IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

MURRAY ENERGY CORPORATION, **MURRAY AMERICAN ENERGY, INC.**, **THE AMERICAN COAL COMPANY**, **AMERICAN ENERGY CORPORATION**, **THE HARRISON COUNTY COAL COMPANY**, **KENAMERICAN RESOURCES, INC.**, **THE MARION COUNTY COAL COMPANY**, **THE MARSHALL COUNTY COAL COMPANY**, **THE MONONGALIA COUNTY COAL COMPANY**, **OHIOAMERICAN ENERGY INC.**, **THE OHIO COUNTY COAL COMPANY**, and **UTAHAMERICAN ENERGY, INC.**,

Plaintiffs,

v.

Civil Action No. 5:14-CV-39
Judge Bailey

GINA McCARTHY, Administrator, United States Environmental Protection Agency, in her official capacity,

Defendant.

ORDER DENYING DEFENDANT'S EXPEDITED MOTION TO DISQUALIFY OR EXCLUDE JEFFREY HOLMSTEAD

Pending before this Court is United States' Expedited Motion to Disqualify or Exclude Jeffrey Holmstead [Doc. 206]. The Motion has been fully briefed and is ripe for decision.

In her Motion, the defendant seeks to exclude the testimony and opinions of Jeffrey Holmstead on the basis that (1) he has significant conflicts of interest that preclude his testimony and (2) his proffered testimony "amounts to nothing more than legal conclusions

and is otherwise unreliable. The significant conflicts of interest appear to emanate from his tenure as a high ranking official at the EPA.

To put the argument into context, it is beneficial to examine Mr. Holmstead's educational and employment background:

- 1984 Graduated summa cum laude from Brigham Young University
- 1987 Graduated from Yale Law School
- 1987-88 Law Clerk to Hon. Douglas H. Ginsburg, D.C. Court of Appeals
- 1988-89 Davis, Polk, and Wardwell LLP, Washington, D.C.
- 1989-93 The White House. Served on the White House Staff as a member of the White House Counsel's Office. In this capacity, was involved in discussions that led to passage of the Clean Air Act Amendments of 1990. After the Amendments were adopted, he was involved in the interagency review process for all major EPA rules arising under the Clean Air Act.
- 1993-2001 Latham & Watkins, Washington, D.C. As a member of the firm's Environmental Group, Mr. Holmstead represented a wide variety of companies and trade associations dealing with issues arising under several environmental statutes. Much of his work involved the Clean Air Act and, in particular, regulatory issues arising from the 1990 Amendments to the Clean Air Act.
- 2001-05 United States Environmental Protection Agency. Appointed by President George W. Bush and confirmed by the U.S. Senate

to oversee all regulatory and permitting programs created under the Clean Air Act. During his tenure at EPA, Mr. Holmstead was the architect of several of the Agency's most important initiatives, including the Clean Air Interstate Rule, the Clean Air Diesel Rule, the Mercury Rule for power plants, and the reform of the New Source Review program. He also oversaw the development of the Bush Administration's Clear Skies Legislation and key parts of its Global Climate Change Initiative.

- 2006-present Bracewell LLP, Washington, D.C. The Environmental Strategies Group (ESG) is a multi-disciplinary group that includes environmental and energy attorneys, public policy advocates, and strategic communications experts – most of whom have had high-level government experience. As head of the ESG, Mr. Holmstead represents companies, business groups, and not-for-profit organizations on a wide range of environmental and energy-related issues related to the Clean Air Act.

Based upon the foregoing, Mr. Holmstead certainly has the experience to testify concerning the matters for which he is proffered - a conclusion that the EPA does not contest. The issue is whether his experience at the EPA over ten years ago so taints his opinions that he should not be permitted to offer expert testimony.

"Analysis properly begins with an acknowledgment of the inherent power of federal

courts to disqualify experts in certain circumstances. This power exists in furtherance of the judicial duty to protect the integrity of the adversary process and to promote public confidence in the fairness and integrity of the legal process." ***Wang Laboratories, Inc. v. Toshiba Corp.***, 762 F.Supp. 1246, 1248 (E.D. Va. 1991) (Ellis, J.). *Accord* ***Koch Refining Co. v. Jennifer L. Boudreaux MV***, 85 F.3d 1178, 1181 (5th Cir. 1991); ***United States v. NHC Health Care Corp.***, 150 F.Supp.2d 1013 (W.D. Mo. 2001); ***Rhodes v. E.I. DuPont de Nemours & Co.***, 558 F.Supp.2d 660, 664 (S.D. W.Va. 2008) (Goodwin, J.); ***Return Mail, Inc. v. United States***, 107 Fed.Cl. 459, 461 (2012); ***In re C.R. Bard, Inc.***, 2014 WL 6960396, *7 (S.D. W.Va. December 8, 2014) (Eifert, MJ.). *See* ***Koch Refining****, supra*.

Disqualification is a drastic remedy that courts use sparingly. ***Hewlett–Packard Co. v. EMC Corp.***, 330 F.Supp.2d 1087, 1092 (N.D. Cal. 2004) (citations omitted). Cases granting disqualification are rare because courts are "generally reluctant to disqualify expert witnesses, especially those ... who possess useful specialized knowledge." ***Rhodes***, 558 F.Supp.2d at 664, quoting ***Grant Thornton, LLP v. FDIC***, 297 F.Supp.2d 880, 882 (S.D. W.Va. 2004) (Faber, CJ.). The burden of showing that disqualification is warranted rests with the party seeking disqualification and requires a "high standard of proof." ***Rhodes****,* 558 F.Supp.2d at 664 (quoting ***Tessier v. Plastic Surgery Specialists, Inc.***, 731 F.Supp. 724, 729 (E.D. Va.1990)). *See also* ***Koch Refining****, supra.*

In ***Wang Laboratories, Inc. v. Toshiba Corp.***, 762 F.Supp. 1246 (E.D. Va. 1991), Judge Ellis sets forth the standard which appears to have been adopted by the courts reviewing disqualification issues:

While the existence of the disqualification power is clear, its exercise

presents more difficult issues in certain circumstances. To be sure, no one would seriously contend that a court should permit a consultant to serve as one party's expert where it is undisputed that the consultant was previously retained as an expert by the adverse party in the same litigation and had received confidential information from the adverse party pursuant to the earlier retention. This is a clear case for disqualification. *See* ***Marvin Lumber & Cedar Co. v. Norton Co.,*** 113 F.R.D. 588 (D. Minn. 1986); ***Miles v. Farrell,*** 549 F.Supp. 82 (N.D. Ill. 1982). Less clear are those cases where, as here, the parties dispute whether the earlier retention and passage of confidential information occurred. In this event, courts should undertake a two-step inquiry:

> First, was it objectively reasonable for the first party who claims to have retained the consultant, . . . to conclude that a confidential relationship existed?
>
> Second, was any confidential or privileged information disclosed by the first party to the consultant?

See ***Paul*** [***v. Rawlings Sporting Goods Co.***], 123 F.R.D. at 278 [(S.D. Ohio 1988)]; ***Great Lakes Dredge & Dock Co.*** [***v. Harnischfeger Corp.***], 734 F.Supp. at 337 [(N.D. Ill. 1990)].

Affirmative answers to both inquiries compel disqualification. But disqualification is likely inappropriate if either inquiry yields a negative response. Thus, even if counsel reasonably assumed the existence of a

> confidential relationship, disqualification does not seem warranted where no privileged or confidential information passed. *See* ***Paul***, 123 F.R.D. at 279 (expert not disqualified where there was a "lack of communication of any information of either particular significance or which can be readily identified as either attorney work product or within the scope of the attorney client privilege"); *see also* ***Nikkal Ind. Ltd. v. Salton, Inc.,*** 689 F.Supp. 187, 190 (S.D. N.Y. 1988). Were this not so, lawyers could then disable potentially troublesome experts merely by retaining them, without intending to use them as consultants. Lawyers using this ploy are not seeking expert help with their case; instead, they are attempting only to prevent opposing lawyers from obtaining an expert. This is not a legitimate use of experts, and courts should not countenance it by employing the disqualification sanction in aid of it.

762 F.Supp.2d at 1248.

In ***Grant Thornton, LLP v. FDIC***, 297 F.Supp.2d 880, 883 (S.D. W.Va. 2004), Judge Faber added a third prong, that the confidential information received by the expert was about the case at issue that has affected or will affect the expert's opinion.

In ***Rhodes***, Judge Goodwin noted that with regard to the second arm, in the specific context of expert disqualification, "confidential information essentially is information 'of either particular significance or [that] which can be readily identified as either attorney work product or within the scope of the attorney-client privilege.'" 558 F.Supp.2d 667, citing ***Hewlett-Packard v. EMC Corp.***, 330 F.Supp.2d 1087, 1094 (N.D. Cal. 2004). *See also*

Return Mail, Inc. v. United States, 107 Fed.Cl. 459, 463 (2012) (Generally, the "confidential or privileged information disclosed" in the second prong of the test is interpreted to mean information that is relevant to the case).

The Fifth Circuit, in ***Koch Refining***, stated that "confidential information" includes "discussion of the [retaining party's] strategies in the litigation, the kinds of experts [the party] expected to retain, [the party's] views of the strengths and weaknesses of each side, the role of each of the [party's] witnesses to be hired, and anticipated defenses." 85 F.3d at 1182, citing ***Mayer v. Dell,*** 139 F.R.D. 1, 4 (D.D.C. 1991). The Court added that "[h]owever, purely technical information is not confidential," citing ***Nikkal Ind., Ltd. v. Salton***, 689 F.Supp. 187, 191–92 (S.D. N.Y. 1988).

Judge Goodwin also recommended that a court "'balance the competing policy objectives' in determining expert disqualification, which include 'preventing conflicts of interest,' 'maintaining the integrity of the judicial process,' maintaining accessibility to experts with specialized knowledge, and encouraging experts to 'pursue their professional calling.'" 558 F.Supp.2d at 667-68, citing ***Cordy v. Sherwin-Williams Co.***, 156 F.R.D. 575, 580 (D.N.J. 1994). The Judge opined that a court "should also consider 'whether another expert is available and whether the opposing party will be unduly burdened by having to retain a new expert.'" ***Id***. citing ***United States ex rel. Cherry Hill Convalescent Center, Inc. v. Healthcare Rehab. Sys., Inc.,*** 994 F.Supp. 244, 251 (D.N.J. 1997).

In balancing the competing policy objectives, a court should keep in mind that:

> Many employees of the government are experts in particular fields. A broad construction of "particular matter" might make it very difficult for these people,

> their human capital heavily invested in a single subject, to leave the government for a private employer that deals extensively with the government. The "revolving door"—the movement from private employment to the government and back—has benefits for the government as well as drawbacks. On the one hand it creates a risk of conflict of interest, a risk that people who hope to move to the private sector will favor while in public employment those firms they think may offer rewards later, and after these employees switch to the private side they may exercise undue influence on those they leave behind (who may seek to follow the same path, or may just need some of the information the departing employee took with him). On the other hand offering the opportunity to move from private to public employment and back again may enable the government to secure the services of skilled people who are unwilling to devote their careers to public service at current rates of pay. The government can hire people for less, and attract specially skilled agents, if it allows them to put their skills to use later for private employers. It is therefore important to define "particular matter" broadly enough to prevent disloyalty without defining it so broadly that the government loses the services of those who contemplate private careers following public service.

United States v. Medico Indus., Inc., 784 F.2d 840, 843 (7th Cir. 1986).

Application of these standards to the present case leads this Court to conclude that the EPA has failed to sustain its burden of demonstrating that disqualification is warranted.

Initially, this Court should make it clear that the "bright-line rule" of ***Wang***

Laboratories does not apply to this case. Mr. Holmstead has never been "previously employed or retained by [the United States] in the same or similar *litigation*." [Doc. 207, at 8]. The "bright-line rule" requires disqualification only in the blatant "side-switching" situation where an expert was employed by one side in a case and then seeks to serve as an expert for the other side in the same (or similar) case. *See* ***Koch Refining***, 85 F.3d at 1181.

It is important to stress that Mr. Holmstead left his employment with the EPA more than ten years ago. While the EPA contends that "Mr. Holmstead actually based portions of his expert report on privileged and confidential information that he received while at EPA" and that "privileged and confidential communications . . . form the basis of his report," [Doc. 207 at 8, 11], the EPA fails to identify any part of his report that is based on confidential or privileged information.

This Court has reviewed Mr. Holmstead's report and cannot discern any parts of the report which are or could be based on confidential information, no matter how that term is defined. There is certainly no "discussion of the [retaining party's] strategies in the litigation, the kinds of experts [the party] expected to retain, [the party's] views of the strengths and weaknesses of each side, the role of each of the [party's] witnesses to be hired, and anticipated defenses," as defined in ***Koch Refining***. Nor is there any indication of "communication of any information of either particular significance or which can be readily identified as either attorney work product or within the scope of the attorney client privilege," per ***Wang Laboratories***. There is no indication that Mr. Holmstead's opinions are based upon documents which are predecisional and deliberative, per ***City of Virginia***

Beach v. U.S. Dept. of Commerce, 995 F.2d 1247 (4th Cir. 1993). In fact, the EPA has not pointed to any "privileged communications" that have anything to do with Mr. Holmstead's report. As noted by plaintiffs, the defendant effectively argues that, because Mr. Holmstead once worked at EPA, he should be disqualified from serving as an expert witness in any case adverse to EPA. That dog won't hunt.

The EPA also contends that Mr. Holmstead makes "inadmissible legal conclusions" in his report. [Doc. 207 at 14]. This Court does not agree that the statements which the EPA contends are legal conclusions are in fact such. To the extent any witness seeks to introduce legal conclusions, this Court will exclude the same at trial.

The EPA also argues that Mr. Holmstead should not be permitted to provide expert testimony because he has no "scientific, technical or other specialized knowledge" as required by Rule 702 of the Federal Rules of Evidence. Frankly, this argument is ridiculous!

Rule 702 was "intended to liberalize the introduction of relevant expert evidence." ***Westberry v. Gisiaved Gummi AB,*** 178 F.3d 257 (4th Cir. 1999). Defendant seeks to exclude Mr. Holmstead's testimony under ***Daubert*** and Fed. R. of Evid. 702. The Fourth Circuit's test was established from ***Daubert v. Merrell Dow Pharms.***, 509 U.S. 579 (1993), in ***Westberry***, where an expert's testimony is admitted "if it concerns (1) scientific, technical, or other specialized knowledge that (2) will aid the jury or other trier of fact to understand or resolve a fact at issue." ***Westberry,*** 178 F.3d 257; *see also* ***Landis v. Hearthmark, LLC***, 2014 U.S. Dist. LEXIS 5576, at *5-6 (N.D. W.Va. Jan. 16, 2014), quoting ***Daubert***, 509 U.S. at 592 (1993). Mr. Holmstead's testimony is not scientific in the

traditional sense, but it is specialized knowledge. Few if any others have worked on CAA matters for more than 25 years in so many different capacities – a White House staffer, an attorney and lobbyist in private practice, and an EPA official – as Mr. Holmstead has done.

Furthermore, there are a multitude of cases which involve CAA experts or experts on statutes. *See* ***United States v. Ohio Edison Co.***, 276 F.Supp.2d 829 (S.D. Ohio 2003) (expert on the CAA and implementation of regulations); ***United States v. Am. Elec. Power Serv. Corp.***, 2005 U.S. Dist. LEXIS 46249 (S.D. Ohio 2005) (expert on NSR and PSD through the CAA); ***United States v. Ala. Power Co.***, 372 F.Supp.2d 1283, 1315 (N.D. Ala. 2005) (expert on PSD regulations under the CAA proffered by EPA); ***United States v. ConAgra Grocery Products Co., LLC***, 4 F.Supp.3d 243 (D. Me. 2014) (expert on CERCLA and the soil contamination analysis required); ***Adams v. United States***, 2008 U.S. Dist. LEXIS 105460 (2008) (expert on EPA's pesticide program implemented through a number of environmental statutes). Experts on statutes or regulations are recognized as having specialized knowledge. Mr. Holmstead has the requisite credentials for serving as an expert on the CAA. He helped implement the CAA Amendments with EPA, he has participated in the regulatory process pursuant to the CAA on behalf of clients, and he has lobbied on CAA issues.

To the extent that this Court is to balance the competing policy objectives in determining expert disqualification, this Court finds that in this case the most important factors are maintaining accessibility to experts with specialized knowledge and encouraging experts to pursue their professional calling. In addition, this Court notes that there is too little time before trial or before the final briefing on summary judgment for the plaintiffs to

secure another expert with similarly impressive credentials. In fact, were a substitute expert found with similarly impressive credentials, this Court is confident that it would be ruling on another motion to disqualify the expert.

The plaintiffs contend that the only standards under which Mr. Holmstead's participation in this case should be measured are 5 C.F.R. Part 2641 and 18 U.S.C. § 207. In light of this Court's determination that the ***Wang Laboratories*** test does not exclude Mr. Holmstead, this Court need not determine whether the 5 C.F.R. Part 2641 and 18 U.S.C. § 207 are the exclusive standards. Inasmuch as the EPA does not believe that the witness is in violation of 18 U.S.C. § 207, this Court need not conduct an analysis under that provision. Suffice it to say that the fact that the witness is not in violation of 18 U.S.C. § 207 is a further indication that the testimony should not be excluded.

As explained by Judge Easterbrook of the Seventh Circuit, Congress enacted 18 U.S.C. §§ 201-09 in 1962 to replace a "hodgepodge of statutes" that "dealt with conflicts of interest in different agencies." ***United States v. Medico Industries, Inc.***, 784 F.2d 840, 842 (7th Cir. 1986). Section 207(a) prohibits former government employees from serving as agent or attorney for anyone other than the United States in connection with a "particular matter involving a specific party." In ***Medico Industries***, Judge Easterbrook notes: "Many employees of the government are experts in particular fields. A broad construction of "particular matter" might make it very difficult for these people … to leave the government for a private employer that deals extensively with the government. The 'revolving door' – the movement from private employment to the government and back – has benefits for the government as well as drawbacks." ***Id.*** at 843; *see also* ***United States v. Rosen***, 599

F.Supp.2d 290, 701 (E.D. Va. 2009). Accordingly, Section 207(a) was drafted so as to disqualify a former employee "only if the contract or other particular matter involves the same 'specific party or parties.'" ***Id.***

The Office of Government Ethics promulgated regulations implementing the 1962 legislation and, in so doing, addressed certain situations not explicitly addressed in the statute. Thus, 5 C.F.R. Part 2641 was issued in order to "explain[] the scope and content of 18 U.S.C. § 207 as it applies to former employees of the executive branch or of certain independent agencies . . ." 5 CFR 2641.101(a). The Office of Government Ethics clearly contemplated the provision of expert testimony by a former government employee, as the regulation cites a nearly identical situation as Mr. Holmstead's in § 2641.301:

> A former senior employee of the Environmental Protection Agency (EPA) is a recognized expert concerning compliance with Clean Air Act requirements. Within one year after terminating Government service, she is retained by a utility company that is the defendant in a lawsuit filed against it by the EPA. While the matter had been pending while she was with the agency, she had not worked on the matter. After the court rules that she is qualified to testify as an expert, the former senior employee may offer her sworn opinion that the utility company's practices are in compliance with Clean Air Act requirements. She may do so although she would otherwise have been barred by [§ 207(c)] . . .

5 C.F.R. 2641.301(f); *See also* ***Gulf Group Gen. Enters. Co. W.L.L. v. United States***, 98 Fed. Cl. 639, 645 (2011).

> Pursuant to 5 C.F.R. 2641.202:
>
> For two years after his Government service terminates, no former employee shall knowingly, with the intent to influence, make any communication to or appearance before an employee of the United States on behalf of any other person in connection with a ***particular matter*** involving a ***specific party*** or parties, in which the United States is a party or has a direct and substantial interest, and which such person knows or reasonably should know was actually pending under his official responsibility within the one-year period prior to the termination of his Government service.

5 C.F.R. 2641.202 (emphasis added).

Mr. Holmstead's testimony will not be excluded under any of the theories suggested by the EPA.

For the reasons stated above, the United States' Expedited Motion to Disqualify or Exclude Jeffrey Holmstead [**Doc. 206**] is **DENIED**.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

DATED: June 17, 2016.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE