

TESTIMONY OF JOHN D. WALKE
CLEAN AIR DIRECTOR

NATURAL RESOURCES DEFENSE COUNCIL

Attorney General Scott Pruitt EPA Administrator Nominee

Sunshine Roundtable

Tuesday, January 24, Time: 3:30-6PM

SVC 202-203

Thank you, Senator Carper for the opportunity to testify today. My name is John Walke, and I am clean air director and senior attorney for the Natural Resources Defense Council (NRDC)—a nonprofit organization of scientists, lawyers, and environmental specialists dedicated to protecting public health and the environment. I have worked at NRDC since 2000. Before that I was a Clean Air Act attorney in the Office of General Counsel for the U.S. Environmental Protection Agency (EPA). I am currently counsel for NRDC in several lawsuits that Oklahoma Attorney General Scott Pruitt has filed to overturn EPA clean air protections, including cases involving EPA’s Mercury & Air Toxics Standards and national health standards for ozone or smog pollution.

My testimony today will address two topics. First, I will discuss Mr. Pruitt’s lawsuits to overturn EPA’s Mercury and Air Toxics Standards for power plants, and his testimony about these standards and his own positions during his January 18th confirmation hearing. Second, my testimony will discuss some of Mr. Pruitt’s conflicts of interest arising out of his EPA lawsuits, along with his refusal to recuse himself from those lawsuits and related rulemakings were he to be confirmed as EPA Administrator.

Mr. Pruitt’s Lawsuits to Overturn EPA’s Mercury and Air Toxics Standards

During the second round of questioning at Mr. Pruitt’s confirmation hearing, Senator Carper asked Mr. Pruitt whether EPA should not move forward with its Mercury and Air Toxics Standards. Mr. Pruitt responded, “Senator, I actually have not stated that I believe the EPA should not move forward on regulating mercury or adopting rulemaking in that regard. Our challenge was with regard to the process that was used in that case and how it was not complicit (sic) with statutes as defined by Congress.”

This response missed the point of Senator Carper’s question: that Mr. Pruitt has sued twice to challenge EPA’s Mercury and Air Toxics Standards—indeed he has pending litigation against the standards now—and Americans deserve to know whether Mr. Pruitt as EPA Administrator would continue to uphold and enforce these standards or stop them from continuing.

The more serious problem with Mr. Pruitt’s response to Senator Carper, however, is that Mr. Pruitt badly misrepresented his positions before federal courts in his two lawsuits against EPA’s Mercury and Air Toxics Standards. Mr. Pruitt seriously misled Senators on the Committee about his own statements and the nature of his legal challenges.

On November 18, 2016, Mr. Pruitt filed a joint legal brief with industry groups challenging EPA’s determination that it remains “appropriate and necessary” to regulate power plant hazardous air pollutants using the Mercury and Air Toxics Standards. Contrary to his responses to Senator Carper, Mr. Pruitt’s brief asserts that EPA is breaking the law by regulating power plant mercury emissions and other hazardous air pollutants under the Mercury and Air Toxics Standards. Mr. Pruitt argues that hazardous air pollutant emissions from power plants are too insignificant to warrant regulation at all and that any benefits are “minuscule.” His brief argued EPA was wrong to adopt the Mercury and Air Toxics Standards under Clean Air Act section 112, and even that EPA should have deferred regulation to the states under some wholly different

part of the Act. In a short appendix to my testimony, I include quotes from Mr. Pruitt's 2016 brief making these arguments.

Also contrary to Mr. Pruitt's hearing testimony, his 2012 challenge to the original 2011 Mercury and Air Toxics Standards was not solely about the "process" used by EPA. In his October 2012 brief challenging these standards in the U.S. Court of Appeals for the D.C. Circuit, Mr. Pruitt challenged these protections on multiple *substantive* grounds. Section II of Mr. Pruitt's brief was devoted to multiple, independent arguments that the standards were substantively unlawful under the Clean Air Act. For example, Mr. Pruitt argued that "the record does not support EPA's findings that mercury, non-mercury [hazardous air pollutant] metals, and acid gas [hazardous air pollutants] pose public health hazards." *White Stallion v. EPA*, No. 12-1100 (D.C. Cir. Apr. 15, 2014) (attached), Pet. Br. 23. Mr. Pruitt urged federal judges to vacate the Mercury and Air Toxics Standards on substantive and process grounds. *See, e.g., id.* at 26, 38, 55, 57, 66. He failed before both the D.C. Circuit and Supreme Court, which both left those standards in place.

Why do these multiple misrepresentations before the Committee matter? First, it is a serious matter to give misleading testimony to Senators during a confirmation hearing. Senators should not confirm a nominee that deliberately misleads them on such an important matter.

Second, these misrepresentations demonstrate that Mr. Pruitt has prejudged numerous legal, policy, factual and technical issues at the very core of the Mercury and Air Toxics Standards and EPA's authority to issue them. And yet Mr. Pruitt is pretending that he is impartial. To the contrary, he testified that he intends to switch sides and represent EPA in this and other lawsuits that he brought against EPA, as well as in subsequent rulemakings concerning these standards.

Senator Carper wanted to know whether EPA under Scott Pruitt as Administrator should continue to "move forward" with the Mercury and Air Toxics Standards that EPA adopted under section 112 of the Clean Air Act. Mr. Pruitt's position in federal court briefs is that EPA should *not* continue moving forward with the Mercury and Air Toxics Standards under that section of the law. He concealed that position in his testimony last week. There is no escaping the conclusion that he misrepresented his position before this Committee last week.

Mr. Pruitt's Conflicts of Interest

Mr. Pruitt has a long list of lawsuits against EPA to overturn clean air and clean water protections, raising unavoidable conflicts of interest were he to become EPA Administrator and participate in these lawsuits by switching sides. Americans expect an EPA Administrator who will uphold and enforce federal environmental laws, impartially and honorably and in the best interests of Americans' health and natural environment. That is why it matters so much that Mr. Pruitt has prejudged the central legal and factual and technical issues behind EPA's Mercury and Air Toxics Standards (and other rules), and concluded that EPA lacks authority adopt these standards and that EPA broke the law in doing so. Indeed, as the Appendix to my testimony shows, Mr. Pruitt has made repeated representations to federal judges that the Mercury and Air Toxics Standards he will be expected to enforce in his view run afoul of the Clean Air Act and even Supreme Court rulings.

Mr. Pruitt's January 3, 2017 letter to EPA's Designated Agency Ethics Official, Mr. Kevin Minoti, says that despite having a "covered relationship" with Oklahoma that ordinarily would bar his participation in lawsuits Oklahoma brought against EPA, he will seek a waiver to allow that participation. His letter says that he "will seek authorization to participate personally and substantially in particular matters involving specific parties in which I know the State of Oklahoma is a party or represents a party." This would include Mr. Pruitt's lawsuits seeking to overturn EPA's Mercury and Air Toxics Standards and EPA's national health standards for ozone pollution, as well as numerous other pending cases Mr. Pruitt has brought against EPA.

A January 17, 2017 letter from Citizens for Responsibility and Ethics in Washington (CREW) notes that his intention to seek such waivers "raises a concern that Mr. Pruitt intends to 'switch sides' in the litigation and seek to participate as EPA Administrator, if confirmed, which would present both an actual and an apparent conflict of interest, and therefore would be improper under the governing ethics rules."

Mr. Pruitt's misrepresentations last week about his lawsuit to overturn the Mercury and Air Toxics Standards, which I have already described, underscore the degree to which he has prejudged core legal and factual issues concerning those standards. His hearing testimony confirms that reasonable persons, including the members of this Committee, cannot count on him to exercise discretion fairly and impartially in ongoing litigation that he originated or in any related rulemakings.

Office of Government Ethics guidelines provide for broadly recusing a nominee from participating rulemakings— "particular matters of general applicability"—where his prior strong position adverse to the EPA would lead reasonable persons to doubt his impartiality in those matters. OGE guidelines provide for such recusals to last for the duration of a nominee's appointment at the agency. Mr. Pruitt's ethics letter does not even address this question.

Further serious problems with Mr. Pruitt's intended strategy emerged at his confirmation hearing. Neither EPA's Designated Agency Ethics Officer, Senators, nor the American people can know the full scope of Mr. Pruitt's conflicts of interest because he failed to disclose all the relevant facts. Despite Senators' best efforts to obtain the information, Mr. Pruitt has declined to disclose from which companies he solicited or received donations on behalf of the Republican Attorneys General Association and Rule of Law Defense Fund. As Oklahoma Attorney General, Mr. Pruitt also has failed to disclose documents (reported to exceed 3,000 in number) responsive to open records requests that have been pending for two years concerning communications between regulated energy companies and his office.

Mr. Pruitt's actual and apparent conflict of interest in the MATS and other rules goes well beyond his current relationship with Oklahoma. He pursued the MATS case and others jointly with multiple industries and other states. No reasonable person could conclude that Mr. Pruitt can participate as Administrator in these matters impartially and without conflicts of interest. This would remain true even if Oklahoma dropped out of these cases altogether or purported to waive its own interest in avoiding Mr. Pruitt's switching sides.

APPENDIX

Excerpts from the November 18, 2016 joint industry-Oklahoma *et al.* legal brief (attached) challenging EPA's renewed finding that it remains appropriate and necessary to regulate power plant mercury and hazardous air pollutants under EPA's Mercury & Air Toxics Standards:

- “EPA cannot properly conclude that it is ‘appropriate and necessary’ to regulate [hazardous air pollutants] under Clean Air Act § 112”—the legal underpinning of the Mercury and Air Toxics Standards (pp. 3-4);
- “EPA [has] found that [electric generating unit] emissions of non-mercury [hazardous air pollutants] were too insignificant to warrant regulation” (p. 12);
- “EPA’s refusal to consider such alternative control strategies (especially regulation under § 111(d)—an alternative that Congress unlocked in the 1990 Amendments specifically for this purpose when it also enacted the current § 112) disregards the statutory framework and is inconsistent with [the Supreme Court decision in *Michigan v. EPA*]” (pp. 25-26);
- He argued there are “minuscule benefits to regulating [electric generating units] under [CAA] § 112” (p. 40);
- He argued EPA does not demonstrate that the benefits of reducing power plant [hazardous air pollutant] emissions justify the compliance costs from the Mercury & Air Toxics Standards (p. 57);
- He argued that Clean Air Act § 111 should be used to regulate power plant hazardous air pollutants, including mercury, rather than § 112 (p. 60); and
- He argued Congress allows EPA to “defer regulation of [power plant hazardous air pollutants] to States” under Clean Air Act section 116, rather than EPA regulating with the Mercury and Air Toxics Standards under section 112 (pp. 61, 70).