

## CLIENT ALERT

### Scott Pruitt Confirmed as Administrator of the Environmental Protection Agency

Feb.17.2017

The U.S. Senate voted 52 to 46 today to confirm Scott Pruitt as the new Administrator of the Environmental Protection Agency. Pruitt is an attorney by trade and until his confirmation had served as the Attorney General of Oklahoma since 2010. Prior to his tenure as Attorney General, Pruitt served for several years in the Oklahoma State Senate.

Administrator Pruitt will oversee more than 15,000 EPA employees, ten regional offices, 27 laboratories and a budget of more than \$8 billion. EPA was established by President Nixon in 1970 and now administers the country's most well-known and consequential environmental laws, including the Clean Air Act, Clean Water Act, Toxic Substances Control Act, and the "Superfund" program under which EPA investigates and remediates hazardous substance disposal sites. EPA's regulatory choices impact almost every major industry in the U.S.

Given the scope of EPA's regulatory authority, everyone from the board room to the coal mines is reading the tea leaves to determine EPA's agenda for the next several years. Mr. Pruitt's testimony at his confirmation hearing on January 18, 2017, before the U.S. Senate Committee on Environment and Public Works, as well as his public statements about adverse impacts of environmental regulations, provide an indication of how EPA's mission may change under Administrator Pruitt.

#### A "Leading Advocate Against the EPA's Activist Agenda"

Scott Pruitt's official biography at the Oklahoma Attorney General's website describes him as a "leading advocate against the EPA's activist agenda" who is dedicated to combatting "unwarranted regulation and overreach by the federal government." He has lived up to that portrayal as Attorney General, suing the EPA 14 times, most notably to contest the Cross-State Air Pollution Rule, the Mercury and Air Toxic Standards, and the Clean Power Plan, which Pruitt has described as "an unlawful attempt to expand federal bureaucrats' authority over states' energy economies in order to shutter coal-fired power plants and eventually other sources of fossil-fuel generated electricity."

#### Skeptical of the Clean Power Plan and Global Warming

Given Pruitt's criticism of the Clean Power Plan, most prognosticators believe the Clean Power Plan will not survive in its current form under Administrator Pruitt. Pruitt refused to state in his oral or written testimony what steps EPA will take to rescind or revise the Clean Power Plan on the grounds that he does not want to pre-judge the issue. However, Pruitt is also on record contesting the extent to which climate change is caused by human activity, which has led some industry analysts to wonder whether Administrator Pruitt will reconsider EPA's 2009 "endangerment finding" concluding that carbon dioxide is a threat to human health and therefore must be regulated. Pruitt stated during his confirmation hearing that EPA will not revisit its determination; regardless, no one expects EPA to pursue an aggressive climate agenda during the next few years. We are likely to know more about EPA's approach to regulating for climate change purposes and for rolling back or revising the Clean Power Plan within the next week, when the White House is expected to issue an Executive Order directing EPA to reconsider the rule.

### **Pruitt Focuses on Federalism**

Pruitt is on record as a critic of the previous Administration's encroachment on state regulatory prerogatives. He highlighted during his testimony that the previous Administration rejected State Implementation Plans promulgated under the Clean Air Act on numerous occasions and issued 56 Federal Implementation Plans to replace them. Pruitt suggested that EPA's past approach is contrary to the "cooperative federalism" that is the foundation of most environmental statutes. He has promised instead to work in greater "partnership" with the states. He cited favorably, for instance, six states' coordination with EPA to set Total Maximum Daily Loads for discharges into the Chesapeake Bay (a plan Pruitt challenged as Attorney General of Oklahoma), and suggested that he intended to engage in similar partnerships as EPA Administrator. Despite his focus on federalism, Pruitt demurred when questioned by Senator Harris as to whether EPA would approve a request by California for permission to issue new, more stringent pollution standards for motor vehicles under Section 209 of the Clean Air Act.

### **Future of the "Waters of the United States" Rule in Doubt**

Pruitt has been an outspoken opponent of EPA's 2015 rule defining "Waters of the United States," calling it a "brazen effort to stifle private property rights." Although he sued EPA seeking to halt enforcement of the regulation in his capacity as Attorney General of Oklahoma, it is unclear from his testimony what steps Pruitt will take as Administrator to revise or rescind the rule. He did state during his confirmation hearing that "the best thing the EPA can do, going forward, is to reestablish that clarity so that states and individuals know what's expected of them in compliance." Pruitt did not clarify how the EPA under his leadership would provide clarity, but he appeared open to a suggestion by Senator Cardin that perhaps it is time for Congress to define what is, or is not, a Water of the United States. Sources suggest that the White House may also issue an Executive Order in the coming weeks that may map out an approach to withdrawing and revising the rule.

### **Pruitt Praises 2016 Reforms to the Toxic Substances Control Act**

During the course of his testimony, Pruitt was asked several times about recent reforms to TSCA. He applauded the changes to TSCA, which he characterized as vesting EPA with new authority to order testing of chemicals, and he promised to implement the TSCA reforms efficiently. Administrator Pruitt will have significant leeway in interpreting and implementing the new law.

### **EPA's Agenda Moving Forward**

Administrator Pruitt had an active litigation docket against EPA as Attorney General of Oklahoma, and a yet-to-be-answered question is whether ethics rules will require him to recuse himself from any of the matters that were the subject of litigation instituted by him as Attorney General. Still, much remains to be seen about how he will approach his tenure as head of EPA. He has articulated some broad goals, such as partnering more with states during the decision-making process, but the success of his agenda will rise and fall, in part, with his ability to enlist career staff at EPA to carry out his mission. Also unclear is the extent to which EPA may be influenced by President Trump's recent Executive Order (No. 13371) requiring the elimination of two existing regulations for every new regulation promulgated. It is likely that many Obama-era regulations (and even some older ones) will be on the chopping-block as part of that initiative, but that effort may be hampered by statutory requirements that regulations be promulgated. Nonetheless, we can expect Democratic attorneys general, who largely remained on the sidelines during the previous administration, and environmental groups to assume the role Administrator Pruitt pursued as Attorney General of Oklahoma and challenge EPA's authority to fulfill Pruitt's agenda.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

**Elliott P. Laws**

Partner – Washington, D.C.  
Phone: +1 202.624.2798  
Email: [elaws@crowell.com](mailto:elaws@crowell.com)

**Thomas A. Lorenzen**

Partner – Washington, D.C.  
Phone: +1 202.624.2789  
Email: [tlorenzen@crowell.com](mailto:tlorenzen@crowell.com)

**Robert Meyers**

Partner – Washington, D.C.  
Phone: +1 202.624.2967  
Email: [rmeyers@crowell.com](mailto:rmeyers@crowell.com)

**Richard E. Schwartz**

Senior Counsel – Washington, D.C.  
Phone: +1 202.624.2905  
Email: [rschwartz@crowell.com](mailto:rschwartz@crowell.com)

**W. Scott Douglas**

Senior Policy Director – Washington, D.C.  
Phone: +1 202.508.8944  
Email: [sdouglas@crowell.com](mailto:sdouglas@crowell.com)

**Kirsten L. Nathanson**

Partner – Washington, D.C.  
Phone: +1 202.624.2887  
Email: [knathanson@crowell.com](mailto:knathanson@crowell.com)

**R. Timothy McCrum**

Partner – Washington, D.C.  
Phone: +1 202.624.2752  
Email: [rmccrum@crowell.com](mailto:rmccrum@crowell.com)

**David Chung**

Partner – Washington, D.C.  
Phone: +1 202.624.2587  
Email: [dchung@crowell.com](mailto:dchung@crowell.com)

**Tyler A. O'Connor**

Associate – Washington, D.C.  
Phone: +1 202.624.2929  
Email: [toconnor@crowell.com](mailto:toconnor@crowell.com)