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## **AIR POLLUTION:**

## EPA official who drafted Volkswagen order owns a VW

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The director of U.S. EPA's Air Enforcement Division found himself on the sidelines as the federal government moved against Volkswagen over the company's emissions-cheating scheme.

Why? Because air enforcement chief Phillip Brooks owns a Volkswagen car, specifically one of the models that company had programmed with software to skirt clean air rules.

The EPA senior official's ownership of a 2015 Audi A3 diesel vehicle -- the German luxury car brand that is run by Volkswagen -- triggered an internal ethics process at the agency that led to Brooks recusing himself for nearly two months from taking part in enforcement actions against VW. EPA would later clear Brooks to return to working with federal regulators on the case.

According to a <u>waiver</u> obtained by *Greenwire* under the Freedom of Information Act, Brooks' ownership of a VW car raised questions over whether he had conflicting interests as an EPA enforcement official pursuing action against the car company while also potentially participating in a class-action lawsuit against Volkswagen as a consumer.

Brooks' waiver -- drafted by Kevin Minoli, EPA's principal deputy general counsel, and dated Dec. 3 last year -- said the air enforcement official was issued the document "out of an abundance of caution."

"Typically, a routine consumer purchase does not trigger concerns about the appearance of conflicts of interest," Minoli said in the waiver. "This case is different, however, given your role as the Air Enforcement Division Director, and the fact that the Clean Air Act enforcement action may contemplate recall or retrofitting of your vehicle. Similarly, it is also possible that you may be a putative class member in pending civil litigation against VW in relation to the installation of defeat devices."

Subsequently, it was best for EPA to clear Brooks in owning his Audi.

"Although the outcome of litigation may be remote at this point in time, I have determined that the issuance of a waiver in this case is appropriate out of an abundance of caution," Minoli said.

An EPA spokesman said Brooks would not take part in any civil or class-action lawsuit against VW.

"Mr. Brooks is following all legal and ethical requirements concerning his role on the Volkswagen case. He will not participate in any civil or class-action recoveries from Volkswagen," spokesman Nick Conger said.

Brooks himself raised the issue of his car ownership, contacting Justina Fugh, a senior ethics counsel at the agency, on Oct. 9 last year to inquire "whether potential inclusion in a class action lawsuit could be a disqualifying financial interest."

Brooks had already signed a <u>violation notice</u> against VW over its emissions-cheating scheme on Sept. 18, 2015.

By then, he was an Audi owner, having purchased the car in July 2015, its price redacted from the waiver. Kelley Blue Book puts the price of the vehicle's make and model at starting at more than \$28,000 in the Washington, D.C., area.

At the time when he was buying the car, Brooks was not aware of any looming enforcement action against VW. Nevertheless, the EPA air enforcement official recused himself from the case on Oct. 9 when he notified the agency's ethics counsel.

By the time his waiver was granted in early December last year, Brooks had spent close to two months not working on the Volkswagen enforcement action.

During that time, EPA referred its September 2015 violation notice to the Justice Department for enforcement. Further, a <u>second violation notice</u> was issued against VW in November 2015, which wasn't signed by Brooks.

Brooks could have been subject to an official investigation because he owned a VW car affected by the government's enforcement action against the company. EPA's Office of General Counsel consulted with the inspector general, which declined to investigate and did not refer the matter to the Justice Department, according to the waiver.

Nevertheless, the senior EPA official has been cleared to accept a "goodwill" package from Volkswagen under the gift exception for federal employees' ethics rules. The package, which is being given to all affected diesel owners, includes a \$500 prepaid Visa loyalty card, a \$500 Volkswagen dealership card and three years of free roadside assistance.

Brooks, however, will forgo participating in any class-action lawsuit against VW, according to his waiver.

The EPA official won plaudits from those following the VW case for alerting agency ethics lawyers about his being a VW car owner. Dan Becker, director of the Safe Climate Campaign, works on auto emissions issues and is participating in a lawsuit against the company over its emissions cheating.

"He did what he was supposed to do while the IG took a look. He got his interest out there by publicizing the issue that might be a problem for Volkswagen," Becker said. "I think to his credit he blew the whistle on this and told someone about it. I think he should be recognized for having done the right thing."

## **Disclosed too late?**

Ethics experts questioned whether Brooks was timely enough in disclosing that he owned a car affected by the enforcement action that he helped create.

On Oct. 8 last year, the day before Brooks told an EPA ethics attorney about being an Audi owner, the agency air enforcement official testified before the House Energy and Commerce Committee on the Volkswagen case.

Brooks did not tell lawmakers or their aides about his ownership of a VW diesel vehicle. He didn't mention it on <u>his "Truth in Testimony" form</u> or when he testified before the panel in person, according to a review of the hearing's <u>preliminary transcript</u>. During that hearing, lawmakers focused on Michael Horn, president and CEO of Volkswagen Group of America, blasting the company for its emissions-cheating scheme (<u>*Greenwire*</u>, Oct. 8, 2015).

It appears that Brooks didn't think it was an issue at the time. Though he participated in the September 2015 violation and in "briefing Congress" about the VW enforcement action, Brooks did not think "ownership of a vehicle would trigger conflicts concerns," according to his waiver.

Public interest watchdogs said the EPA official could have been more forthcoming with lawmakers.

"Anytime he is talking to government and congressional officials about this issue, he should disclose that he owns a car impacted by this, at least when he became aware that he owned an affected car," said Scott Amey, general counsel for the Project on Government Oversight. "It seems a little after the fact. I would have liked it to be more timely."

Amey added that the "Truth in Testimony" form may not have been the appropriate channel for Brooks to disclose that he owned a car affected by VW's emissions-cheating scheme. The EPA official, however, could have brought it up during his testimony.

"I don't know if it would have been appropriate for this form, but during his testimony, right off the bat, he should have disclosed that he was driving one of the impacted cars," Amey said.

"Brooks probably should have disclosed the class action lawsuit to the committee, but he may well have not realized there was a potential conflict at the time of the hearing, and he promptly sought ethics advice from the proper sources afterwards," Craig Holman, a government affairs lobbyist for Public Citizen, said in an email to *Greenwire*.

Nevertheless, Holman said Brooks' seeking the waiver is an example of how ethics rules are designed to function.

"He went so far as to recuse himself from the matter until such time as any potential conflicts could be reviewed and resolved and a waiver received and published," Holman said. "This is how the ethics process is supposed to work."

Nevertheless, Volkswagen could question Brooks' impartiality as an affected consumer as the government pursues action against the company.

"Is Volkswagen aware of this? And have they signed off on it? Are they aware of this and believe he shouldn't participate?" Amey said. "The ethics opinion he received could be an attempt to circumvent that move by saying that this was not a substantial conflict."

Becker also noted that the car company could raise a stink about the EPA air enforcement official's being an Audi owner.

"The only player left is Volkswagen, and they are the opponent in this. They could ask the court or petition EPA to have Brooks recuse himself, which may lead EPA to ask him to sit this one out and have someone else to step in," Becker said. "If I was Volkswagen, though, I would be thanking my lucky stars. This guy is going to be bending over backwards to make sure that he is fair to them."

A Volkswagen spokesman said the company declined to comment for this story.

The German car company is coming under increasing scrutiny for its emissions cheating. A federal judge has given VW more time to come up a court-ordered plan to fix the vehicles (*Greenwire*, March 25). In addition, the Federal Trade Commission has charged that Volkswagen deceived consumers with its "clean diesel" advertising (*Greenwire*, March 29).

Reporters Ariel Wittenberg and Sean Reilly contributed.

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