DC CIRCUIT COURT TO EPA: GRANT-HOLDING SCIENTISTS CANNOT BE BANNED FROM SCIENTIFIC ADVISORY COMMITTEES

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The D.C. Circuit ruled this week that EPA must discontinue its practice of banning grant recipients from serving on its federal advisory committees. This precedent-setting ruling reverses a lower court's decision which found the EPA did not violate a conflict-of-interest statute regarding executive branch employees and related regulations. The D.C. Circuit's ruling comes in a lawsuit seeking to overturn former EPA administrator Scott Pruitt's October 2017 directive regarding alleged conflicts of interest and advisory committee membership.

Among other points, the October 2017 directive stated that

1. members of advisory committees must be "independent" of the EPA, and therefore no members could hold EPA grants and also serve on committees; and
2. membership on the advisory committees should be "rotated regularly" in the service of offering "fresh perspectives."

Technically speaking, the October 2017 directive only bars scientists from serving on committees while they are actively receiving grant funds. However, the directive has long-term effects given the fact that science funding tends to be paid out over long periods of time. Thus, in the wake of the directive's release, scientists were faced with a choice: leave the committees or relinquish the grants crucial to their research. In sum, the directive disqualified thousands of scientists who would otherwise have been able to serve on one of the EPA's advisory committees. Advisory groups say their absence has resulted in a marked increase in industry influence over EPA advisory panels.

The DC Circuit held that EPA's directive was subject to judicial review and bypassed proper protocol for introducing such a measure. Although the lower court was correct in saying that EPA is allowed to deviate from ethics rules created by the U.S. Office of Government Ethics, the panel argues the court neglected to recognize the fact that a policy change entailing a major change from prior practice must be thoroughly reasoned. As such, the EPA must consult with the OGE before implementing a new rule that significantly changes prior policy. The EPA's failure to consult with the OGE demonstrates they skipped the "thorough reasoning" step, and therefore the directive was found to be "arbitrary and capricious." The fact that Pruitt failed to address contrary conclusions of the OGE and EPA was particularly egregious because the prior practice existed in part to emphasize the role of scientific advisory committees. OGE's conflict-of-interest policy was designed to keep government workers from participating in matters that directly affect their personal financial benefits.

The advisory groups' lawsuit has been sent back to the lower court for further proceedings that take into account its opinion. Proponents of the suit argue this is concrete evidence the rule is illegal and the policy must be abolished. The case is Physicians for Social Responsibility et al. v. Andrew Wheeler, case number 19-5104, in the U.S. Court of Appeals for the D.C. Circuit.

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