

November 7, 2017

Kevin Minoli
Acting General Counsel and Ethics Officer
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington DC 20460

Re: Recusal of Dr. Nancy Beck from Proposed TSCA Rules Banning Particular Uses of Trichloroethylene, Methylene Chloride and N-Methylpyrrolidone

Dear Mr. Minoli:

The undersigned groups are committed to assuring the safety of chemicals used in our homes, workplaces and the many products to which our families and children are exposed each day. We believe that effective implementation of the newly strengthened Toxic Substances Control Act (TSCA) is vital to assessing and reducing exposure to the numerous chemicals that pose known threats to public health and the environment.

We are writing to request the mandatory recusal of Dr. Nancy Beck, Deputy Assistant Administrator (DAA) for Chemical Safety and Pollution Prevention, from ongoing rulemakings under section 6(a) of TSCA to ban unsafe uses of three widely used chemicals – Trichloroethylene (TCE), Methylene Chloride (MC) and N-Methylpyrrolidone (NMP) (together, the “section 6(a) rulemakings”).¹ Participation in these rulemakings violates federal conflict of interest and impartiality requirements, as illustrated by Dr. Beck’s troubling history as an advocate for chemical companies opposed to the proposed bans and the author of industry comments criticizing the EPA risk assessments on which the bans are based.

Dr. Beck Has Already Misused Her EPA Position to Advance Industry Interests in Violation of Ethics Requirements

An October 21 *New York Times* [article](#) -- *Why Has the EPA Shifted on Toxic Chemicals? An Industry Insider Helps Call the Shots* -- describes at length the role Dr. Beck played as a long-time official of the American Chemistry Council (ACC) and how she has used her current position at EPA to radically alter proposed TSCA regulations to advance the chemical industry’s interests.

For more than five years, Dr. Beck was ACC’s Senior Director, Regulatory Science Policy. A registered lobbying organization, ACC is the principal trade association for large chemical manufacturers and has engaged in extensive advocacy to influence implementation of TSCA. Dr. Beck played a central role in

¹ Trichloroethylene (TCE); Regulation of Use in Vapor Degreasing under TSCA Section 6(a), 82 Fed. Reg. 7432 (Jan. 19, 2017) – Docket EPA-HQ-OPPT-2016-0387; Trichloroethylene; Regulation of Certain Uses under TSCA § 6(a), 81 Fed. Reg. 91592 (Dec. 16, 2016) – Docket EPA-HQ-OPPT-2016-0163; and Methylene Chloride and N-Methylpyrrolidone; Regulation of Certain Uses under TSCA Section 6(a), 82 Fed. Reg. 7464 (Jan. 19, 2017) – Docket EPA-HQ-OPPT-2016-0231. We request that this letter be added to the dockets for these three chemicals.

industry advocacy during her employment by ACC. Both before and after the amendment of TSCA, she was the author of numerous comments filed with EPA on TSCA issues, presented ACC's views on how the law should be implemented at EPA public meetings and testified in Congress on behalf of ACC on these matters. Through these and other activities, she developed and advocated ACC positions on the critical issues regarding evaluation and regulation of chemicals under TSCA for which she is now responsible as a senior policymaker in the EPA chemicals program.

According to your June 8, 2017 [memorandum](#), when she began work at EPA, Dr. Beck was "advised . . . that [she] cannot participate in any meetings, discussions or decisions that relate to any individual ACC comment." This advice applied to the proposed rules establishing processes for risk evaluations and prioritization of chemicals (the "framework rules") that were awaiting finalization at the time of her arrival at EPA. The June 8 memorandum indicates that "[u]ntil now, you have recused yourself from participating personally and substantially in those comments to rulemaking that were offered by ACC." Yet as recounted in the *New York Times* article, Dr. Beck was the principal decision-maker on EPA's final rules, directing the staff to make extensive changes from the Agency's original proposals that mirrored the recommendations in ACC comments that Dr. Beck herself wrote. According to EPA employees interviewed by the *Times*, Dr. Beck "spent her first weeks on the job pressing agency staff to rewrite the standards to reflect, in some cases, word for word, the chemical industry's proposed changes." As one EPA senior manager noted, "Nancy was just rewriting the rule herself. And it was a huge change. Everybody was stunned such a substantial change would be made literally in the last week." Dr. Beck's work on the rules was substantially complete by June 1, by which time both rules had been submitted to the Office of Management and Budget (OMB) for interagency review.

Even though she had been explicitly advised by you not to "participate in any meetings, discussions or decisions that relate to any individual ACC comment," Dr. Beck did exactly that in rewriting the draft final rules to incorporate ACC's recommendations.

The June 8 Impartiality Determination is Contrary to OGE Regulations Because it Fails to Consider the Threats Posed by Dr. Beck to the Integrity of EPA Decision-making

After Dr. Beck oversaw the rewriting of the framework rules to incorporate ACC positions in violation of your ethics instructions, your office [issued](#) an "impartiality determination" on June 8 broadly authorizing her "to participate fully in matters of general applicability, including rulemaking, including consideration of any comments that were made by ACC." This determination did not legitimize Beck's participation in finalizing the framework rules in violation of your ethics advice but only applied prospectively.

We disagree strongly with the June 8 determination allowing Dr. Beck to consider and base decisions on ACC comments in future TSCA rulemakings. As discussed below, the determination is contrary to the criteria in Office of Government Ethics (OGE) regulations for authorizing such participation notwithstanding an official's lack of impartiality. We urge you to reconsider the determination so that Dr. Beck does not further impair the integrity of EPA's decision-making process in connection with other TSCA matters. We are particularly concerned about Dr. Beck's participation in the section 6(a) rulemakings, which would compound the harm to the Agency's independence and credibility that has already occurred as a result of her rewriting of the two framework rules to conform to ACC positions.

Under OGE regulations at 5 C.F.R 2635.502(d), where there is a reasonable basis to question an agency's employee's impartiality because of a covered relationship with a party participating in a matter, the ethics official can authorize the employee to participate in the matter if he makes a "determination, in light of all the circumstances, that the interest of the Government in the employee's participation outweighs the concern that a reasonable person might question the integrity of the agency's programs and operations."

This provision requires a careful balancing of interests under the specific circumstances of the matter in question. The OGE regulations enumerate several factors that should be considered as part of this balancing process:

- (1) The nature of the relationship involved;
- (2) The effect that resolution of the matter would have upon the financial interests of the person involved in the relationship;
- (3) The nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) The sensitivity of the matter;
- (5) The difficulty of reassigning the matter to another employee; and
- (6) Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

Several of these factors address the degree to which the employee's participation in the matter would compromise the integrity and impartiality of the agency's decisions and harm its credibility with the public. For example, if the employee's role in the matter is central, she has broad discretion to influence agency decisions, the matter is sensitive and implicates important agency programs, and the employee's actions are highly likely to reflect the views of her former employer, the potential harm to the decision-making process would be substantial and would only be outweighed by a compelling government interest in her participation in the matter.

Your impartiality determination focused on the purported benefits to the Agency of Dr. Beck's "extensive prior expertise with the regulated industry's perspective." Contrary to the OGE regulations, you failed to consider the potential harm to the Agency's decision-making process from the likelihood that Dr. Beck would give preference to the views of her former employer while summarily rejecting those of other key stakeholders, resulting in decisions that are biased and reflect overt favoritism. By ignoring the threat posed by Dr. Beck to the credibility of the Agency's implementation of TSCA, the determination failed to apply the balancing test required by the OGE regulations

Dr. Beck's Involvement in the Section 6(a) Rulemakings is Plainly Unjustified under the OGE Balancing Test and She Should be Recused from Participating in these Rulemakings

An even-handed application of the OGE criteria to the circumstances of the three section 6(a) rulemakings demonstrates that Dr. Beck's further participation poses threats to EPA's integrity and credibility far greater than the limited benefits of her continuing involvement and recusal is necessary.

As the first use of EPA's expanded authority to reduce chemical risks, these rulemakings are precedent setting and vital to the success of the amended toxics law; they also involve serious risks to the millions of workers and consumers who are exposed to the three chemicals. Dr. Beck will have unparalleled opportunities to influence these rulemakings as the highest-ranking political appointee in the chemicals program. Yet ACC filed [comments](#) in the three rulemakings that were prepared when Dr. Beck was an ACC employee and likely reflected her input. Dr. Beck also was an author of ACC [comments](#) on the risk assessments that formed the basis for the proposed rules and [presented](#) ACC's views at public meetings and in Congressional [testimony](#). Her positions were highly critical of Agency's scientific analysis, making it likely that she will adhere to ACC's views and block finalization of the rules. That certain major ACC members will be financially harmed if the rules go forward further underscores her lack of impartiality and the likelihood of industry influence on the outcome of the rulemaking process.

While ignoring these considerations, your determination places great weight on the "benefits" to the government from Dr. Beck's participation in TSCA rulemakings. However, the "benefits" cited mainly involve her ties to the chemical industry and experience as an industry insider. These factors not only underscore Dr. Beck's lack of impartiality but also fail to show that she has unique scientific or policy expertise that makes her irreplaceable within the Agency – a claim that would not hold water given the many experienced and able toxicologists and risk assessors on the EPA career staff. Even Dr. Beck's ability to provide a pipeline to the industry and help explain its positions offers no unique value given the industry's long history of effectively communicating its perspective to EPA through comments, other submissions and in-person meetings.

In sum, the danger of compromising EPA's integrity in these high-profile rulemakings under a new law designed to protect public health greatly outweighs any limited industry-related insight Dr. Beck may be able to contribute to the resolution of the vital scientific and policy issues before the Agency. You should reconsider your impartiality determination as it applies to the section 6(a) rulemakings and instruct Dr. Beck to cease her participation.

At a Minimum, EPA's June 8 Impartiality Determination Should not Apply to the Section 6(a) Rulemakings Because They are Specific Party Matters

Alternatively, you should require Dr. Beck's recusal from the section 6(a) rulemakings on the ground that they fall outside the scope of your impartiality determination. The June 8 determination only authorizes Dr. Beck's participation in matters of general applicability. It emphasizes that she "cannot participate in any specific party matter in which ACC is a party . . . if the circumstances would cause a reasonable person with knowledge of the relevant facts to question [her] impartiality."

At 5 C.F.R. § 2640.102(l), the OGE regulations define "particular matter involving specific parties" as a "judicial or other proceeding . . . or other particular matter involving a specific party or parties. The term typically involves a specific proceeding affecting the legal rights of the parties." As the Trump ethics pledge [recognizes](#), rulemakings can be specific party matters if they target a small number of identified entities and directly impact their legal obligations and economic interests.

This is clearly the case for the section 6(a) rulemakings. As proposed, these rules are limited to three specific chemicals and prohibit their use in particular applications (i.e. vapor degreasing and spot removal for TCE and paint removal for MC and NMP). The chemicals are manufactured by a small and identifiable group of companies who belong to ACC. For example, the two principal US producers of TCE are Axiall Corporation and Olin Corporation; Dow Chemical Company and Occidental Chemical Corporation produce virtually all MC in the US. Finalization of the proposed section 6(a) rules would deprive these companies of markets for their chemicals and result in lost revenue, directly affecting their economic interests and legal obligations. By filing comments on behalf of its affected members, ACC is clearly a “party” to these rulemakings. Since your determination is inapplicable to particular matters impacting Dr. Beck’s former employee ACC and its members, it does not encompass the section 6(a) rulemakings and Dr. Beck’s lack of impartiality should compel her recusal.

In summary, we request that you reconsider the June 8 impartiality determination as applied to the section 6(a) rulemakings or determine that the rulemakings are not subject to the determination. In either event, we ask you to conclude that Dr. Beck is recused from any further participation in the rulemaking process and to inform her of such determination as soon as possible.

Our groups look forward to your early response to this letter. Should you have any questions, please contact Bob Sussman, counsel for Safer Chemicals, Healthy Families, at bobsussman1@comcast.net.

Sincerely yours,

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