



PROTECT the PUBLIC'S TRUST

February 7, 2024

TO: Inspector General Sean O'Donnell
Environmental Protection Agency
Office of Inspector General
1200 Pennsylvania Avenue, N.W. (2410T)
Washington, DC 20460

CC: Emory A. Rounds
Director
U.S. Office of Government Ethics
1201 New York Ave NW #500
Washington, D.C. 20005

Corey Amundson
Chief, Public Integrity Section
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Supplemental Complaint to Request for Investigation into Potential Violation by David Batson of the Lifetime Ethics Ban (18 U.S.C. § 207)

Dear Mr. O'Donnell:

I am writing to your office to supplement a complaint that my organization, Protect the Public's Trust (PPT), previously filed. On April 3, 2023, PPT submitted a complaint detailing the actions of a former EPA official that appear to have violated his ethics obligations – and a federal criminal statute – upon leaving federal service.

Since submission, it appears that our concerns have been echoed in filings related to the particular matter that the employee, Mr. David Batson, has been inappropriately and unlawfully participating in. In response to those concerns, attorneys working for the Energy and Natural Resources Division (ENRD) of the Department of Justice (DOJ) who have a substantial professional and reputational interest in protecting Mr. Batson and his work product, have filed a letter with the U.S. District Court for the District of New Jersey in an attempt to rebut these concerns of ethical misconduct.

While we do not intend to distract from any potential ongoing investigation into the matter, we felt compelled to provide your office with a supplement to our original complaint. A more



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balanced and comprehensive analysis of the issues appears warranted in light of the incomplete and inaccurate assessment filed with the court and apparently provided to your office.

Several documents filed with the court pertain to the claim of apparent ethics misconduct by Mr. Batson. Notably, a letter labeled Exhibit C summarized the Department of Justice's position stating, "The Ethics Reform Act is not applicable to Mr. Batson's work on the Allocation Team." This letter's findings appear to be largely dependent on an accompanying document filed with the court labeled Exhibit D which contains email correspondence between an EPA ethics official with a redacted official within the EPA's Office of Inspector General.

The conclusions in both Exhibits make multiple claims that they believe clear Mr. Batson of wrongdoing. Each of these were addressed to some degree in our previous complaint but are worth revisiting in light of the government's incomplete and misleading response.

Erroneous Claim #1

DOJ Claim: "Mr. Batson's communications with the United States during his work on the allocation team were not 'on behalf of' another person...Mr. Batson served as a neutral allocator. He was not acting as anyone's agent or attorney and he was not acting subject to control or direction by any party to the allocation."

The Facts: From 2017-2022, Mr. Batson worked on behalf of AlterEcho, a private company for which he acted as an agent. As part of his employment for AlterEcho, Mr. Batson aided the United States (a party to the matter) by recommending an allocation of liability among potentially responsible parties (PRPs) at the Lower Passaic River. This is precisely what has occurred.

As provided in our original complaint, "according to trial testimony offered by Mr. Batson, he has been 'continuously' working with a 'PRP group to perform an allocation on their behalf' for the Lower Passaic site since 2016.¹ AlterEcho was part of a contract with EPA for the Diamond Alkali-Lower Passaic River Allocation, listing Mr. Batson in its staffing matrix in the role of "Senior allocation specialist."²

Presuming the consent decree will be finalized, the EPA is set to financially benefit, through recouped expenses (some of which are arguably for Alter Echo's contract or even his services while an EPA employee), by relying on Mr. Batson's recommendations.³ There is no dispute that Mr. Batson's allocation recommendations formed an essential part of the government's proposed

¹ *El Paso Natural Gas Company, LLC v. United States*, 3:14:cv-08165-DGC (D. Ariz. 2019), Notice of Filing of Official Transcript of Trial at 108, ECF No. 193. ("Batson Testimony").

² Contract #68HERH19D0033, "Revised Work Plan and Pricing Estimate for Task Order Request #013: Diamond Alkali-Lower Passaic River Allocation," Eastern Research Group, Inc. (September 20, 2019) ("Diamond Alkali Allocation Task Order").

³ See p.7 of original PPT complaint filed April 3, 2023: "Court filings from 2016 show that the EPA expects to claim over \$42 million in past transaction or oversight costs related to this site. The costs date back to 2000 and arguably cover at least some of the costs incurred by Mr. Batson while he was an employee of the EPA."



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consent decree. Indeed, it appears the government adopted Mr. Batson's recommendations as its sole justification for the settlement.⁴

Further, Mr. Batson was not engaged with the U.S. government in his individual capacity, nor as a sole proprietor. He performed allocation services as an agent of his employer, AlterEcho, pursuant to the company's contractual obligations, and ostensibly at their direction. By definition, the employment relationship between Mr. Batson and AlterEcho constitutes control and direction of his actions. These actions expressly sought to provide a specific representation to the U.S. government, a party to the matter, that sought to influence their course of action in a matter he participated in while at EPA. AlterEcho and, by extension, Mr. Batson were ultimately successful as demonstrated by the publication of the proposed consent decree citing AlterEcho's representation (i.e., Final Allocation Recommendation Report).

Erroneous Claim #2

DOJ Claim: "Mr. Batson was not communicating 'with the intent to influence' the United States...Mr. Batson acted a neutral allocator. The Allocation Recommendation Report offered recommendations for how to allocate responsibility among responsible parties in connection with the Diamond Alkali Superfund Site. The Report and Mr. Batson's communications with the United States did not seek a particular government action or try to affect government action in any matter.

The Facts: To deny Mr. Batson's attempt to influence the ultimate allocation (via fulfillment of his employer's obligations to the US government), is to deny the objective and performance of his (and AlterEcho's) contractual duties. Mr. Batson did not develop and submit allocation recommendations for them to be discarded or even adjusted. The entire objective of the arrangement was that the EPA would rely on their government contractor AlterEcho, and their expert representative Mr. Batson, to guide (i.e., determinatively influence) their proposed course of action. After submission of the Final Allocation Recommendation Report, this is precisely what happened.⁵

Erroneous Claim #3

DOJ Claim: "a communication lacks the intent to influence when it is made for the purpose of '[m]aking a communication, at the initiation of the Government, concerning work performed or to be performed under a Government contract.' Id. at § 2641.201(e)(2). Mr. Batson's work was under a government contract...Mr. Batson's work falls within one of the exceptions to the lifetime ban. Mr. Batson was a contractor for the United States. Thus, he was 'acting on behalf of

⁴ "Notice of Lodging of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act," Federal Register, Jan. 12, 2023: "The process concluded with a Final Allocation Recommendation Report that **recommends** relative shares of responsibility...After review of the [Recommendation], EPA identified the parties who were eligible to participate...**Based on the results** of the allocation, **the United States concluded** that the Settling Defendants, individually and collectively, are responsible..."

⁵ *Id.*



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the United States' during the course of his work on the allocation team and his work was excepted from the lifetime ban.”

The Law: Our complaint addresses this point directly and extensively, citing several authorities that appear to contradict EPA ethics official Justina Fugh’s inadequate and incomplete opinion provided to the court in Exhibit D.

It is worth reciting this information given the apparent failure to address why AlterEcho and Mr. Batson’s interests should be considered the same as the U.S. government’s and be excepted from the lifetime ban. From our original complaint:

As noted above, EPA’s own ethics guidance indicates that activities on behalf of federal contractors are not deemed to be acting on behalf of the United States and governmentwide ethics guidance also strongly suggests that Mr. Batson’s work for AlterEcho remains subject to the Lifetime Ban. That is, the Office of Government Ethics (OGE) has discussed the important distinctions between post-government restrictions under 18 U.S.C. §§ 203, 205 and those under 18 U.S.C. § 207, the Lifetime Ban:

We also think it is significant that two related statutes, unlike section 207, contain express exceptions for certain representational activity during the performance of Government contracts. Sections 203 and 205 of title 18, which were enacted originally as part of the same legislation as section 207, expressly exempt certain representational activity “in the performance of work under a grant by, or a contract with or for the benefit of, the United States.” 18 U.S.C. 203(e), 205(f). These provisions indicate that Congress knew how to exempt, explicitly, representational activity in the performance of contracts. Perhaps more telling, these provisions also indicate that Congress carefully imposed very significant limitations and safeguards when it did choose to exempt such activity. *See* section 203(e) (applicable only to special Government employees; requires certification from agency head that activity is in national interest; requires publication of certification in **Federal Register**); section 205(f) (same). It is difficult to believe that Congress would have intended a broad exclusion in section 207 without even mentioning the subject, let alone without imposing any limits on the circumstances under which such activity would be permitted.⁶

⁶ Post-Employment Conflict of Interest Restrictions, 73 Fed. Reg. 36168, 36174 (June 25, 2008).



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In many instances, contractors for the government would appear to remain subject to the post-government employment restrictions under the Lifetime Ban if for the simple reason that their interests often diverge from the government.

The proposition that Government contractors may have their own interests in recommending certain courses of action as opposed to others should not be surprising. This concern is even illustrated by newspaper headlines. *See Ariana Eunjung Cha, Shuttle Safety vs. Profit: Contractors Had 'Potential' Conflict, Washington Post, August 27, 2003, at A13.*⁷

[T]he Government and its contractors have their own interests in the performance of a contract, which are not necessarily identical.⁸

Perhaps for this reason, OGE has also rejected an agency recommendation to create an exception to permit former employees to make certain contacts during the performance of a government contract.

According to this agency, a former employee who is now employed by a Government contractor should be permitted to make communications and appearances before the Government during the performance of the contract, provided that the contractor exerts no control over the former employee in the making of the communication or appearance. Under such circumstances, the commenter thought “it is at least arguable that the communication is not made on behalf of” the contractor.”

OGE has not followed this recommendation in the final rule. A contractor's employee is fulfilling his or her duties as an employee when performing the work of the contractor. Under such circumstances, **OGE cannot avoid the conclusion that the contractor's employee is acting on behalf of his or her employer.** *See, e.g.,* Restatement of the Law (Second) Agency section 2(2) (1958) (servant is agent employed by master to perform service in his affairs whose physical conduct in performance of service is controlled or is subject to right to control by master); *id.*, comment a (servant is species of agent). (emphasis added).⁹

⁷ *Id.*

⁸ *Id.* at 36182.

⁹ *Id.* at 36175.



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Under the current set of available facts, it is not difficult to view Mr. Batson's activities on behalf of AlterEcho as a financial benefit to himself, his employer, and his future career prospects as the vendor of choice to manage a novel allocation process at Superfund sites.

Erroneous Claim #3

DOJ Claim: "The 'particular matter' on which Mr. Batson worked during his time with EPA is distinguishable from the matter that was the subject of the allocation. The mere fact that both matters involved the Diamond Alkali Superfund Site does not make it the same matter. A Superfund site can take years to resolve and often involves multiple phases and different potentially responsible parties. It is not necessarily true that any given Superfund site will always be only one particular matter. There may be different phases of remedial investigation, different feasibility studies, and different remedial actions. In fact, with respect to the Diamond Alkali Site, the allocation focused on allocating responsibility among potentially responsible parties for releases of contamination into the Lower Passaic River. The Record of Decision for the lower 8.3 miles of the River was not even issued until March 3, 2016, after Mr. Batson had left the Agency. Mr. Batson's work on the allocation involved different facts and a different set of potentially responsible parties than the work Mr. Batson did while an EPA employee."

The Facts: The arguments made in Exhibits C and D both conclude that Mr. Batson's work while at the EPA was somehow distinct from the matter he worked on after government while at AlterEcho. Both the EPA ethics official and the DOJ attorney offer correct statements of the law which provide support for the proposition that the two periods of work by Mr. Batson *could* be considered separate particular matters. However, both officials also issue conclusory statements that either misstate or ignore the facts justifying why Mr. Batson's work should be considered the same particular matter.

First, the most glaring misstatement of fact is that the two periods of work did not involve the same set of PRPs. Indeed, as our original complaint highlighted, at least 14 specific parties that Mr. Batson engaged while working on the matter in 2004 remain affected PRPs whose rights and liabilities Mr. Batson's Allocation Recommendation Report attempts to impact today. While the total quantity of PRPs subject to the current proposed consent decree is certainly greater today, the overlap of more than a dozen private parties is certainly sufficient to have justified a determination that Mr. Batson should be prohibited from working on the particular matter. To put a finer point on it, the percentage of total liability that AlterEcho/Mr. Batson's Final Allocation Recommendation Report assigns to the 14 overlapping parties equals roughly 96.9% (\$1.76B) of the nearly \$1.8 billion estimated cleanup costs at the Site!¹⁰

Second, the notion that the particular matter Mr. Batson worked on after he left government was somehow sufficiently distinct in nature to consider it an independent particular matter is

¹⁰ *U.S. v. Alden Leeds*, No. 2:22-cv-07326-MCA-LDW, Docket 289-19, Attachment Q, p. ARR3239-ARR3241 (D.N.J. Jan. 31, 2024) (relying on Batson's Alternative Method as recommended by the DOJ).



contradicted by the facts and Mr. Batson's own descriptions of his role in the process. Quoting from a cited passage from Mr. Batson in our first complaint:

There was the phase that I was involved in as a convening neutral and someone that provided an allocation for the initial cost for that site, and that was back in, what, 10 years ago, 15 years ago.

At that point, I went in, assisted the parties in dealing with their initial allocation of operating costs, worked with the parties as a convening neutral, assist them in hiring a party that did PRP searches. Actually, I helped – the agency helped to pay for part of those neutral services for PRP search purposes, and to go on to perform their first allocation.

I have been employed since mid-2015 as a full-time neutral working with the now current PRP group to do their final allocation as it relates to the full two-billion-dollar remediation.¹¹

In sworn testimony, Mr. Batson describes the intimate working relationship he had with arguably many of the overlapping 14 PRPs who continue to remain subject to his allocation recommendations:

So I would go out on a government salary, I would be paid by the government, all my other expenses would be paid by the private parties, travel, support services, scientific services, through direct supplying, obviously, of that service, so we didn't have to deal with the wonders of ethics rules. And I worked with, oh, a large number of different PRP groups as they were organizing as we went through the early stages of allocations, helping them to understand allocation practice, but also understand how to effectively negotiate that allocation with the government.¹²

Batson's Final Allocation Recommendation Report, which formed the basis of the government's proposed consent decree, also expressly states the relevance and critical nature of his 2004 work to producing his Report. In Attachment S to his Report, Batson applies a favorable weighting to the settling defendants' allocation share based on their purported cooperation with EPA in 2004 (i.e., by entering into the settlement that he was involved in while at EPA).¹³ In other words, Batson is referring to and incorporating into his 2022 analysis the very same events that he participated in during 2004 while at EPA.

¹¹ *Id.* at 108-109.

¹² *Id.* at 64-65.

¹³ *U.S. v. Alden Leeds*, No. 2:22-cv-07326-MCA-LDW, Docket 289-19, Attachment S, p. ARR3248 (D.N.J. Jan. 31, 2024).



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Even the recently modified consent decree filed with the court on January 31, 2024, affirms the importance of Batson's 2004 work as part of the factual predicate for the settlement:

WHEREAS, in 2002, EPA commenced a remedial investigation and feasibility study ("RI/FS") of the 17-mile LPRSA, now denominated as OU4. In 2004, EPA and a group of potentially responsible parties ("PRPs") known as the Cooperating Parties Group ("CPG") entered into a Settlement Agreement under Section 122(h) of CERCLA in which members of the CPG agreed to provide funds for EPA's performance of the 17-mile LPRSA RI/FS. That Settlement Agreement was amended in 2005 and 2007, adding more parties.¹⁴

The efforts are so intricately and inseparably intertwined that Mr. Batson's Final Allocation Recommendation Report would not have been possible without his earlier 2004 work. While it may be fair to describe Mr. Batson's work in 2004 and 2022 as different phases of the Diamond Alkali Superfund site cleanup, separating them into different particular matters in order to avoid an irreconcilable conflict of interest for Mr. Batson would produce an absurd result.

For instance, it would be akin to determining that a detective charged with managing a portion of a complex racketeering investigation could subsequently be anointed an impartial, conflict-free judge allowed to determine the defendants' fate under the rationale that the trial is a separate phase of the criminal justice process. This conclusion would defy common sense and so would determining that Mr. Batson somehow engaged in two separate particular matters.

Another Conflict of Interest?

Before concluding, we could not help but note yet another apparent conflict that, ironically, undergirds Ms. Rowley's attempt to discard ethics misconduct identified by PPT and echoed by PRPs negatively affected by Mr. Batson's allocation recommendations. Ms. Rowley (and her colleague Brian Donohue) received an EPA Bronze Medal in 2020 for:

[Her] work on a cash-out agreement... related to cleanup of the lower Passaic River from parties potentially liable for an operable unit of the Diamond Alkali Superfund Site. The award was also given in recognition of [her] work in advising EPA on the establishment of an allocation process related to over 100 other potentially responsible parties at the site.

This commendation inherently attaches a professional and reputational interest in the successful outcome of her current efforts. It is not surprising that she would fiercely resist any actions that may, in retrospect, undermine the wisdom of her judgment that relied both on Mr. Batson's expertise (via AlterEcho) as well as his non-governmental allocation methodology long advocated by him but twice rejected by Congress. In fact, an average member of the public struggles to see how Ms. Rowley's conflicts would not impair her ability to objectively assess the merits of a former government employee's apparent ethical misconduct.

¹⁴ *U.S. v. Alden Leeds*, No. 2:22-cv-07326-MCA-LDW, Docket 283, (D.N.J. Jan. 31, 2024).



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Conclusion

While we stand by the adequacy and accuracy of our original complaint, we respectfully submit this supplemental complaint to account for and expose the profound misstatements and errors in the DOJ and EPA analysis made public in recent court filings. We appreciate your attention in this matter and will be available for any follow up questions that you may have. Thank you.

Sincerely,

Michael Chamberlain
Director
Protect the Public's Trust