommendations that are coming our way,” and he vowed to “fix that.” Brady Dennis, *Scott Pruitt Suggests He Will Restrict Scientists Who Get EPA Grants from Advising the Agency*, Wash. Post (Oct. 17, 2017).⁶

34. The first provision of the Directive, under the heading “Strengthen Member Independence,” sets forth a requirement “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.” The Directive does not define or discuss what constitutes a “substantial direct benefit” from an EPA grant. The final sentence of this

⁶ Available at: https://www.washingtonpost.com/news/energy-environment/wp/2017/10/17/scott-pruitt-suggests-he-will-restrict-scientists-who-get-epa-grants-from-advising-the-agency/?utm_term=.e0024fcc211b

provision also makes a blanket exception to the restriction: “This principle shall not apply to state, tribal or local government agency recipients of EPA grants.”

35. Neither the Directive nor the Memorandum identifies a source of legal authority for prohibiting advisory committee service by EPA grant recipients. Nor do those documents explain how or why competitive research grants create “the appearance or reality of potential interference” with a federal advisory committee member’s “ability to independently and objectively serve.” The conclusion itself is logically backwards: The fact that EPA entrusts scientists with producing rigorous and valid research on topics that are important to the agency is a reason to seek out their expertise on other scientific and technical questions, not a reason to categorically ban them from providing it.

36. That conclusion also has no support in the Directive or the Memorandum. The Directive and Memorandum do not discuss the grant-making process at all, let alone explain why the existing process fails to ensure that researchers are providing independent and scientifically rigorous advice to EPA. Neither the Directive nor the Memorandum identifies even one instance—either actual or hypothetical—in which an advisory committee’s recommendations were or could be influenced by the fact that members of the committee had also won competitive research grants from EPA. Finally, neither the Directive nor the Memorandum discusses or considers how this new requirement will affect EPA’s obligations to appoint qualified individuals to advisory

committees, or its obligation under FACA to ensure that advisory committees are fairly balanced and not subject to improper influence from special interests. Indeed, the Directive ensures that membership on the committees will be skewed towards industries regulated by EPA, and has already been used to secure the appointments of scientists employed by industry or who have received funding from industry.

37. The Directive represents a change in position from EPA's prior practice, as the agency previously did not prevent scientists who had won competitive research grants from serving on agency advisory committees. It is also inconsistent with positions that EPA has taken in its own Peer Review Handbook, and with the position taken by the Office of Management and Budget (OMB).

a. EPA's Peer Review Handbook, which was revised in 2015 and establishes the agency's procedure for peer review of scientific or technical studies, also takes the position that agency research grants should not automatically disqualify scientists from serving on other projects: "[W]hen a scientist is awarded an EPA research grant through an investigator-initiated, peer-reviewed competition, there generally should be no question as to that scientist's ability to offer independent scientific advice to the Agency on other projects. Those grantees are independent of Agency direction, and can serve as peer reviewers for scientific or technical work products (or portions thereof) that are not solely a product of their own research conducted under the Agency

grant.” EPA Sci. and Tech. Policy Council, *Peer Review Handbook 77* (4th ed. 2015).⁷ EPA advisory committees, such as the Science Advisory Board and the Clean Air Scientific Advisory Committee, engage in just this type of peer review. *See id.* at 65-67. Yet the Directive does not acknowledge or explain its departure from the prior policy.

b. OMB, a division of the Executive Office of the President which, among other things, oversees executive branch rulemaking, has provided federal agencies with guidance on conducting peer reviews of scientific and technical studies under the Information Quality Act, 44 U.S.C. § 3516 note. OMB’s peer-review guidelines, which were adopted after extensive public comment, do not prohibit scientists who receive agency grants from conducting peer reviews: “When an agency awards grants through a competitive process that includes peer review, the agency’s potential to influence the scientist’s research is limited. As such, when a scientist is awarded a government research grant through an investigator-initiated, peer-reviewed competition, there generally should be no question as to that scientist’s ability to offer independent scientific advice to the agency on other projects.” Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664, 2669 (Jan. 14, 2005). Again, the Directive does not acknowledge or explain its departure from executive branch policy.

⁷ Available at: <https://www.epa.gov/osa/peer-review-handbook-4th-edition-2015>.

38. Scientists relied on EPA's prior policy positions. Research grants are often funded for multi-year terms, and scientists working on a grant often arrange for co-investigators or research assistants to provide assistance. Similarly, federal advisory committee appointments often consist of multi-year terms. Thus, in structuring their professional commitments, scientists relied on EPA's prior policy position and did not anticipate being abruptly put to the choice of either continuing to work on EPA research grants or having the opportunity to serve on an EPA advisory committee.

39. The Directive also failed to explain an internal inconsistency: While the Directive purports to avoid financial entanglements between EPA and individuals serving on federal advisory committees, it exempts recipients of state, local, and tribal assistance grants from this restriction, even though these grants represent a significant portion of EPA's grant budget. It is thus ironic that, in issuing the Directive, Administrator Pruitt proclaimed, "[f]rom this day forward, EPA advisory committee members will be financially independent from the Agency." *Administrator Pruitt Issues Directive to Ensure Independence, Geographic Diversity & Integrity in EPA Science Committees*, EPA Press Office (Oct. 31, 2017).⁸

40. The Directive thus singles out academic researchers as uniquely susceptible to conflicts-of-interest and a supposed loss of independence from the receipt

⁸ Available at: <https://www.epa.gov/newsreleases/administrator-pruitt-issues-directive-ensure-independence-geographic-diversity>.

of EPA funding. Yet nothing in the Directive explains this inconsistent treatment of recipients of EPA funding, and no evidence is provided to support it.

41. The Directive's restriction on eligibility for service on federal advisory committees also purports to ensure that advisory committee members "avoid any conflicts of interest within the scope of their review," and is purportedly offered "in addition to EPA's existing policies and legal requirements preventing conflicts of interest among the membership of the Agency's [federal advisory committees]." Administrator Pruitt claimed before the Heritage Foundation that the Directive was designed to eliminate "questions on the independence and the veracity and the transparency of those recommendations that are coming our way." Dennis, *supra* ¶ 33. The Directive does not consider its compatibility with existing federal conflict-of-interest laws and regulations, however, and it is both procedurally and substantively inconsistent with them.

42. The Office of Government Ethics (OGE) has issued government-wide regulations defining conflicts-of-interest under federal ethics laws. OGE's conflict-of-interest regulations disqualify government employees (including Special Government Employees, a category that encompasses individuals serving on EPA's federal advisory committees) from working only on a "particular matter" that will have a "direct and predictable effect" on their financial interests. See 5 C.F.R. § 2635.402(a). A "particular matter" is a "matter[] that involve[s] deliberation, decision, or action that is focused

upon the interests of specific persons, or a discrete and identifiable class of persons,” and “does not extend to the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons.” *Id.* § 2635.402(b)(3). A government grant is not defined as a “financial interest” as that term is used in section 2635.402. However, even if a government grant could be defined as a “financial interest,” there is no “direct and predictable effect” between a scientist providing advice on the scientific aspects of EPA’s work as part of a committee and any EPA grants that the scientist might receive.

43. Second, OGE has promulgated a regulation that specifically applies to Special Government Employees serving on advisory committees. *See* 5 C.F.R. § 2640.203(g). That regulation permits members of advisory committees to “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.” *Id.* (emphasis omitted).

44. The Directive is thus at odds with federal conflict-of-interest laws insofar as it adopts a novel interpretation of what constitutes a disqualifying financial interest.

45. The Directive is also procedurally flawed because, in issuing it, Mr. Pruitt did not follow OGE’s established procedure for adopting new conflict-of-interest regulations. Agencies must “prepare and submit to the Office of Government Ethics, for

its concurrence and joint issuance, any agency regulations that supplement the regulations” OGE itself has issued under the federal conflict-of-interest laws. 5 C.F.R. § 2635.105(a). Further, an agency may “prohibit or restrict the acquisition or holding of a financial interest or a class of financial interests by agency employees, or any category of agency employees,” only through such a “supplemental agency regulation.” 5 C.F.R. § 2635.403(a). The Directive does not appear to have been provided to OGE for concurrence and joint issuance, and was not issued under the authority of the conflict-of-interest statutes or regulations.

46. EPA has already used the Directive to remove scientists from EPA advisory committees. On EPA’s Science Advisory Board, the Directive was used to justify the removal of scientists from the Harvard School of Public Health, the University of Southern California, and Stanford Medical School, among other institutions, and with expertise in topics such as children’s health, epidemiology, and air pollution. On EPA’s Clean Air Scientific Advisory Committee, the Directive was used to justify the removal of experts on air quality monitoring and air pollution from non-profit research institutions.

47. On the Science Advisory Board, EPA has subsequently appointed individuals who work for, or receive research funding from, industries that are regulated by EPA. In total, 30 of 44 members of the Science Advisory Board now have some affiliation with regulated industries. *See* Liza Gross, Lindsey Konkel, & Elizabeth

Grossman, *EPA Swaps Top Science Advisers with Industry Allies*, *Reveal* (Nov. 17, 2017).⁹

On the Clean Air Scientific Advisory Committee, EPA has likewise recently named at least one individual who has conducted research funded by industry to serve on the committee. *Id.*

48. Science is the foundation of NRDC's work to protect people and the environment. Among NRDC's members and employees are scientists who currently serve, or have previously served, on EPA advisory committees, including the Science Advisory Board and the Clean Air Scientific Advisory Committee. NRDC's members and employees also include scientists who are currently working on research projects funded by EPA grants, or who have previously worked on such projects. The Directive injures these scientists by limiting their professional opportunities. Scientists serving on EPA's advisory committees are forced to choose between continuing their service on advisory committees or competing for EPA research grants. Similarly, scientists working on projects funded by EPA research grants are denied the professional and public service opportunity of joining an EPA advisory committee. All scientists are given an unnecessary and illogical choice: They can either accept competitively obtained EPA research funding and limit themselves from agency advisory committees for a number of years, or they can accept a position on an EPA advisory committee and

⁹ Available at: <https://www.revealnews.org/article/epa-swaps-top-science-advisers-with-industry-allies/>

limit themselves from research opportunities, again often for a number of years. These injuries are traceable to the Directive because they are created by the conditions that the Directive imposes. These injuries are likely to be redressed by an order vacating the Directive.

49. Additionally, by prohibiting many of the most qualified scientists from serving on EPA advisory committees and skewing composition of those committees in favor of regulated industries, the Directive harms NRDC's organizational objective to ensure that science is used to inform the regulatory process. By prohibiting a number of qualified researchers from competing for EPA research grants and supplying the agency with research of high scientific merit, the Directive similarly harms the interests that NRDC seeks to protect.

50. Further, defendant's failure to comply with notice-and-comment requirements before issuing the Directive harmed NRDC and its members by depriving them of their right to comment on the Directive. Had NRDC been permitted the opportunity to comment, it would have opposed the Directive. That injury would be remedied by an order vacating the Directive and an injunction prohibiting EPA from implementing it.

CLAIMS FOR RELIEF

First Claim for Relief (Violation of the APA, 5 U.S.C. § 706)

51. Plaintiff incorporates by reference all preceding paragraphs.

52. Under section 706 of the APA, a reviewing court may set aside final agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” and final agency action “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(A), (C). As explained below, the Directive is arbitrary and capricious for a number of reasons.

53. First, Administrator Pruitt’s Directive fails to consider or explain how its provision barring scientists who have won EPA grants from serving on the agency’s advisory committees is consistent with FACA, including the requirements that membership on advisory committees be fairly balanced in terms of points of view represented, and that advisory committees not be subject to improper influence. 5 U.S.C. App. 2 § 5(b)(2), (b)(3), (c). In imposing this restriction, the Directive and the accompanying Memorandum do not cite or discuss the “fairly balanced” or “improper influence” requirements of FACA, and there is no evidence in the public record that these requirements were considered.

54. Second, the Directive does not consider or explain how its prohibition on advisory committee service by scientists working on projects funded by EPA grants is consistent with the statutory requirements that EPA advisory committees, including the

Science Advisory Board, the Clean Air Scientific Advisory Council, and the FIFRA Science Advisory Panel, have appointees with relevant scientific expertise in their fields. *See, e.g.*, 42 U.S.C. § 4365(b); 42 U.S.C. § 7403(a)(4); 7 U.S.C. § 136w(d)(1). In fact, courts have previously concluded that such a restriction would be incompatible with a statutory requirement to appoint the most qualified advisory committee members. By prohibiting *any* scientist working on an EPA grant from serving on *any* advisory committee—no matter how removed that advisory committee may be from the particular research project funded by the EPA grant—the Directive serves only to “eliminate many of those most qualified to give advice.” *Cargill, Inc. v. United States*, 173 F.3d 323, 339 (5th Cir. 1999). Administrator Pruitt did not consider EPA’s legal obligations under these statutes, however, or explain how the Directive is consistent with those obligations.

55. Third, in determining that EPA research funding represents a “financial entanglement[]” with the agency that merits excluding researchers from advisory committees, Mr. Pruitt does not explain his differential treatment of recipients of state, local, and tribal assistance grants. In fact, the Directive separately seeks to increase the number of advisory committee members employed by the regulatory agencies of certain states. While Mr. Pruitt does not explain how his new requirements regarding committee member “independence” are consistent with FACA or the statutes creating EPA’s advisory committees, he also fails to explain how FACA or those statutes could

justify the disparate treatment of individuals working for institutions receiving EPA grants.

56. Finally, while the Directive purports to be offered “in addition to” the existing conflict-of-interest laws applicable to federal advisory committees, it is inconsistent with those laws both procedurally and substantively. Mr. Pruitt’s Directive depends upon a conception of conflicts-of-interest which is inconsistent with the existing, government-wide conflict-of-interest regulations applicable to members of federal advisory committees. As such, it should have been issued as a supplemental agency ethics regulation. Instead, the Directive was simply issued by the Administrator without the concurrence of the Office of Government Ethics, and without the authority of the conflict-of-interest statutes and regulations.

57. Accordingly, Mr. Pruitt’s action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” in violation of section 706(2) of the APA.

**Second Claim for Relief
(Violation of the APA, 5 U.S.C. § 706)**

58. Plaintiff incorporates by reference all preceding paragraphs.

59. The APA’s requirement that an agency provide reasoned explanation for its action includes a requirement that, when an agency reverses its prior position it acknowledge the change of position and explain its reasons for adopting the new

position. An agency must also provide a more detailed justification for a change of position where a prior policy created reliance interests among those affected by it.

60. Mr. Pruitt fails to acknowledge or explain his Directive's sharp departure from EPA's past practice. EPA has never previously interpreted either FACA or the statutes establishing its advisory committees to permit the agency to exclude scientists working on EPA grants from serving on any advisory committee. EPA, and the rest of the executive branch, expressly took the opposite position: That a scientist working on an agency-funded research grant is not thereby disqualified from advising the agency on any other topic. In barring scientists from EPA advisory committees, the Directive does not acknowledge that it represents a reversal of EPA's position, does not cite or discuss the documents setting forth EPA's prior position, and does not explain what circumstances or findings underlie the change in position.

61. Finally, the Directive does not provide a reasoned explanation for disregarding the factual determinations underlying EPA's previous policy. The policy embodied in EPA's Peer Review Handbook, and other sources, has determined that a the research grant process does not function as a means for EPA to interfere with scientists' work, or affect their ability to advise the agency on other matters. The Directive does not consider or discuss EPA's prior policy, acknowledge the reliance interests created by that policy, or attempt to develop a factual record that would justify a change in policy.

62. The Directive is thus arbitrary and capricious, in violation of section 706(2) of the APA.

**Third Claim for Relief
(Violation of the APA, 5 U.S.C. §§ 553, 706)**

63. Plaintiff incorporates by reference all preceding paragraphs.

64. Defendant issued the Directive without publishing a notice of proposed rulemaking or providing an opportunity for public comment on the Directive, in violation of 5 U.S.C. § 553(c)-(d).

65. Defendant did not have good cause to disregard the notice and comment requirements of the APA when he issued the Directive without public comment and made it immediately effective. *See id.* § 553(b)(B).

66. Further, the Directive is not exempt from public comment as “a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.” *Id.* § 553(a)(2). The Directive substantially affects individuals outside of EPA, including co-investigators and other researchers working on projects with scientists who serve on EPA advisory committees, as well as the general public, which relies on the quality of the advice given by EPA’s advisory committees to ensure robust environmental protection. Further, because the Directive affects the composition of federal advisory committees, it is not exempt from public comment as a matter relating to grants.

67. The Directive was published “without observance of procedure required by law,” *id.* § 706(2)(D), and is invalid.

REQUEST FOR RELIEF

Plaintiff respectfully requests that the Court enter judgment as follows:

- A. Declaring that the Directive violates the APA;
- B. Vacating the Directive and all EPA actions based on the Directive;
- C. Enjoining defendant from implementing or taking any action pursuant to the Directive;
- D. Awarding NRDC its reasonable costs and attorneys’ fees; and
- E. Granting such other relief as the Court deems just and proper.

Respectfully submitted this 24th day of January, 2018.

/s/ Mitchell S. Bernard
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