Message

From: Ex. 6 Personal Privacy (PP) @epa.gov]
Sent: 6/18/2018 3:55:34 PM
To: Elkins, Arthur [Elkins.Arthur@epa.gov]
Subject: RE: Morning Consult Energy: Audi CEO Arrested in Relation to Volkswagen's Emissions Cheating Scandal

You are welcome.

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By Jacqueline Toth

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Coal Plants Keep Shutting Despite Trump's Order to Rescue Them
Ari Natter, Bloomberg

President Donald Trump has ordered a rescue of the nation's struggling coal and nuclear power industries, but that doesn't mean utilities are reconsidering the shutdown of unprofitable plants.

Nuclear

WIPP waste rules face more scrutiny
Maddy Hayden, Albuquerque Journal

The state's environment department has determined the Waste Isolation Pilot Plant's request to revise how the volume of radioactive waste it

houses is determined should go through a more stringent process than it initially submitted.

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Amy Harder and Eric J. Lyman, Axios

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Big U.S. auto makers are racing to equip pickup trucks with fuel-efficient engines, a surprising pivot away from their longstanding practice of putting gas-guzzling engines into large vehicles.

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Trump Picks Economic Winners, Guided by Nostalgia
Brad Plumer and Jim Tankersley, The New York Times

As President Trump tries to tilt global trade in the United States' favor, he is increasingly putting his finger on the scale to help once-iconic industries that are declining as a share of the American economy, at the expense of some of the country's fastest-growing sectors.

The Social Benefits of Fossil Fuels Far Outweigh the Costs
Joseph L. Bast and Peter Ferrara, The Wall Street Journal

The benefits of oil, coal and gas are rarely acknowledged by environmental activists, who seek to regulate and tax these fuel sources

out of existence. But an honest accounting shows that fossil fuels produce enormous social value that far outweighs their costs.

Scott Pruitt's Passive-Aggressive War on Reporters
Emily Atkin, The New Republic

The EPA chief is making journalists wait longer than a year for even the simplest document requests.

Sizing Up Tesla's $10 Billion Debt Stack
Matt Wirz and Charley Grant, The Wall Street Journal

Tesla Inc. is growing faster than any other auto maker-just not always in ways stockholders would want. The company's debt has surged just as fast as sales, while profits remain elusive.

It's Trump Sanctions, Not OPEC, That Are Boosting Oil
Julian Lee, Bloomberg

As OPEC oil ministers prepared to meet in Vienna later this week, President Trump fired another twitter-shot across their bows. But it is his decision to slap sanctions back on Iran that is the real driving force behind the rising price of oil.

Research Reports

Drinking Water and Wastewater Infrastructure: Opportunities Exist to Enhance Federal Agency Needs Assessment and Coordination on Tribal Projects
U.S. Government Accountability Office

Federal agencies have identified several billion dollars in existing and future tribal drinking water and wastewater infrastructure needs. Specifically, the Indian Health Service (IHS) worked with tribes to identify, in fiscal year 2016, an estimated $3.2 billion in water infrastructure projects to address existing sanitation deficiencies in Indian homes, and the Environmental Protection Agency (EPA) identified an additional $2.4 billion in future tribal drinking water infrastructure needs over the next 20 years.

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Message

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Scott Pruitt's Passive-Aggressive War on Reporters
Emily Atkin, The New Republic

The EPA chief is making journalists wait longer than a year for even the simplest document requests.

Sizing Up Tesla's $10 Billion Debt Stack
Matt Wirz and Charley Grant, The Wall Street Journal

Tesla Inc. is growing faster than any other auto maker-just not always in ways stockholders would want. The company's debt has surged just as fast as sales, while profits remain elusive.

It's Trump Sanctions, Not OPEC, That Are Boosting Oil
Julian Lee, Bloomberg

As OPEC oil ministers prepared to meet in Vienna later this week, President Trump fired another twitter-shot across their bows. But it is his decision to slap sanctions back on Iran that is the real driving force behind the rising price of oil.

Research Reports

Drinking Water and Wastewater Infrastructure: Opportunities Exist to Enhance Federal Agency Needs Assessment and Coordination on Tribal Projects
U.S. Government Accountability Office

Federal agencies have identified several billion dollars in existing and future tribal drinking water and wastewater infrastructure needs. Specifically, the Indian Health Service (IHS) worked with tribes to identify, in fiscal year 2016, an estimated $3.2 billion in water infrastructure projects to address existing sanitation deficiencies in Indian homes, and the Environmental Protection Agency (EPA) identified an additional $2.4 billion in future tribal drinking water infrastructure needs over the next 20 years.

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Message

From: Ex. 6 Personal Privacy (PP) epa.gov]
Sent: 6/18/2018 3:23:15 PM
To: Elkins, Arthur [Elkins.Arthur@epa.gov]; Sheehan, Charles [Sheehan.Charles@epa.gov]; Sullivan, Patrick F. [Sullivan.Patrick@epa.gov]; Larsen, Alan [Larsen.Alan@epa.gov]; Hanger, Eric [Hanger.Eric@epa.gov]; Ex. 6 Personal Privacy (PP) Ex. 6 Personal Privacy (PP) Ex. 6 Personal Privacy (PP) epa.gov]; Kaplan, Jennifer [Kaplan.Jennifer@epa.gov]; Lagda, Jeffrey [Lagda.Jeffrey@epa.gov]; Elbaum, Kentia [elbaum.kentia@epa.gov]
Subject: FW: Morning Consult Energy: Audi CEO Arrested in Relation to Volkswagen's Emissions Cheating Scandal

In case you have not seen this yet, the third bullet below is a Politico article on the OGE issues concerning the Administrator.

Ex. 6 Personal Privacy (PP)

From: Morning Consult [mailto:reply@e.morningconsult.com]
Sent: Monday, June 18, 2018 9:18 AM
To: Ex. 6 Personal Privacy (PP) epa.gov>
Subject: Morning Consult Energy: Audi CEO Arrested in Relation to Volkswagen's Emissions Cheating Scandal

By Jacqueline Toth

Top Stories

- The Munich prosecutor's office issued an arrest warrant against Rupert Stadler, chief executive of Audi AG, the luxury vehicle company run by Volkswagen AG, over VW's emissions cheating scandal. A German judge ordered Stadler to be remanded in custody due to concerns he might obstruct an ongoing investigation into the matter, and while Audi and VW confirmed Stadler's arrest, they said there still exists a presumption of innocence for him. (Reuters)

- As the trade dispute continues between the United States and China, the latter has threatened a further 25 percent tariff on $50 billion of U.S. goods, including crude oil, gasoline, natural gas and other energy products but excluding liquefied natural gas, for which Chinese demand is increasing. The threat comes less than a month after the two countries' May 19 agreement to end the trade war, with China agreeing to buy more American LNG and crude. (Platts)

- Acting Office of Government Ethics Director David Apol told Environmental Protection Agency Inspector General Arthur Elkins in a letter that he is considering bringing a "formal corrective action proceeding" over EPA Administrator Scott Pruitt's alleged ethical missteps in office, asking that the EPA Office of Inspector General expand its ongoing inquiries to include more recent allegations against Pruitt and wrap up its investigations soon to help OGE determine whether to bring the action. An OGE spokesperson said the office is unaware of previous instances where it has initiated a formal corrective action proceeding against any federal official. (Politico)

- Ahead of this week's meeting of members and nonmembers of the Organization of the Petroleum Exporting Countries, OPEC members are considering a compromise agreement to increase oil production by 300,000 - 600,000 barrels per day in the next few months, according to people briefed on the discussions. Iran has staked out a position against production increases, while Russia, whose domestic oil firms want to develop new oil fields, has said producers should boost production by as much as 1.5 million bpd. (Bloomberg)

- Energy and investment executives and Pope Francis agreed to the necessity of a price on carbon emissions to move toward the use of cleaner energy sources, according to several officials at a meeting between the pope and executives on June 9, although multiple

attendees said that specific details about carbon pricing were left undiscussed. Notre Dame University, which helped arrange the sit-down, has indicated it will discuss with attendees about holding another meeting, according to one participant. (Axios)

Chart Review

Adoption of autonomous vehicles could increase U.S. transportation energy consumption
U.S. Energy Information Administration

Events Calendar (All Times Local)

MONDAY

Northeast U.S. Petrochemical Construction conference	7 a.m.
Northeast Energy Efficiency Partnerships renewable heating and cooling workshop	9 a.m.
Lexington Institute forum on cybersecurity of the electric grid	12 p.m.

Released via FOIA EPA-2019-008216

CSIS conversation with members of the University Climate Change Coalition	2:30 p.m.
Resources for the Future webinar on the economics of electricity system resilience	3 p.m.
Renewable Energy Finance Forum-Wall Street	6:30 p.m.

TUESDAY

American Council on Renewable Energy Renewable Energy Finance Forum-Wall Street	8 a.m.
Argus Consulting Services training on renewable energy credits and renewable portfolio standards	8 a.m.
Northeast Energy Efficiency Partnerships renewable heating and cooling workshop	8 a.m.
Renewable Energy Finance Forum-Wall Street	8 a.m.
Northeast U.S. Petrochemical Construction conference	8:30 a.m.
Nuclear Regulatory Commission briefing on results of the Agency Action Review Meeting	9 a.m.
Center on Global Energy Policy discussion of the BP Statistical Review of World Energy 2018	9:30 a.m.
American Enterprise Institute talk with Office of Information and Regulatory Affairs Administrator Neomi Rao	10:45 a.m.

WEDNESDAY

Environmental Business Council New Hampshire Chapter program on PCBs	7:30 a.m.
Renewable Energy Finance Forum-Wall Street	7:45 a.m.
Greentech Media Innovation Summit	8 a.m.

National Renewable Energy Laboratory annual Technology Development and Innovation program open house	8 a.m.
Association for Environmental Studies and Sciences Annual Conference	9 a.m.
Senate Finance Committee hearing on current and proposed Commerce Department tariff actions	9 a.m.
CSIS launch of Bloomberg New Energy Finance's New Energy Outlook 2018	10 a.m.
Environment and Public Works confirmation hearing on two EPA assistant administrator nominees	10 a.m.
House Energy and Commerce Energy Subcommittee hearing on tax reform and the energy sector	10 a.m.
Atlantic Council launch of the BP Statistical Review of World Energy 2018	12:30 p.m.
West Coast Energy Management Congress conference	2 p.m.
Environmental Protection Agency webinar on the Environmental Sampling and Analytical Methods tool	3 p.m.

THURSDAY

Platts Transmission Planning and Development Conference	7:15 a.m.
Environmental Business Council Connecticut Program update on PFAS	7:30 a.m.
Association for Environmental Studies and Sciences Annual Conference	8 a.m.
Greentech Media Innovation Summit	8 a.m.
Sol Systems discussion on commercial solar energy in Washington, D.C.	8 a.m.
SolarWakeup and the Midwest Solar Expo event on solar power in Illinois	8 a.m.

Stanford University Precourt Institute for Energy Silicon Valley Energy Summit	8:30 a.m.
West Coast Energy Management Congress conference	9 a.m.
Federal Energy Regulatory Commission open meeting	10 a.m.
House Science, Space and Technology Energy Subcommittee hearing on background ozone	10 a.m.
Nuclear Regulatory Commission meeting with the Organization of Agreement States and the Conference of Radiation Control Program Directors	10 a.m.
Railroads, Pipelines, and Hazardous Materials Subcommittee hearing on pipeline safety program oversight	10 a.m.
Wilson Center event on energy innovation in remote Arctic communities	11 a.m.
National Energy Resources Organization annual awards dinner	5:30 p.m.
CSIS conversation with Duke Energy President and CEO Lynn Good	6 p.m.

FRIDAY

Platts Transmission Planning and Development Conference	7:30 a.m.
Association for Environmental Studies and Sciences Annual Conference	8 a.m.
Brookings Institution event on climate finance for low-carbon infrastructure	10 a.m.

The Midterm Wave Watcher

An interactive feature showcasing a range of survey research insights related to to the 2018 midterm elections.

General

China threatens 25% tariff on US energy, agricultural products
Oceana Zhou et al., Platts

The trade war between the US and China escalated on Saturday with China threatening an additional 25% tariff on $50 billion worth of US goods, including energy and agricultural products, in response to President Donald Trump's decision to place similar tariffs on the same annual value of Chinese product imports.

Ethics office weighs 'corrective action' for Pruitt
Alex Guillén, Politico

The federal government's top ethics official suggested Friday he is considering a "formal corrective action proceeding" regarding alleged improper behavior by EPA Administrator Scott Pruitt, a perhaps unprecedented step against a sitting member of the president's Cabinet.

Trump: Pruitt has done 'fantastic job,' but 'I'm not happy about certain things'
Anthony Adragna, Politico

President Donald Trump offered a mix of praise and frustration for his embattled EPA administrator Friday amid new questions over whether Scott Pruitt misused his office.

For Pruitt, gaining Trump's favor - and keeping it - came through fierce allegiance
Josh Dawsey et al., The Washington Post

In the run-up to the decision to pull out of the Paris climate agreement last May, President Trump wanted the opinion of Environmental Protection Agency Administrator Scott Pruitt. But when the president's personal secretary called the EPA, Pruitt wasn't around.

Rich Alaskan donor gave $250K to Trump after EPA reversed decision on Pebble Mine
Stephanie Ebbs, ABC News

A wealthy activist who has funded efforts to block a proposed mine in Alaska's Bristol Bay donated $250,000 to President Donald Trump's re-election effort six weeks after the administration abruptly decided to prevent the mine from moving forward.

Oil steady ahead of OPEC, pressured by China tariffs
Christopher Johnson, Reuters

Oil prices steadied on Monday ahead of an OPEC meeting that is widely expected to increase global crude supply and as investors assessed the impact of a trade dispute between the United States and China.

Oil and Natural Gas

OPEC Discusses Output Hike of Up to 600,000 Barrels a Day
Javier Blas et al., Bloomberg

OPEC members are discussing a compromise agreement that would see an oil production increase of between 300,000 and 600,000 barrels a day over the next few months, according to people briefed on the talks.

China's tariffs on U.S. oil would disrupt $1 billion monthly business
Henning Gloystein, Reuters

China's threat to impose duties on U.S. oil imports will hit a business that has soared in the last two years, and which is now worth almost $1 billion per month.

US EPA close to releasing 2019-20 biofuel mandate volumes
Meghan Gordon, Platts

The US Environmental Protection Agency is close to releasing its proposal for how much biofuel refiners must blend into the US transportation fuel supply next year, a spokeswoman said Friday.

An Oil Giant Is Taking Big Steps. Saudi Arabia Can't Afford for It to Slip.
Stanley Reed, The New York Times

As the kingdom prepares for its next evolution, Saudi Aramco is central. But a planned public listing leaves the company, and the country, at risk.

Trans Mountain pipeline expansion still has hurdles to cross
Ashok Dutta, Platts

The Canadian government's deal to buy Kinder Morgan's Trans Mountain crude pipeline is far from over, with industry executives anticipating a six-month delay in the planned startup, keeping Alberta heavy oil prices at steep discounts to global benchmarks.

A Greener Future Starts With Natural Gas, World Energy Chiefs Say
Jonathan Gilbert and Jennifer A. Dlouhy, Bloomberg

World energy ministers representing about two thirds of the global population tussled over how the world can achieve a cleaner energy future. The compromise answer: Natural gas, at least for now.

Utilities and Infrastructure

Enbridge pipeline debate goes to decisionmakers
Mike Hughlett, Star Tribune

After more than three years of rancorous debate, Enbridge's quest to build a new $2.6 billion pipeline across northern Minnesota is finally in front of the decisionmakers.

Cooling towers imploded at Florida power plant
The Associated Press

Two cooling towers - both well over the length of a football field - came tumbling down in seconds on Saturday in Florida as part of an effort to dismantle a power plant.

Renewables

Cities Look to "Virtual Power" to Reach Climate Goals
Benjamin Storrow, E&E News

Corporate America has emerged as a leading buyer of renewable energy in recent years. Now, U.S. cities are getting in on the act.

New Mexico national forest says no to geothermal drilling
Susan Montoya Bryan, The Associated Press

Underground pockets of boiling water and steam that could have been tapped to produce electricity are now off limits as one national forest in northern New Mexico has said no to the prospect of geothermal development.

Elon Musk e-mails Tesla employees urging 'radical improvements' to hit quarterly targets
Lora Kolodny, CNBC

An e-mail sent to all Tesla staff from Elon Musk on Friday night congratulated employees for the progress they've made on Model 3 vehicle production recently - but also said "radical improvements" are still needed in manufacturing to hit the company's quarterly targets.

E-scooter company Bird confirms $2 billion valuation plans
Dan Primack, Axios

E-scooter company Bird confirmed via a state regulatory filing that it is raising new funding that could value the company at $2 billion.

Coal

U.S. nuclear, coal plant bailout plan still being 'fleshed out': Perry
Luc Cohen, Reuters

A plan requested by U.S. President Donald Trump to prevent struggling nuclear and coal power plants from shutting is still being "fleshed out" by the U.S. Department of Energy (DOE) and the White House, Energy Secretary Rick Perry said on Friday.

Coal Plants Keep Shutting Despite Trump's Order to Rescue Them
Ari Natter, Bloomberg

President Donald Trump has ordered a rescue of the nation's struggling coal and nuclear power industries, but that doesn't mean utilities are reconsidering the shutdown of unprofitable plants.

Nuclear

WIPP waste rules face more scrutiny
Maddy Hayden, Albuquerque Journal

The state's environment department has determined the Waste Isolation Pilot Plant's request to revise how the volume of radioactive waste it

houses is determined should go through a more stringent process than it initially submitted.

Climate

Audi CEO arrested in Germany over diesel scandal
Jan Schwartz et al., Reuters

The head of Volkswagen's luxury arm Audi was arrested on Monday, the most senior company official so far to be taken into custody over the German carmaker's emissions test cheating scandal.

Pope Francis and Big Oil come together on carbon price
Amy Harder and Eric J. Lyman, Axios

Top energy and investment executives attending a conference last weekend hosted by Pope Francis at the Vatican agreed a price on carbon emissions was essential in transitioning to cleaner sources of energy, according to multiple officials at the meeting.

U.S. Auto Makers Are Putting Smaller Engines Into Big Trucks So They Guzzle Less Gas
Mike Colias and Chester Dawson, The Wall Street Journal

Big U.S. auto makers are racing to equip pickup trucks with fuel-efficient engines, a surprising pivot away from their longstanding practice of putting gas-guzzling engines into large vehicles.

Opinions, Editorials and Perspectives

Trump Picks Economic Winners, Guided by Nostalgia
Brad Plumer and Jim Tankersley, The New York Times

As President Trump tries to tilt global trade in the United States' favor, he is increasingly putting his finger on the scale to help once-iconic industries that are declining as a share of the American economy, at the expense of some of the country's fastest-growing sectors.

The Social Benefits of Fossil Fuels Far Outweigh the Costs
Joseph L. Bast and Peter Ferrara, The Wall Street Journal

The benefits of oil, coal and gas are rarely acknowledged by environmental activists, who seek to regulate and tax these fuel sources

out of existence. But an honest accounting shows that fossil fuels produce enormous social value that far outweighs their costs.

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From: Elkins, Arthur [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8E6CFEF587834F388791A500A803E7B2-ELKINS, ARTHUR]
Sent: 9/13/2018 2:25:27 PM
To: Larsen, Alan [Larsen.Alan@epa.gov]
Subject: RE: Story questioning whether Andrew Wheeler violated ethics pledge in meeting with former clients

Okay, thanks.

From: Larsen, Alan
Sent: Thursday, September 13, 2018 10:03 AM
To: OIG Leadership Committee Ex. 6 Personal Privacy (PP) @epa.gov>; OIG-HQ-OCPA Ex. 6 Personal Privacy (PP) epa.gov>; OIG-HQ-OC Ex. 6 Personal Privacy (PP) @epa.gov>
Subject: Story questioning whether Andrew Wheeler violated ethics pledge in meeting with former clients

We have not received any Congressional requests related to this, but we often do shortly after a story like this comes out. We'll let everyone know if we do receive such an inquiry or request.
Al

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EPA

Wheeler's private calendar reveals recused client contacts

Corbin Hiar and Kevin Bogardus, E&E News reporters Greenwire: Wednesday, September 12, 2018

Acting EPA Administrator Andrew Wheeler attended a meeting with Growth Energy, which is listed as one of his recused clients. In this file photo, Wheeler (second from right) is shown at a separate meeting earlier this year. Wheeler/Facebook

Acting EPA Administrator Andrew Wheeler has met with at least two former clients whom he promised to avoid directly interacting with, according to his personal calendar and meeting attendees.

The meetings, particularly one that took place at EPA headquarters, violate the spirit of President Trump's ethics pledge, according to good government advocates. That pledge restricts the ability of former lobbyists like Wheeler, who took over EPA's top job in early July, from meeting with their recent previous clients.

But on June 26, while Wheeler was still serving as former chief Scott Pruitt's deputy, he had a meeting at EPA headquarters with biofuels lobbyists and executives, including Emily Skor, the CEO of Growth Energy, the agency and biofuels trade group confirmed yesterday. They met at the agency's central offices in downtown Washington.

The previous month, Wheeler signed a recusal statement in which he acknowledged that he is "prohibited from participating in any particular matter involving specific parties in which my former employer, Faegre Baker Daniels LLP, or any former client to whom I provided legal or consultative services during the past two years is a party or represents a party."

Growth Energy was one of eight former clients — out of nearly two dozen that are publicly known — listed on Wheeler's recusal statement. The acting EPA chief said on his financial disclosure report that he had provided the trade group with "strategic advice and consulting" for more than $5,000 in compensation.

Advertisement

Wheeler's recusal makes exceptions for interactions "of general applicability" during which "participation in the meeting or other event is open to all interested parties."

That means "the meeting should include a multiplicity of parties representing a diversity of viewpoints," the statement says. "Generally speaking, at least four other parties should be present to ensure that a diversity of viewpoints is represented and not the same united perspective."

The meeting with Growth Energy, which included more than a half-dozen members of biofuels coalition Fuels America listed as likely attendees, exceeded that numerical requirement, according to meeting attendees and EPA. But ethics watchdogs are skeptical that the attendees represented the required "diversity of viewpoints."

Fuels America is a nonprofit registered with the IRS as a "social welfare organization." The mission of the corporate-backed entity is "to advance and support renewable fuel policies through advertising, communications, education and advocacy efforts," according to its tax returns.

Meanwhile, the lobbyist who requested the meeting told EPA the executives "would like to discuss the timing/importance of the 2019 renewable volume obligations and their unified support for a strong renewable fuel standard," Wheeler's personal calendar shows. The document was obtained by E&E News via a Freedom of Information Act request (*E&E News PM*, Sept. 10).

Growth Energy's presence in the meeting was not disclosed in Wheeler's public calendar, which EPA posts online. In that version of his schedule, it was logged as "Stakeholder Meeting: Fuels America Coalition."

Taking meetings like the one with Growth Energy "undermines the very purpose of the ethics pledge," said Craig Holman, a government affairs lobbyist for the good government group Public Citizen.

"What you have described to me is a lobbying meeting, pure and simple," he added. "Wheeler is being lobbied by one of his former clients."

But EPA argued Wheeler's meeting including Growth Energy didn't violate the fine print of his pledge since it included a handful of other corporate executives.

"In Acting Administrator Wheeler's ethics guidance, he is allowed to attend group meetings where his former clients may be in attendance if four or more parties are represented with a diversity of viewpoints, which was the case with this meeting, as every individual in the room had a difference of opinion on the [renewable fuel standard]," an EPA spokesman said. "Administrator Wheeler has followed this guidance and this meeting was no different."

Some of the meeting attendees supported EPA's interpretation of the recusal statement.

"Yes, Emily attended, along with a large number of attendees," Leigh Claffey, a spokeswoman for Growth Energy, said, referring to the group's CEO.

James Carstensen, a lobbyist for DuPont who went instead of the DuPont vice president listed in Wheeler's personal calendar, said "there was a healthy exchange of opinions during the meeting."

When asked whether the meeting had a "diversity of viewpoints," as the recusal statement requires, Carstensen said, "Yeah, I thought that there was. But it was a biofuels coalition."

Kathleen Clark, a lawyer and a law professor at Washington University in St. Louis, Mo., who specializes in ethics, disagreed with that assessment. She noted the email requesting the biofuels meeting on Wheeler's personal calendar.

"This email promises 'unified support' for a strong renewable fuel standard. We weren't in the room. You and I don't know what was said. But this email doesn't provide any evidence of a 'diversity of viewpoints,'" Clark said.

Clark doesn't think Wheeler met the ethics standard laid out in his recusal statement

"There is no indication there were a diversity of viewpoints in that meeting," she said. "There was a multiplicity of parties, but there was not a diversity of viewpoints."

Two events with Mark Sutton, the chairman and CEO of International Paper Co. — another company on Wheeler's client recusal list — were less clearly focused on swaying Wheeler. In both cases, he was invited to speak about the Trump administration's priorities to groups that included many corporate executives.

On June 6, Wheeler's personal calendar shows he delivered remarks to the Business Roundtable's Energy & Environment Committee, which is led by Sutton. Other Roundtable members include leaders from DowDuPont Inc., NRG Energy Inc. and Shell Oil Co.

Then on June 28, he spoke at a meeting of the American Forest & Paper Association's board of directors, on which Sutton is the second vice chairman. The association had asked Wheeler to address "public policy priority issues including carbon

neutrality of biomass for energy, regulatory reform initiatives and permitting reforms, and clean water issues related to human health water quality criteria," according to his calendar.

EPA and the paper products company previously confirmed that Wheeler and Sutton were both at those events. The agency argued they didn't run afoul of his ethics commitments (*Greenwire*, July 26).

Holman argued only large events — not small gatherings — involving former clients should be allowed under Trump's ethics pledge.

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From: Larsen, Alan [Larsen.Alan@epa.gov]
Sent: 9/13/2018 2:02:35 PM
To: OIG Leadership Committee Ex. 6 Personal Privacy (PP) @epa.gov]; OIG-HQ-OCP Ex. 6 Personal Privacy (PP) @epa.gov]; OIG-HQ-OC Ex. 6 Personal Privacy (PP) @epa.gov]
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Message

From: Kaplan, Jennifer [Kaplan.Jennifer@epa.gov]
Sent: 10/1/2018 9:54:52 PM
To: Elkins, Arthur [Elkins.Arthur@epa.gov]; Sheehan, Charles [Sheehan.Charles@epa.gov]
CC: Larsen, Alan [Larsen.Alan@epa.gov]; OIG-HQ-OCPA Ex. 6 Personal Privacy (PP) @epa.gov]; Mason, Darryl [Mason.Darryl@epa.gov]
Subject: OCPA Biweekly Activity Report for Period Ending 9-28-18
Attachments: OCPA Biweekly Activity Report for Period Ending 9-28-18.docx

Art and Chuck,

Please find attached OCPA's biweekly activity report for the period ending 9-28-18.

Art, I guess this is the last of these I'll be sending to you. On October 15, I will try to remember not to type "Art and Chuck"!

Jennifer

OCPA highlights report for the 2-week period ending 9-28-18

Congressional Activities

- Responded to House Science minority staffer's request to be included on the OIG's distribution list
- Responded to HOGR minority about the OIG's audit regarding Pebble Mine
- Responded to HOGR minority about the IG's retirement
- Acknowledged letter to the IG from House Science minority regarding the Glider truck rule and drafted formal response
- Sent IG's response to letter from Reps. Beyer and Connolly regarding Ex. 6 Personal Privacy (PP)
- Sent IG's response to Leader Pelosi's request for review of EPA's oversight of Hunters Point Annex Superfund Site
- Responded to Senate EPW minority forward of info related to FEMA OIG's review of the FEMA Administrator's travel

Media

- Responded to E&E News, ABC News, CQ Roll Call and S&P Global regarding the IG's retirement
- Responded to Lexington Herald-Leader regarding asbestos-in-schools audit report
- Arranged and staffed interview with Northeast Indiana Public Radio for OA&E staffer on asbestos-in-schools report
- Responded to Lexington Herald-Leader request for information specific to Kentucky in the asbestos-in-schools report
- Made media outlets in Statesville and Charlotte, N.C., markets aware of Old Davis Hospital audit report
- Arranged and staffed interview for Statesville Record & Landmark with OA&E staffer on Old Davis Hospital report
- Referred to Statesville Record & Landmark to agency regarding whether CID is conducting an investigation
- Responded to France 2 request for an IG interview regarding Monsanto investigation
- Responded to Associated Press and E&E News regarding ongoing audits related to Hurricane Harvey
- Responded to Washington Suburban Sanitary Commission's request for assistance with a draft press release
- Responded to E&E News regarding the travel audit
- Declined Federal News Radio, Environment News Service and InsideEPA requests for exit interviews with the IG
- Responded to E&E News regarding the ongoing glider truck audit
- Declined Bloomberg Environment request for embargoed copy of FIFRA Pesticide Emergency Exemption Process report
- Responded to E&E News regarding the status of OIG work relating to former Administrator Pruitt
- Responded to Politico regarding the fellowship program cooperative agreements report

Publications

- **Published six reports:**
  - Asbestos in Schools
  - Old Davis Hospital
  - Emergency Exemptions--Pesticides
  - State Vehicle Inspections
  - Fellowship Program Cooperative Agreements
  - PII in Incident Tracking System (management alert)

- **Reviewed three final reports:**
  - Land-Applied Biosolids
  - Houston CWSRF
  - OCEFT LEAP Pay

- **Editorial Blog Feature:** Gary's "A Word on Word" tip on agency response appendices

Multimedia

- **Graphics/imagery consultation on three reports:**
  - 2018 Financial Statement
  - SEE program
  - Biosolids

- **Podcasts:** Released—Asbestos in Schools, Old Davis Hospital, Foreign Fellows, FBK consumer fraud case. Recorded and began editing—Biosolids. Planned—Travel.

- **Video:** Jason accompanied OA&E "Air" team to Houston, Texas, for fieldwork relating to Hurricane Harvey response project. Captured extensive video and photos to be used toward multimedia products supporting future report.

Web Communications/Social Media

• Worked with ITD to provide higher security to the OIG Intranet using an encryption certificate (results in converting all links from http to https). The seamless addition of this added layer was completed.

Public Information

- Of nine public inquiries, two were referred to the hotline, two to state government agencies and one to another EPA office. The remaining four were handled by the OIG.

Agency Communications

- Responded to OCFO staffer about the OIG's OMB justification meeting
- Responded to OPA staffer about the OIG's "PeoplePlus Efficiency and Effectiveness" notification memo

Message

From: Kaplan, Jennifer [Kaplan.Jennifer@epa.gov]
Sent: 7/12/2019 6:11:44 PM
To: Sheehan, Charles [Sheehan.Charles@epa.gov]
CC: Elbaum, Kentia [elbaum.kentia@epa.gov]
Subject: Daily_News_Clips_07-12-2019
Attachments: Daily_News_Clips_07-12-2019.docx

Chuck,

Just FYI, Tia included the Cavuto video clip with the Administrator in today's "Daily" News Clips, which this round are actually a weekly wrap-up since she just returned from travel. It's highlighted in the attachment, which also includes coverage from Anaconda.

Jennifer

Daily News Clips – July 12, 2019

DailyNewsClips
EPA Office of Inspector General

OIG IN THE NEWS

[HYPERLINK "https://www.mtpr.org/post/anaconda-residents-detail-superfund-cleanup-concerns-epa-watchdogs"]
[HYPERLINK "https://mtstandard.com/news/local/anaconda-residents-say-there-are-treasures-found-in-dirt/article_cd38dce4-37ab-51c0-b73f-8575cd1579bb.html"]
[HYPERLINK "https://mtstandard.com/news/local/anaconda-gets-chance-to-grade-epa-on-superfund-communication/article_0b1e5c33-952d-5a4f-a8a0-dd1fc894b730.html"]
[HYPERLINK "https://www.mtpr.org/post/epa-watchdog-seeks-feedback-anaconda-superfund-cleanup"]
[HYPERLINK "https://www.mtpr.org/post/evening-newscast-07-08-19"]
[HYPERLINK "https://www.mtpr.org/post/butte-anaconda-superfund-cleanup-top-priority-new-epa-region-chief-says"]
[HYPERLINK "https://www.fairborndailyherald.com/top-stories/36121/citizens-speak-at-epa-hearing"][HYPERLINK "https://www.eenews.net/greenwire/2019/07/08/stories/1060712499"][HYPERLINK "https://www.minnpost.com/environment/2019/07/what-the-legislative-auditor-will-and-wont-investigate-about-a-key-polymet-permit/"]
[HYPERLINK "https://www.twincities.com/2019/07/12/john-marty-revisit-polymet-permits-in-light-of-mpca-scandal/"]
[HYPERLINK "https://theecologist.org/2019/jul/12/epa-must-do-more"]
[HYPERLINK "https://www.jdsupra.com/legalnews/screening-air-emissions-data-from-74889/"]
[HYPERLINK "https://thehill.com/policy/energy-environment/452528-critics-worry-trump-turning-blind-eye-to-honeybee-decline"]
[HYPERLINK "https://beyondpesticides.org/dailynewsblog/2019/07/usda-shuts-down-data-collection-on-honey-bees/"]
[HYPERLINK "https://www.eenews.net/greenwire/2019/07/10/stories/1060721243"]
[HYPERLINK "https://www.eenews.net/energywire/2019/07/10/stories/1060718413"]
[HYPERLINK "https://www.govexec.com/defense/2019/07/pentagon-parts-supplier-falls-under-watchdogs-scrutiny-again/158279/"]
[HYPERLINK "https://www.npr.org/sections/health-shots/2019/07/09/739471717/hospice-oig-reports"]
[HYPERLINK "https://abcnews.go.com/US/87-us-hospices-surveyed-deficiencies-inspector-general/story?id=64085574"]
[HYPERLINK "https://www.washingtonexaminer.com/news/doj-inspector-general-interviewed-ex-spy-christopher-steele"]
[HYPERLINK "https://www.washingtonexaminer.com/news/doj-inspector-general-reaches-breakthrough-with-key-witness-in-fisa-abuse-investigation"]
[HYPERLINK "https://www.washingtonexaminer.com/news/doj-inspector-general-dea-supervisor-had-improper-relationship-with-confidential-source"]

EPA NEWS

[HYPERLINK "https://www.eenews.net/eenewspm/2019/07/11/stories/1060726429"]
[HYPERLINK "https://insideepa.com/daily-news/epa-finalizes-policy-giving-enforcement-%E2%80%98deference%E2%80%99-state-agencies"]
[HYPERLINK "https://video.foxnews.com/v/6056718219001/" \l "sp=show-clips"]
[HYPERLINK "https://www.eenews.net/greenwire/2019/07/11/stories/1060725879"]
[HYPERLINK "https://insideepa.com/daily-feed/wheeler-replaces-children%E2%80%99s-center-director"]
[HYPERLINK "https://www.eenews.net/greenwire/2019/07/11/stories/1060725775"]
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[HYPERLINK "https://insideepa.com/daily-feed/wheeler-hears-call-%E2%80%98fair%E2%80%99-labor-contract-awards-event"]
[HYPERLINK "https://thehill.com/policy/energy-environment/452614-epa-employee-protests-union-contract-while-receiving-award-from"]
[HYPERLINK "https://insideepa.com/daily-news/epa-poised-%E2%80%98challenging%E2%80%99-time-it-implements-controversial-contract"]
[HYPERLINK "https://www.eenews.net/greenwire/2019/07/10/stories/1060721531"]
[HYPERLINK "https://thehill.com/policy/energy-environment/452425-pressure-mounts-on-epa-to-withdraw-new-foia-rule"]
[HYPERLINK "https://insideepa.com/daily-feed/environmental-groups-urge-epa-delay-foia-rule"]
[HYPERLINK "https://thehill.com/policy/energy-environment/452066-environmental-groups-fight-epas-new-public-records-restrictions"]
[HYPERLINK "https://www.eenews.net/greenwire/2019/07/09/stories/1060716985"]
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[HYPERLINK "https://insideepa.com/daily-news/three-years-after-tsca-reform-epa-struggles-provide-hoped-certainty"]
[HYPERLINK "https://insideepa.com/daily-news/petitioning-oecd-epa-seeks-blunt-impact-global-plastic-waste-limits"]
[HYPERLINK "https://insideepa.com/daily-feed/niehs-director-announces-retirement"]
[HYPERLINK "https://insideepa.com/daily-feed/ewire-trump-tout-%E2%80%98environmental-leadership%E2%80%99"]
[HYPERLINK "https://www.washingtonpost.com/politics/federal_government/trump-hailing-environmental-leadership-as-skeptics-abound/2019/07/08/737f6692-a1b4-11e9-a767-d7ab84aef3e9_story.html?utm_term=.ed9721cdd264"]
[HYPERLINK "https://thehill.com/policy/energy-environment/452077-trump-touts-environmental-policies-but-says-nothing-of-climate"]
[HYPERLINK "https://www.cnn.com/2019/07/08/politics/fact-check-trump-environmental-leadership-speech/index.html"]
[HYPERLINK "https://thehill.com/opinion/energy-environment/452417-epas-new-public-records-rule-lets-trump-administration-pollute-in"]
[HYPERLINK "https://thehill.com/opinion/energy-environment/452222-scientific-integrity-is-crumbing-under-trump"]

AIR NEWS
[HYPERLINK "https://insideepa.com/daily-feed/ewire-look-new-epa-air-chief"]
[HYPERLINK "https://insideepa.com/daily-feed/epa-moves-speed-oil-gas-nsr-air-permitting-tribal-land"]
[HYPERLINK "https://insideepa.com/daily-news/states-accept-epa-delay-air-monitor-network-fault-inadequate-funds"]

WATER NEWS
[HYPERLINK "https://www.eenews.net/eedaily/2019/07/11/stories/1060723339"]
[HYPERLINK "https://insideepa.com/daily-news/democratic-senators-push-superfund-pfas-listing-during-wright-vote"]
[HYPERLINK "https://insideepa.com/daily-news/house-poised-debate-pfas-superfund-listing-sparking-gop-criticism"]
[HYPERLINK "https://www.eenews.net/eedaily/2019/07/11/stories/1060723289"]
[HYPERLINK "https://www.eenews.net/greenwire/2019/07/08/stories/1060712575"]
[HYPERLINK "https://insideepa.com/daily-feed/house-panel-eyes-epa-estuary-panel-reauthorization"]

LAND NEWS
[HYPERLINK "https://www.eenews.net/greenwire/2019/07/08/stories/1060712561"]
[HYPERLINK "https://insideepa.com/daily-news/doe-urges-wheeler-limit-superfund%E2%80%99s-reach-nuclear-waste-site"]

CONGRESSIONAL NEWS
[HYPERLINK "https://insideepa.com/daily-news/senate-confirms-epa-waste-chief-wright-party-line-vote"]
[HYPERLINK "https://www.eenews.net/eenewspm/2019/07/11/stories/1060726529"]
[HYPERLINK "https://www.eenews.net/greenwire/2019/07/11/stories/1060725927"]

CLIMATE CHANGE NEWS

[HYPERLINK "https://www.eenews.net/eenewspm/2019/07/08/stories/1060713261"]
[HYPERLINK "https://www.eenews.net/eenewspm/2019/07/09/stories/1060717381"]
[HYPERLINK "https://insideepa.com/daily-feed/hill-democrats-float-%E2%80%98climate-emergency%E2%80%99-resolution"]
[HYPERLINK "https://www.govexec.com/workforce/2019/07/career-feds-publicly-defy-trump-administration-over-climate-change/158364/"]

BUDGET NEWS
[HYPERLINK "https://www.eenews.net/eedaily/2019/07/08/stories/1060709805"]
[HYPERLINK "https://www.govexec.com/management/2019/07/congress-remains-stalemate-shutdown-avoiding-deal-debt-ceiling-deadline-looms/158276/"]

GOVERNMENT EMPLOYEE NEWS
[HYPERLINK "https://federalnewsnetwork.com/pay/2019/07/salary-council-members-make-official-case-for-comprehensive-federal-pay-changes/"]

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Message

From: Elbaum, Kentia [elbaum.kentia@epa.gov]
Sent: 2/22/2019 12:49:12 PM
To: OIG Leadership Committe Ex. 6 Personal Privacy (PP) @epa.gov]; OIG Deputy Assistant Inspectors General Ex. 6 Personal Privacy (PP) @epa.gov]; OIG-HQ-OCPA Ex. 6 Personal Privacy (PP) @epa.gov]; Mears, Gilbert [Mears.Gilbert@epa.gov]
Subject: FW: request for IG investigation from Chairman Pallone and Senators Carper and Whitehouse
Attachments: 2019-02-21 Wehrum Letter to EPA IG final.pdf

Good morning,

Attached is a letter from Sen. Whitehouse, Sen. Carper and Rep. Pallone requesting that the OIG look into potential violations of the Ethics in Government Act by the Assistant Administrator for the EPA OAR and Senior Counsel in OAR. I acknowledged receipt of the letter.

Tia

Kentia Elbaum
Public Affairs Specialist
Office of Congressional and Public Affairs - Office of Inspector General
U.S. Environmental and Protection Agency
1301 Constitution Ave. NW, Rm 3102
Washington, DC 20460
202-566-2548
Elbaum.Kentia@epa.gov

From: Gaeta, Joe (Whitehouse) <Joe_Gaeta@whitehouse.senate.gov>
Sent: Thursday, February 21, 2019 5:05 PM
To: Elbaum, Kentia <elbaum.kentia@epa.gov>; Lagda, Jeffrey <Lagda.Jeffrey@epa.gov>
Cc: 'Monger, Jon' <Jon.Monger@mail.house.gov>; Dudis, Dan (Whitehouse) <Dan_Dudis@whitehouse.senate.gov>; Freedhoff, Michal (EPW) <Michal_Freedhoff@epw.senate.gov>
Subject: request for IG investigation from Chairman Pallone and Senators Carper and Whitehouse

Tia and Jeff,

Attached is a request from Chairman Pallone and Senators Carper and Whitehouse that the Inspector General review the conduct of Bill Wehrum and David Harlow for compliance with federal ethics regulations. The file, which includes supporting exhibits, is 189 pages. Please let me know as soon as possible if there are any transmission issues.

Joe Gaeta
Senior Advisor and Director of Oversight
Senator Sheldon Whitehouse (D-RI)
202-224-9214

Congress of the United States

Washington, DC 20510

February 21, 2019

Charles J. Sheehan
Acting Inspector General
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Acting Inspector General Sheehan,

We write to request that the Environmental Protection Agency (EPA) Office of Inspector General (OIG) conduct an investigation into potential violations of the Ethics in Government Act by William Wehrum, Assistant Administrator for the EPA Office of Air and Radiation (OAR), and David Harlow, Senior Counsel in OAR. We are troubled that it appears that Mr. Wehrum and Mr. Harlow may have violated the law and associated regulations given their direct involvement in EPA's December 7, 2017 memo titled "New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability" ("DTE Memo"). The memo disavowed EPA's position in litigation against DTE Energy Company ("DTE litigation"), a client of Mr. Wehrum's and Mr. Harlow's former law firm, Hunton & Williams, and of Mr. Harlow's himself.

While the underlying facts and legal arguments in the DTE litigation are complicated, the ethics violations are simple and clear: federal employees may not participate in particular matters that involve their former clients or employers. Hunton & Williams has represented DTE in the DTE litigation since it started in 2010. Shortly after Mr. Wehrum and Mr. Harlow arrived at EPA, the agency abandoned its long-standing position and adopted the views of DTE on the legal issue central to the case, which was then pending before the United States Supreme Court. The memo was widely understood at EPA to be about the DTE litigation, the memo itself discussed the litigation, and it was issued expressly to affect the Supreme Court's decision on whether to grant a writ of certiorari. The DTE memo is a particular matter involving a client represented by their former law firm, and their participation in it was prohibited by the ethics rules.

We believe an OIG investigation is warranted in this case. No other federal agency or component of EPA will be able to fully ascertain whether, and if so, the degree to which, ethics violations have occurred. With respect to Mr. Wehrum, the facts suggest that he may have ignored ethics advice from the Office of General Counsel, which may have resulted in improper conduct. The allegations as to both men are based in large part on heavily redacted documents released by EPA in response to Freedom of Information Act requests. OIG has the authority to review unredacted communications and compel interviews with current EPA employees, both of which will be necessary for a complete investigation. Furthermore, one of your mandates under the Inspector General Act of 1978 is to keep "the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the

necessity for and progress of corrective action."[1] We view this request as consistent with that responsibility.

Attached is additional information in support of this request. We respectfully request you give this matter your fullest consideration. Should you have any questions, please contact Joe Gaeta (joe_gaeta@whitehouse.senate.gov) of Senator Whitehouse's staff, Michal Freedhoff (michal_freedhoff@epw.senate.gov) of Senator Carper's Environment and Public Works Committee staff, or Jon Monger (jon.monger@mail.house.gov) of the House Energy and Commerce Committee staff.

Sincerely,

Sheldon Whitehouse
United States Senator

Thomas R. Carper
United States Senator

Frank Pallone, Jr.
United States Representative

[1] 5 U.S.C. (IG Act) App. § 2(3)

The Ethics In Government Act prohibits Mr. Wehrum and Mr. Harlow from participating in the DTE litigation.

The Ethics in Government Act and associated regulations are designed to prevent the appearance of a conflict of interest when federal officials perform their official duties. "[A]n employee should not participate in a particular matter involving specific parties… in which he knows a person with whom he has a covered relationship is or represents a party [to such a matter], if he determines that a reasonable person with knowledge of the relevant facts would question his impartiality in the matter."[2] An attorney who enters federal service from a private law firm has a covered relationship with the firm and all its clients, and must recuse himself from matters handled by that law firm for a period of one year.[3]

Mr. Wehrum and Mr. Harlow both left their law practices at Hunton & Williams to take positions at EPA.[4] Hunton & Williams has represented DTE Energy in the DTE litigation since 2010 and continues to represent them today. Exhibits A and B.

Both Mr. Wehrum and Mr. Harlow were aware of their recusal obligations. The Assistant Administrator for OAR is a Senate-confirmed position. Accordingly, prior to his nomination hearing before the Senate Environment and Public Works Committee, Mr. Wehrum entered into an ethics agreement with EPA acknowledging his responsibility to recuse himself from participating in particular matters involving Hunton & Williams and its clients. This understanding was memorialized in an August 28, 2017 pre-confirmation letter to EPA Designated Agency Ethics Official Kevin Minoli. Exhibit C. That responsibility was confirmed in a recusal statement dated September 17, 2018. Exhibit D.

Mr. Harlow is currently Senior Counsel at OAR. He appears to have been suggested for that position by Mr. Wehrum. Exhibit E. Harlow started work at EPA on October 1, 2017. Exhibit F. Mr. Harlow acknowledged his responsibility not to participate in any particular matters involving Hunton & Williams or its clients in a memo to his supervisor, Mr. Wehrum, on December 28, 2017. Exhibit G.

It is beyond dispute that Mr. Wehrum and Mr. Harlow, in their EPA positions, cannot be involved in the DTE litigation because Hunton & Williams currently represents DTE. With respect to Mr. Wehrum, at the time the DTE memo (Exhibit H) was issued EPA reportedly acknowledged that ethics rules prohibited his participation in its development.[5] Their recusal

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[2] 5 C.F.R. § 2635.502(a)

[3] Id. at 502(b)(iv). See also Office of Government Ethics, "Conflicts of Interest Considerations: Law Firm or Consulting Employment," (June 22, 2018) available at https://www.oge.gov/web/OGE.nsf/0/53BE4061E9EFDEB4852582B400626DAA/$FILE/Law%20Firm%20or%20Consulting%20Employment.pdf. While an employee may seek authorization from the agency to participate in a particular matter notwithstanding the conflict, neither Mr. Wehrum nor Mr. Harlow appear to have received any such authorization here.

[4] Hunton & Williams is now Hunton, Andrews and Kurth.

[5] Timothy Cama, "EPA works to ease air pollution permitting process," *The Hill*, Dec. 8, 2017, ("[T]he agency said Wehrum was not involved in Thursday's memo, having recused himself because his former law firm, Hunton & Williams, represents DTE in the litigation.") available at

statements additionally show how closely they are tied to the parties and issues involved in the DTE litigation. Mr. Harlow's recusal statement lists DTE as a client. Exhibit G. Both of their recusal statements list the Utility Air Regulatory Group (UARG) as a former client.[6] Exhibits D and G. Mr. Wehrum personally entered an appearance and filed a brief on behalf of UARG in the DTE litigation in support of DTE's position. Exhibit I. As recently as 2016, it has been reported that DTE Energy self-identified as a member of UARG.[7]

Mr. Wehrum ignored OGC advice and took ten months to finalize and make public his required recusals, including those from particular matters involving Hunton & Williams.

Mr. Wehrum was confirmed by the United States Senate on November 9, 2017. Mr. Wehrum's first "Certification of Ethics Agreement Compliance" was signed by him and dated December 7, 2017, and then modified on December 19, 2017. Exhibit J. Through this certification, Mr. Wehrum represented that "I am recusing from particular matters in which any former employer or client I served in the past year is a party or represents a party, unless I have been authorized under 5 C.F.R. § 2635.502(d)," and that he had not received any authorizations exempting particular matters from this requirement.[8]

At EPA, recusals are memorialized in "recusal statements" negotiated between career ethics officials and nominees once they are confirmed. While the duty to recuse applies irrespective of whether and when a recusal statement has been signed by an employee, these statements, combined with an employee's ethics agreement, provide a clear roadmap for other EPA employees, Congress, and the public about an employee's ethics obligations under the law. Mr. Wehrum's recusal statement should have been complete when he signed his "Certification of Ethics Agreement Compliance" on December 7, 2017. After multiple inquiries over many months, we learned it was not.

Senator Whitehouse first requested Mr. Wehrum's recusal statement on February 21, 2018 from ethics officials in EPA's Office of General Counsel. That request was transferred to the Office of Congressional and Intergovernmental Relations. Senator Whitehouse's staff repeatedly requested this document on March 16, 2018, March 22, 2018, and April 23, 2018. On April 25, 2018, Senator Whitehouse wrote to Administrator Pruitt requesting this

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https://thehill.com/policy/energy-environment/364015-epa-works-to-ease-air-pollution-permitting-process.

[6] UARG is not an incorporated entity and does not appear to have a staff, physical location, or presence of any sort outside of Hunton & Williams. Its membership and decision-making processes appear opaque, and it has been described as "a front group of convenience [that] allows individual electric utility companies to shield their names and anti-public health crusades from public awareness." John Walke, "Is Your Power Company Fighting in Court Against Safeguards From Mercury and Toxic Air Pollution?" NRDC, May 25, 2012, available at https://www.nrdc.org/experts/john-walke/your-power-company-fighting-court-against-safeguards-mercury-and-toxic-air.

[7] Annalee Armstrong, "Power companies wield influence through anonymous group," *S&P Global*, July 19, 2016 available at https://www.snl.com/web/client?auth=inherit#news/article?id=37072675&cdid=A-37072675-13095

[8] The form also requires the signer to acknowledge that knows that any intentionally false or misleading statement or response provided in the Certification is a violation of law.

information. Months passed and EPA still did not provide a signed recusal statement from Mr. Wehrum.

On August 19, 2018—over eight months after he certified compliance with his ethics agreement—*The New York Times* reported that Mr. Wehrum had refused to sign a recusal statement because he claimed that he had received conflicting advice from ethics officials.[9] EPA's top ethics official Kevin Minoli explained in a September 29, 2018 letter to Senator Whitehouse that Mr. Wehrum was advised pursuant to Office of Government Ethics (OGE) legal advisories that apply to all members of the Trump administration. Exhibit K. Mr. Wehrum also was advised about the "importance of signing a recusal statement" but nevertheless he "chose to use other tools that *he deemed effective* in helping him comply with the ethics requirements…."[10] Id. (emphasis added.) To date, it remains unclear what that conflicting advice may have been, what recusals and ethics rules Mr. Wehrum followed during this time, and how in the absence of a recusal statement EPA ensured his compliance with all applicable ethics laws and regulations.

To address Mr. Wehrum's ongoing refusal to sign a recusal statement, Senator Whitehouse filed an amendment to the Blocking Regulatory Interference from Closing Kilns Act of 2018 (BRICK Act) that would have required EPA to disclose the statement. Senator Whitehouse filed his amendment on Friday, September 14, 2018. Two business days later (an hour before a scheduled markup of the BRICK Act by the Environment and Public Works Committee), he finally received a recusal statement signed by Mr. Wehrum on September 17, 2018 and a new "Certification of Ethics Agreement Compliance." Exhibits D and L. Following those disclosures, Senator Whitehouse asked Acting Administrator Andrew Wheeler for additional information about Mr. Wehrum's compliance with the terms of his recusals, but as of the date of this letter he has not yet received a response.[11]

DTE has been represented by Wehrum's and Harlow's former law firm in the DTE litigation since 2010.

In August 2010, EPA, represented by the Department of Justice, filed an enforcement action against DTE, alleging Clean Air Act violations by DTE at its Monroe facility, the largest coal-fired power plant in Michigan. EPA claimed DTE failed to acquire the necessary permit before undertaking significant modifications at the plant and stated that had DTE sought that permit it would have been required to install modern pollution controls and dramatically cut its pollution. The government's case was based on the New Source Review ("NSR") provisions of the Clean Air Act. NSR is designed to require facilities to upgrade their pollution controls when they upgrade their plants. Hunton & Williams represented DTE in this case.

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[9] Eric Lipton, "As Trump Dismantles Clean Air Rules, an Industry Lawyer Delivers for Ex-Clients," *New York Times*, August 19 2018, available at https://www.nytimes.com/2018/08/19/us/politics/epa-coal-emissions-standards-william-wehrum.html

[10] In this letter Mr. Minoli also reaffirmed that Mr. Wehrum had not been granted any authorizations to the impartiality requirements of OGE regulations.

[11] https://www.whitehouse.senate.gov/news/release/whitehouse-calls-out-wehrum-for-flaunting-trump-ethics-pledge

DTE vigorously contested the enforcement case, which made two trips to the 6th Circuit Court of Appeals during the next eight years. During the first appeal in 2013 ("DTE I"), in which EPA prevailed, the circuit court noted that "whether a permit is ultimately required is a high stakes determination."[12] The Court found the modern pollution controls that would be required if EPA prevailed would reduce pollution by over 90%, but would also be very expensive; DTE claimed these upgrades would cost DTE about $1.7 billion.[13]

The second decision by the Sixth Circuit ("DTE II") was issued on January 10, 2017, again siding with EPA.[14] The Court stated that although DTE upgraded its pollution control equipment while the enforcement case against it was pending, "if [DTE] is found to have violated the Act, DTE still could face monetary penalties and be required to mitigate excess emissions caused by the delay in installing pollution controls."[15] Facing potentially millions of dollars of penalties and mitigation, DTE filed a petition for a writ of certiorari ("DTE cert petition") on July 31, 2017, asking the United States Supreme Court to reverse the decision of the Court of Appeals.[16]

The DTE cert petition filed by Hunton & Williams was pending before the Supreme Court in the fall of 2017 when Mr. Harlow and Mr. Wehrum left Hunton & Williams and started working at EPA. After the Supreme Court denied certiorari on December 11, 2017, the case was remanded back to the Eastern District of Michigan, where counsel for Hunton & Williams continue to represent it. Exhibit A. The litigation has been stayed pending settlement negotiations since February 2018. Id.

EPA's December 7, 2017 memo was expressly about the DTE litigation.

The central issue in the DTE enforcement litigation was DTE's failure to seek an NSR permit before undertaking modifications at the Monroe coal-fired power plant, thereby avoiding required upgrades of pollution control equipment. EPA argued that DTE failed to do the appropriate calculations of projected "before" and "after" pollution emissions and that proper calculations show an NSR permit was required. DTE argued that it could do those calculations a different way, resulting in an NSR permit not being required, and that EPA was not allowed to "second guess" DTE's calculations. In May 2017, while Mr. Wehrum and Mr. Harlow were still at Hunton & Williams, the firm began lobbying EPA to change the rule, specifically citing DTE's 6th Circuit litigation. Exhibit MM (at pp. 16-17 and fn. 37).

From 2010 to 2017, EPA took the same position throughout the DTE case, prevailing twice before the Court of Appeals. DTE's cert petition asked the Supreme Court to tell EPA that its long-standing position was wrong. With Wehrum and Harlow now ensconced at EPA, the agency reversed itself, and decided that in fact it now agreed with DTE.

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[12] 711 F.3d 643, 647 (6th Cir. 2013)
[13] Id.
[14] 845 F.3d 735 (6th Cir. 2017)
[15] Id. at 737 fn. 2
[16] "DTE Initiates Last-Ditch Effort in Clean Air Act Case," *RTOInsider*, August 8, 2017. https://www.rtoinsider.com/dte-energy-supreme-court-clean-air-act-47428/

On December 7, 2017, EPA issued a memo under Administrator Scott Pruitt's signature reversing EPA's long-standing position.[17] While the DTE Memo announces a generally applicable change in EPA's enforcement position, it is replete with references to the pending DTE litigation and why EPA's position in that litigation was wrong. It also specifically acknowledges the pendency of DTE's cert petition:

> The matters at issue in the DTE litigation are complex, and the appellate court decisions have left ambiguity regarding the scope of the applicable regulations and what sources must do to comply. Further, the Supreme Court has been asked to review the second appellate court opinion. Considering this uncertainty, the EPA believes it would be helpful to explain to stakeholders how the EPA plans to proceed in implementing and exercising its authority under those regulations pending further review of these issues by the EPA.
>
> Thus, pending further review of these issues by the courts and the EPA, the agency does not intend to pursue new enforcement cases in circumstances such as those presented in the DTE matter.

Exhibit H. In addition to what the DTE Memo itself says, EPA internal discussion of the DTE memo shows widespread understanding across EPA that the memo is about the DTE case. Exhibits P, W, BB, CC and DD. And according to Mr. Wehrum's schedule, the same day the DTE Memo was released he gave a speech at Hunton & Williams.[18] Exhibit NN.

The DTE Memo was timed to forestall a decision by the Supreme Court in the DTE litigation.

EPA's new DTE Memo was released late in the evening of December 7, 2017, the day before the Supreme Court was set to consider DTE's certiorari petition at its December 8, 2017 conference. Internal EPA emails produced in response to a FOIA request reveal that there were two constraints on the timing for the release of the DTE Memo: avoid releasing it before Administrator Scott Pruitt was done testifying before the House Energy and Commerce Committee on December 7, but get it out in advance of the Supreme Court's consideration of the DTE cert petition the morning of December 8, 2017.

- December 4, 2017 email from Mandy Gunasekara to Susan Bodine and Patrick Traylor: "Attached is the latest version of the NSR Memo [DTE Memo] pertaining to the issues at issue in the DTE case. I thought we may have more time, but know now that the cert hearing is planned for Wednesday. This memo needs to go out before." Exhibit M.[19]

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[17] "New US EPA Memorandum Suggests a Hand's-Off Approach to NSR Applicability Determinations," *Fresh Law Blog from the law firm of Squire Patton Boggs*, December 18, 2017, available at https://www.freshlawblog.com/2017/12/18/new-us-epa-memorandum-suggests-a-hands-off-approach-to-nsr-applicability-determinations/, which includes a section titled, "U.S. EPA Adopts DTE's Position."
[18] Right before giving that speech, Wehrum met with EPA ethics officials. Id.
[19] The email erroneously refers to the Supreme Court conference as a "hearing" and also misstates the day of the conference: it was scheduled for Friday (December 8), not Wednesday, of that week.

- December 7, 2017 email from Mandy Gunasekara attaching the final version of the DTE Memo "discussed with the Administrator yesterday" and stating that "he would like to get this out today." Exhibit N.
- December 7, 2017 email from Mandy Gunasekara to Josh Lewis entitled "re: Signed NSR memo": "Hold tight until after the energy and comment [sic] hearing. Please have this ready for posting online once the hearing wraps up." Exhibit O.

The DTE Memo was posted on EPA's web page sometime during the evening on December 7, 2017. Early on December 8th, the day of the Supreme Court conference on the DTE cert petition, Hunton & Williams sent a letter to the Supreme Court attaching the DTE Memo. Exhibit P.[20]

Mr. Wehrum and Mr. Harlow were directly involved in the DTE Memo.

William Wehrum

Mr. Wehrum was involved in the DTE Memo before and after it was issued, contradicting EPA's statement to the media that he was not. The documents show that at minimum he participated in a meeting about the memo on December 5 – two days before the memo was released – and it appears he had additional communications about the memo before its release late on December 7, 2017.

- The DTE Memo "redacted version" was sent to Mr. Wehrum and Mr. Harlow by Mandy Gunasekara on December 5. Exhibit Q.
- An email from Brian Doster (OGC) on December 5, 2017 said that there is a "late-breaking" meeting with Mr. Wehrum that day on NSR. The topics for the meeting are redacted. 19 people are listed on the invite to the meeting, and 3 people from the Office of Enforcement and Compliance Assurance are copied. The date, the invitees, and the context of prior conversations about the memo suggest that this meeting with Wehrum includes discussion of the DTE Memo. Exhibit R. The *New York Times* reported that the DTE Memo was discussed with Mr. Wehrum during a meeting on Dec. 5.[21]
- Susan Bodine copied Mr. Wehrum on her email to Ms. Gunasekara on December 7, 2017, in which she appears to be seeking changes to the DTE Memo before it is released. The content of this email is redacted. Exhibit S.
- Ms. Bodine sent a second email to Ms. Gunasekara on the DTE Memo on December 7, 2017, also copying Mr. Wehrum, in which Ms. Bodine appears to continue to press for changes. Exhibit S.
- Ms. Bodine copied Mr. Wehrum on another email on December 8, 2017 in which she says she talked to "SP" [apparently a reference to Scott Pruitt] about the memo. The content of that email is redacted. Exhibit T.
- Mr. Wehrum was a required participant in a December 11, 2017 conference call about the "NSR Memo." Exhibit U.

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[20] The Supreme Court ultimately denied the DTE cert petition and the EPA enforcement case is still pending, albeit in a situation where EPA has announced that its own position in the litigation is wrong.
[21] Lipton, supra note 9.

The emails from Ms. Bodine suggest that she was not pleased with the contents of the DTE Memo. Copying Mr. Wehrum on these emails further suggests he was substantively involved in its development.

Other evidence shows that Mr. Wehrum and others at EPA knew that he should be recused from involvement in the DTE Memo and in some communications attempted to maintain the fiction that he was abiding by that recusal.

- Email to Mr. Wehrum from Ms. Gunasekara on December 5, 2017, attaching a version of the DTE Memo and stating that "I have redacted the potentially offending language given your recusal issues...." Exhibit Q.
- Email from Ms. Gunasekara to Ryan Jackson (Chief of Staff to the Administrator) attaching the DTE Memo for Mr. Jackson to send out to the Regional Administrators. She advised Jackson to "please cc me (since Bill is recused)." Exhibit V.

Notably, in Mr. Wehrum's September 2018 recusal statement, Ms. Gunasekara is identified as one of two people (along with Josh Lewis) responsible for screening matters related to those listed on his recusal statement, "without [his] knowledge or involvement until after [his] recusal period ends." Exhibit D. The documents suggest that at this time, a month into Mr. Wehrum's tenure at EPA, the process had not been communicated to others and/or was not effectively screening matters from Mr. Wehrum's review.

David Harlow

Mr. Harlow was also involved in the DTE Memo before it was issued. He was sent copies of the draft memo, starting just days after he left Hunton & Williams, where he represented DTE, and started work at EPA.

- Alex Dominguez sent Mr. Harlow the draft DTE Memo on October 6, 2017. Exhibit W.
- Ms. Gunasekara sent Mr. Harlow the DTE memo on November 27, 2017. Exhibit X.
- Ms. Gunasekara sent Mr. Harlow and Mr. Wehrum a "redacted" version of the DTE memo on December 5, 2017. Exhibit Q.
- Mr. Harlow was included on the list of invitees to the December 5, 2017 meeting. Exhibit R.
- Mr. Harlow was a required participant in a December 11, 2017 conference call about the "NSR Memo." Exhibit U.

Mr. Harlow's recusal statement, which is in the form of a memo he submitted to Mr. Wehrum on December 28, 2017, identifies Ms. Gunasekara and Mr. Lewis as those responsible for screening matters from which he should be recused. Exhibit G.

An OIG investigation can readily confirm the facts laid out here demonstrating that Mr. Wehrum and Mr. Harlow violated federal ethics rules.

Publicly available information strongly indicates that Mr. Wehrum and Mr. Harlow were involved in the issuance of EPA's December 7, 2017 DTE memo, despite the fact that the memo was part of a particular matter involving specific parties from which they were required to recuse themselves, and that with respect to Mr. Wehrum, EPA publicly stated he had been recused from

its development. The memo was about the DTE litigation and was timed to affect a critical decision by the Supreme Court in the case.

Ample evidence is available to OIG to further investigate this matter. Further details about email correspondence and meetings in the days leading up to the issuance of the memo would be an obvious source of information. Redacted emails indicate a robust internal debate, possibly pitting the Assistant Administrator for EPA's Office of Enforcement and Compliance Assurance Susan Bodine with Mr. Wehrum's Office of Air and Radiation, including Mr. Wehrum himself right until the memo was issued. A review of the unredacted emails and the documents references in them are likely to shed light on Mr. Wehrum's and Mr. Harlow's substantive involvement in the DTE memo. Their participation can also be confirmed by interviews with other EPA staff, including those addressed in the emails and those who attended the December 5, 2017 NSR meeting.

The reference to a "redacted" version of the DTE Memo sent to Mr. Wehrum and Mr. Harlow on December 5, 2017, suggests a transparent attempt to circumvent Wehrum's and Harlow's recusals, aided by those responsible for policing those very recusals. The redacted version has not been publicly provided, but it is hard to see what could be redacted in a memo to work around the fact that the memo was about the DTE litigation, that the DTE litigation was handled by their former law firm, and that both Wehrum and Harlow knew it.

Conclusion

If an OIG investigation confirms the facts as set forth above, that would mean two senior EPA officials were involved in litigation brought on behalf of EPA where the defendant was represented by their former firm. EPA has released heavily redacted documents after months of requests that make that conclusion almost inevitable. This would be a serious violation of the letter and the intent of federal ethics rules. As of result of the DTE memo and EPA's reversal of its long-standing position, a current client of Hunton & Williams may be in a position to reap a multi-million dollar windfall. EPA OIG is in the best position to look behind the redactions and to interview key staff under penalty of perjury to get to the bottom of this matter.

Timeline

***Bolded** documents were heavily redacted in the FOIA response and appear likely to be relevant in unredacted form.*

9/8/17	Scott Pruitt meets with Mandy Gunasekara, Susan Bodine, Patrick Traylor and others about several enforcement matters, including DTE. Exhibit Y.
9/12/17	"Following up from Friday" Gunasekara sends a few points "regarding the NSR memo I mentioned" to Josh Lewis and Sarah Dunham, two employees in the front office of OAR. **The referenced document "Emissions Projection Rule outline DRAFT" was not produced in the FOIA response**. Exhibit Z.
9/22/17	Outline sent to Susan Bodine by Gunasekara. Exhibit AA.
10/3/17	Internal OAR description of "ongoing issues" lists "NSR DTE memo – deliver draft memo on DTE by end of Sept/early Oct." Exhibit BB.
10/4/17	**Brian Doster (career attorney in OGC) sends his supervisors (Justin Schwab, Lorie Schmidt, and Gautam Srinivasan) an email "re: Memos related to DTE NSR case," attaching two draft "memos regarding the issues in the DTE NSR litigation:" a draft of the DTE Memo, plus an OGC "companion memo" identifying some points to consider in evaluating the options, and the outline prepared by Gunasekara on 9/12/17. The email is heavily redacted, and the referenced documents were not produced in the FOIA response.** Exhibit CC.
10/5/17	**Josh Lewis sends the draft DTE Memo to Gunasekara, cc Alex Dominguez and Sarah Dunham, along with an OGC "analysis of options for addressing NSR issues raised by DTE." The email is heavily redacted but mentions that the draft was reviewed by OGC staff attorneys but that "thus far OECA and regional offices have not been engaged." The referenced attachments were not produced in the FOIA response.** Exhibit DD.
10/6/17	Alex Dominguez forwards both memos to David Harlow. **The referenced memos were not produced in the FOIA response.** Exhibit W.
10/25/17	Patrick Traylor asks Gunasekara for a copy of the draft DTE Memo indicating that he has not yet seen it; she sends it to him, copying Susan Bodine. Exhibit EE.
11/17/17	Meeting with Scott Pruitt on New Source Review with Bill Wehrum, Mandy Gunasekara, Ryan Jackson, Samantha Dravis and Lincoln Ferguson. Exhibit FF.
11/27/17	Gunasekara sends the draft DTE Memo to Harlow with the note "first one attached," implying that there had been a conversation between them on the subject before she sent the memo. Exhibit X. **The referenced memo was not produced with the FOIA response.**

11/30/17 Gunasekara represents EPA at Hunton & Williams on a panel discussion titled "Which Way Does the Wind Blow: Priorities and Developments in Air Quality and Climate Change". Exhibit GG.

12/4/17 Gunasekara sends "the latest version" of the "NSR memo pertaining to the issues at issue in the DTE case" to Susan Bodine and Patrick Traylor, cc to Ryan Jackson, Samantha Dravis and Justin Schwab. She specifically notes that "I thought we may have more time, but know now that the cert hearing is planned for Wednesday. This memo needs to go out before." Exhibit M. In other versions of this same email included in the FOIA response, the reference to having to get the memo out before the Supreme Court conference is redacted as "deliberative." **The referenced attached memo was not produced with the FOIA response.**

Patrick Traylor and Susan Bodine request a meeting that day and a scheduler is sent by Traylor to Gunasekara, Susan Bodine, and Justin Schwab for a meeting at 6 pm. Exhibit HH.

12/5/17 Gunasekara sends the DTE Memo to Lincoln Ferguson for "SP review." Exhibit II.

Gunasekara sends Wehrum and Harlow a "redacted" version of the DTE Memo for "tomorrow's" meeting, cc Alex Dominguez and Justin Schwab. She says, "I have redacted the potentially offending language given your recusal issues." **The redacted memo was not produced in the FOIA response.** Exhibit Q.

Brian Doster sends an email to others in OGC re: Meeting today with Wehrum on NSR – May address [redacted], informing them of a "late breaking" meeting that same day with Bill Wehrum. There are multiple redactions in the email, but it appears that the DTE Memo is one of the topics expected to be included in the discussion. Many people are invited to the meeting scheduled by Bill Wehrum, including Mandy Gunasekara, David Harlow, Susan Bodine, Patrick Traylor and Josh Lewis, cc Phillip Brooks, Apple Chapman, Rosemarie Kelley and Justin Schwab. Exhibit R.

12/6/17 OGC sends edits to the DTE Memo to Gunasekara at 10:24 pm. **The email is redacted and the referenced document containing the suggested edits was not produced in the FOIA response.** Exhibit JJ.

12/7/17 Gunasekara sends the "final" DTE memo to unnamed people at 10:15 am, saying she "discussed it with the Administrator yesterday. He would like to get this out today." Exhibit N. **The referenced attached memo was not produced in the FOIA response.**

Gunasekara sends the "final" memo to Susan Bodine at 12:06. The contents of Gunasekara's email are redacted. Susan Bodine immediately responds (with label "Importance: High") to Gunasekara, copying Bill Wehrum, Justin Schwab and Patrick Traylor. The entire contents of Bodine's email

are redacted. Bodine sends another email to the same people at 5:24 saying "at minimum the first two of the three sentences…" (remainder redacted). Exhibit S.

Bill Wehrum meets with OGE Ethics officials at 2:00. Exhibit NN.

At 3:00, Bill Wehrum gives a speech at his former law firm Hunton & Williams on "rules affecting electric generating companies and other stationary sources. Exhibit NN.

Justin Schwab sends Gunasekara an email at 4:52 pm "expanding on some of the comments on the draft" in an email with the subject "NSR memo – general OGC thoughts on legal risk" copying Susan Bodine and Patrick Traylor. The entire 2-page email is redacted. Exhibit KK.

Liz Bowman (from the press office) emails Gunasekara and Ryan Jackson a draft desk statement titled "Dec. 7 DTE/NSR Memo." **The draft desk statement is redacted.** Exhibit LL.

The final memo is auto penned and forwarded to Gunasekara and Ryan Jackson. At 5:36, Gunasekara directs Josh Lewis to "hold tight until after the energy and comment [sic] hearing. Please have this ready for posting online once the hearing wraps up." Exhibit O.

At 6:09 Josh Lewis replies "Got it, and will do." Exhibit O.

At 10:57 pm Gunasekara sends the memo to Ryan Jackson and says that when he sends it to the Regional Administrators he should "cc me (since Bill is recused)." Exhibit V.

12/8/17 Hunton & Williams sends the DTE Memo to the Supreme Court in advance of the Court's conference about the DTE cert petition. Exhibit P.

Susan Bodine emails Wehrum and Gunasekara, cc Patrick Traylor "re: NSR memo" that she "spoke to SP about…." The remainder of the email is redacted, except for "he suggested…" and "my suggestion remains…" Exhibit T.

<u>People with relevant information</u>

A review of the publicly available documents suggests that the following EPA employees may have information related to this matter:

Office of Air and Radiation

Bill Wehrum, David Harlow, Mandy Gunasekara, Alex Dominguez, Josh Lewis and Sarah Dunham

Office of General Counsel

Justin Schwab, Lorie Schmidt, Gautam Srinivasan and Brian Doster

OGC ethics attorneys, re whether they were consulted about the need for Wehrum and Harlow to recuse from the DTE Memo and if so, were they provided the necessary facts that are outlined in this request

Office of Enforcement and Compliance Assurance

Susan Bodine, Patrick Traylor, Rosemarie Kelley, Phillip Brooks and Apple Chapman

EXHIBIT A

This case was appealed to
06th Circuit: 11-2328, 14-2274, 14-2275

US District Court Civil Docket

U.S. District - Michigan Eastern
(Detroit)

2:10cv13101

United States v. Dte Energy et al

This case was retrieved from the court on Tuesday, January 08, 2019

Date Filed: **08/05/2010**
Assigned To: **District Judge Bernard A. Friedman**
Referred To: **Magistrate Judge R. Steven Whalen**
Nature of suit: **Environmental (893)**
Cause: **Clean Air Act**
Lead Docket: **None**
Other Docket: **U.S. Court of Appeals - Sixth Circuit, 11-02328**
U.S. Court of Appeals - Sixth Circuit, 14-02275/14-02274
Jurisdiction: **U.S. Government Plaintiff**

Class Code: **OPEN**
Closed:
Statute: **42:7413(b)**
Jury Demand: **None**
Demand Amount: **$0**
NOS Description: **Environmental**

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Date	#	Proceeding Text	Source

08/05/2010	1	COMPLAINT filed by United States against DTE Energy, Detroit Edison Company. No summons requested. County of 1st Plaintiff: USA - County Where Action Arose: Monroe - County of 1st Defendant: Wayne. [Previously dismissed case: No] [Possible companion case (s): None] (Benson, Thomas) (Entered: 08/05/2010)
08/05/2010		A United States Magistrate Judge of this Court is available to conduct all proceedings in this civil action in accordance with 28 U.S.C. 636c and FRCP 73. The Notice, Consent, and Reference of a Civil Action to a Magistrate Judge form is available for download at http://www.mied.uscourts.gov (DPer) (Entered: 08/05/2010)
08/06/2010	2	Ex Parte MOTION for Leave to File Excess Pages by United States. (Christensen, Ellen) (Entered: 08/06/2010)
08/06/2010	3	Ex Parte MOTION for Leave to File An Exhibit In The Traditional Manner by United States. (Christensen, Ellen) (Entered: 08/06/2010)
08/06/2010	4	Ex Parte MOTION for Leave to File An Exhibit In The Traditional Manner by United States. (Christensen, Ellen) (Entered: 08/06/2010)
08/06/2010	5	ORDER granting 3 Motion for Leave to File in traditional manner. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 08/06/2010)
08/06/2010	6	ORDER granting 4 Motion for Leave to File sealed matter. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 08/06/2010)
08/06/2010	7	ORDER granting 2 Motion for Leave to File Excess Pages. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 08/06/2010)
08/06/2010	8	MOTION for Preliminary Injunction by United States. (Attachments: # 1 Index of Exhibits, # 2 Exhibit 1 - Chinkin Declaration, # 3 Exhibit 2 - Chatfield Declaration, # 4 Exhibit 2A - Inspection Notes, # 5 Exhibit 2B - December 2009 DTE Press Release, # 6 Exhibit 2C - March 2010 DTE Letter, # 7 Exhibit 2D - April 2010 Newspaper Article, # 8 Exhibit 2E - June 2010 Notice of Violation, # 9 Exhibit 2G - June 2010 DTE Letter, # 10 Exhibit 2H - Fessler Testimony, # 11 Exhibit 2I - May 2010 EPA Letter, # 12 Exhibit 2J - June 2010 EPA Letter, # 13 Exhibit 3 - Sahu Declaration, # 14 Exhibit 3A - November 2009 DTE Press Release, # 15 Exhibit 4 - Detroit Edison Applicability Determination, # 16 Exhibit 5 - Koppe Declaration, # 17 Exhibit 6 - Hekking Declaration, # 18 Exhibit 7 - Clay Memo, # 19 Exhibit 8 - Biewald Declaration, # 20 Exhibit 9 - Cinergy Jury Instructions, # 21 Exhibit 10 - Adams Declaration, # 22 Exhibit 11 - Kahal Declaration, # 23 Exhibit 12 - Schwartz Declaration) (Benson, Thomas) (Entered: 08/06/2010)
08/10/2010	9	NOTICE by United States re 8 MOTION for Preliminary Injunction OF FILING EXHIBIT IN THE TRADITIONAL MANNER - APPENDIX F, EXHIBIT1 (CD-ROM) (Christensen, Ellen) (Entered: 08/10/2010)
08/10/2010	10	NOTICE by United States re 8 MOTION for Preliminary Injunction OF FILING EXHIBIT IN THE TRADITIONAL MANNER - EXHIBIT 2-F (SEALED EXCERPTS OF) (Christensen, Ellen) (Entered: 08/10/2010)
08/17/2010	11	NOTICE of Appearance by Michael J. Solo on behalf of All Defendants. (Solo, Michael) (Entered: 08/17/2010)
08/18/2010	12	NOTICE of hearing on 8 MOTION for Preliminary Injunction. Motion Hearing set for Wednesday, 10/13/2010 02:00 PM before District Judge Bernard A Friedman. (CMul) (Entered: 08/18/2010)
08/18/2010	13	NOTICE TO APPEAR: Case Management Status Conference set for Wednesday, 8/25/2010 11:00 AM before District Judge Bernard A Friedman (CMul) (Entered: 08/18/2010)
08/18/2010	14	NOTICE of Appearance by Matthew J. Lund on behalf of DTE Energy, Detroit Edison Company. (Lund, Matthew) (Entered: 08/18/2010)
08/18/2010	15	MOTION to Strike 8 MOTION for Preliminary Injunction by DTE Energy, Detroit Edison Company. (Attachments: # 1 Index of Exhibits, # 2 Exhibit A-Declaration of Skiles W. Boyd, # 3 Exhibit B-March 12, 2010 letter, # 4 Exhibit C-May 28, 2010 letter, # 5 Exhibit D-June 1, 2010 letter, # 6 Exhibit E-June 2, 2010 letter, # 7 Exhibit F-June 3, 2010 letter, # 8 Exhibit G-June 4, 2010 NOV, # 9 Exhibit H-June 8, 2010 letter, # 10 Exhibit I-Amicus Brief, # 11 Exhibit J-February 23, 2004 Order, # 12 Exhibit K-ABA Transcript, # 13 Exhibit L-EPA Response to Request for Admissions, # 14 Exhibit M-August 4, 2003 EPA Opposition, # 15 Exhibit N-October 4, 2004 Reply, # 16 Exhibit O-EPA Motion to Vacate dated October 4, 2007, # 17 Exhibit P-EPA Reply dated September 5, 2003, # 18 Exhibit Q-Joint Status Report, # 19 Exhibit R-Joint Status Report) (Lund, Matthew) (Entered: 08/18/2010)
08/18/2010	16	MOTION to Stay re 8 MOTION for Preliminary Injunction or, in the Alternative, for Extension of Time to Respond to Plaintiff's Motion for Preliminary Injunction and for Leave to File a 36-Page Response Brief by DTE Energy, Detroit Edison Company. (Attachments: # 1 Exhibit A-Plaintiffs' Supplemental Statement Regarding Joint Rule 26(f) Report and Proposed Scheduling and Case Management Order) (Lund, Matthew) (Entered: 08/18/2010)
08/18/2010		Set Hearings: Telephone Conference set for 10/13/2010 01:00 PM before District Judge Bernard A Friedman (CMul) (Entered: 10/06/2010)

08/19/2010	17	NOTICE of Appearance by Makram B Jaber - NOT SWORN on behalf of DTE Energy, Detroit Edison Company. (Jaber - NOT SWORN, Makram) (Entered: 08/19/2010)
08/19/2010	18	NOTICE of Appearance by James W Rubin - NOT SWORN on behalf of DTE Energy, Detroit Edison Company. (Rubin - NOT SWORN, James) (Entered: 08/19/2010)
08/20/2010	19	NOTICE of Appearance by Mark B Bierbower - NOT SWORN on behalf of DTE Energy, Detroit Edison Company. (Bierbower - NOT SWORN, Mark) (Entered: 08/20/2010)
08/20/2010	20	STATEMENT of DISCLOSURE of CORPORATE AFFILIATIONS and FINANCIAL INTEREST by DTE Energy (Lund, Matthew) (Entered: 08/20/2010)
08/20/2010	21	STATEMENT of DISCLOSURE of CORPORATE AFFILIATIONS and FINANCIAL INTEREST by Detroit Edison Company identifying Corporate Parent DTE Energy Company for Detroit Edison Company. (Lund, Matthew) (Entered: 08/20/2010)
08/23/2010	22	NOTICE of Appearance by F. William Brownell - NOT SWORN on behalf of DTE Energy, Detroit Edison Company. (Brownell - NOT SWORN, F.) (Entered: 08/23/2010)
08/23/2010	23	RESPONSE to 16 MOTION to Stay re 8 MOTION for Preliminary Injunction or, in the Alternative, for Extension of Time to Respond to Plaintiff's Motion for Preliminary Injunction and for Leave to File a 36-Page Response Brief MOTION to Stay re 8 MOTION for Preliminary Injunction or, in the Alternative, for Extension of Time to Respond to Plaintiff's Motion for Preliminary Injunction and for Leave to File a 36-Page Response Brief, 15 MOTION to Strike 8 MOTION for Preliminary Injunction MOTION to Strike 8 MOTION for Preliminary Injunction MOTION to Strike 8 MOTION for Preliminary Injunction MOTION to Strike 8 MOTION for Preliminary Injunction filed by United States. (Attachments: # 1 Index of Exhibits, # 2 Exhibit Ex. A - Declaration of Thomas A. Benson, # 3 Exhibit Ex. B - July 1, 2010 EPA Letter to DTE) (Benson, Thomas) (Entered: 08/23/2010)
08/24/2010	24	MOTION to Amend/Correct 8 MOTION for Preliminary Injunction by Filing Corrected Exhibit 12 (Unopposed Motion) by United States. (Attachments: # 1 Exhibit Corrected Exhibit 12 to Preliminary Injunction Motion) (Benson, Thomas) (Entered: 08/24/2010)
08/24/2010	25	NOTICE of Appearance by Brent A. Rosser - NOT SWORN on behalf of DTE Energy, Detroit Edison Company. (Rosser - NOT SWORN, Brent) (Entered: 08/24/2010)
08/25/2010	26	AMENDED NOTICE of hearing on 8 MOTION for Preliminary Injunction. Responses due by 11/4/2010 Replies due by 11/18/2010 Motion Hearing set for Wednesday, 1/19/2011 09:00 AM before District Judge Bernard A Friedman. (CMul) (Entered: 08/25/2010)
08/25/2010	27	ORDER granting 24 Unopposed Motion to Amend/Correct exhibit. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 08/25/2010)
08/25/2010		Minute Entry - Status/Scheduling Conference held on 8/25/2010 before District Judge Bernard A Friedman. (CMul) (Entered: 08/25/2010)
08/30/2010	28	(WRONG IMAGE) ORDER granting 16 Motion to Stay or in the alternative extension of time to file a response. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 08/30/2010)
08/30/2010	29	ORDER granting 16 MOTION to Stay or, in the Alternative, for Extension of Time to Respond to Plaintiff's Motion for Preliminary Injunction filed by Detroit Edison Company, DTE Energy. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 08/30/2010)
08/30/2010	30	NOTICE of Correction re 28 Order on Motion to Stay. (CMul) (Entered: 08/30/2010)
08/30/2010	31	WAIVER OF SERVICE Returned Executed. DTE Energy waiver sent on 8/5/2010, answer due 10/4/2010. (Benson, Thomas) (Entered: 08/30/2010)
08/30/2010	32	WAIVER OF SERVICE Returned Executed. Detroit Edison Company waiver sent on 8/5/2010, answer due 10/4/2010. (Benson, Thomas) (Entered: 08/30/2010)
09/07/2010	33	REPLY to Response re 15 MOTION to Strike 8 MOTION for Preliminary Injunction MOTION to Strike 8 MOTION for Preliminary Injunction MOTION to Strike 8 MOTION for Preliminary Injunction MOTION to Strike 8 MOTION for Preliminary Injunction filed by DTE Energy, Detroit Edison Company. (Attachments: # 1 Exhibit Verdict Form, U.S. v. Cinergy (S.D. Ind. May 22, 2008)) (Brownell, F.) (Entered: 09/07/2010)
09/28/2010	34	Joint MOTION to Intervene as Plaintiffs by Sierra Club, Natural Resources Defense Council. (Issod, Andrea) (Entered: 09/28/2010)
09/28/2010	35	INTERVENOR COMPLAINT filed by Natural Resources Defense Council, Sierra Club against DTE Energy, Detroit Edison Company. (Issod, Andrea) Modified on 9/29/2010 (DWor). [PROPOSED INTERVENOR COMPLAINT] (Entered: 09/28/2010)
09/29/2010	36	ATTORNEY SUBSTITUTION for Natural Resources Defense Council, Sierra Club: Holly D. Bressett - NOT SWORN added. Attorney Andrea S. Issod terminated. (Bressett - NOT SWORN, Holly) (Entered: 09/29/2010)
10/04/2010	37	ANSWER to Complaint by DTE Energy, Detroit Edison Company. (Brownell, F.) (Entered: 10/04/2010)
10/05/2010	38	NOTICE of hearing on 34 Joint MOTION to Intervene as Plaintiffs. Motion Hearing set for 11/10/2010 02:00 PM before District Judge Bernard A Friedman. (CMul) (Entered:

		10/05/2010)
10/06/2010	39	STIPULATED PROTECTIVE ORDER Signed by District Judge Bernard A Friedman. (CMul) (Entered: 10/06/2010)
10/08/2010	40	DISCOVERY plan jointly filed pursuant to Federal Rules of Civil Procedure 26(f) (Benson, Thomas) (Entered: 10/08/2010)
10/13/2010		Minute Entry - Status Conference held on 10/13/2010 before District Judge Bernard A Friedman. (Court Reporter Joan Morgan) (CMul) (Entered: 10/14/2010)
10/14/2010	41	NOTICE TO APPEAR: Status Conference set for Tuesday, 11/30/2010 11:00 AM before District Judge Bernard A Friedman Regarding facilitation and possible hearing dates. (CMul) (Entered: 10/14/2010)
10/22/2010	42	STIPULATION Regarding Claims of Prospective Intervenors by DTE Energy, Detroit Edison Company, Natural Resources Defense Council, Sierra Club (Lund, Matthew) (Entered: 10/22/2010)
10/27/2010	43	DISCOVERY plan jointly filed pursuant to Federal Rules of Civil Procedure 26(f) (Bierbower, Mark) (Entered: 10/27/2010)
10/27/2010	44	DISCOVERY plan jointly filed pursuant to Federal Rules of Civil Procedure 26(f) (Bierbower, Mark) (Entered: 10/27/2010)
11/04/2010	45	Ex Parte MOTION to Seal Exhibits and File in the Traditional Manner by All Defendants. (Rubin - NOT SWORN, James) (Entered: 11/04/2010)
11/04/2010	46	RESPONSE to 8 MOTION for Preliminary Injunction Opposition filed by All Defendants. (Attachments: # 1 Index of Exhibits Index of Exhibits, # 2 Exhibit Exhibit 1: Wolff Declaration, # 3 Exhibit Exhibit 2: Campbell Declaration, # 4 Exhibit Exhibit 3: Boyd Declaration, # 5 Exhibit Exhibit 4: Rogers Declaration, # 6 Exhibit Exhibit 5: Letter from Brooks to Solo 5/28/10, # 7 Exhibit Exhibit 6: Letter from Brooks to Solo 6/2/10, # 8 Exhibit Exhibit 7: Letter from Solo to Palermo 6/3/10, # 9 Exhibit Exhibit 8: EPA NOV, # 10 Exhibit Exhibit 9: Golden Declaration, # 11 Exhibit Exhibit 10: King Declaration, # 12 Exhibit Exhibit 11: Koppe Deposition Excerpt 11/30/05, # 13 Exhibit Exhibit 12: Verdict Form, # 14 Exhibit Exhibit 13: Moolgavkar Declaration, # 15 Exhibit Exhibit 14: Hayes Declaration, # 16 Exhibit Exhibit 15: Morris Declaration) (Brownell, F.) (Entered: 11/04/2010)
11/04/2010	47	NOTICE by All Defendants re 46 Response to Motion,,, of Filing Exhibits in the Traditional Manner, Appendix B to Attachment A to Exhibit 9 (Golden), Appendix C to Exhibit 10 (King) (Brownell, F.) (Entered: 11/04/2010)
11/05/2010	48	EXHIBIT S A & B re 45 Ex Parte MOTION to Seal Exhibits and File in the Traditional Manner by All Defendants (Rubin - NOT SWORN, James) (Entered: 11/05/2010)
11/09/2010	49	TEXT ORDER granting 45 Motion to Seal. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 11/09/2010)
11/09/2010	50	ORDER re 48 Exhibit filed by Detroit Edison Company, DTE Energy. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 11/09/2010)
11/12/2010	51	MOTION for Leave to File Supplemental Declaration (Errata) and to File Exhibit Under Seal and in the Traditional Manner by All Defendants. (Attachments: # 1 Exhibit Supplement to Exhibit 10 to Opposition to Plaintiff's Motion for Preliminary Injunction) (Brownell, F.) (Entered: 11/12/2010)
11/15/2010	52	Sealed Matter (KCas) (Entered: 11/16/2010)
11/18/2010	53	ORDER granting 51 Motion for Leave to File. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 11/18/2010)
11/18/2010	54	Ex Parte MOTION for Leave to File Excess Pages by United States. (Christensen, Ellen) (Entered: 11/18/2010)
11/18/2010	55	MOTION for Leave to File Exhibit Under Seal and in the Traditional Manner by United States. (Christensen, Ellen) (Entered: 11/18/2010)
11/18/2010	56	MOTION for Leave to File Exhibit Under Seal and in the Traditional Manner by United States. (Christensen, Ellen) (Entered: 11/18/2010)
11/18/2010	57	RESPONSE to 54 Ex Parte MOTION for Leave to File Excess Pages (Response in Opposition) filed by All Defendants. (Brownell, F.) (Entered: 11/18/2010)
11/18/2010	58	REPLY to Response re 8 MOTION for Preliminary Injunction filed by United States. (Attachments: # 1 Index of Exhibits, # 2 Appendix B: Sierra Club Slip Op, # 3 Exhibit 13: Chatfield Declaration, # 4 Exhibit 13-A: Monroe Permit Application, # 5 Exhibit 13-B: Michigan NSR Program Review, # 6 Exhibit 13-C: Monroe Permit, # 7 Exhibit 13-D: DTE Presentation (Part 1 of 2), # 8 Document Continuation 13-D: DTE Presentation (Part 2 of 2), # 9 Exhibit 14: Cinergy Special Verdict Form, # 10 Exhibit 15: Koppe Declaration, # 11 Exhibit 16: Biewald Declaration, # 12 Exhibit 17: Adams Declaration, # 13 Exhibit 18: Kahal Declaration, # 14 Exhibit 19: Sahu Declaration, # 15 Exhibit 20: Schwartz Declaration, # 16 Exhibit 21: Chinkin Declaration) (Benson, Thomas) (Entered: 11/18/2010)

11/18/2010	59	MOTION for Leave to File Exhibits under Seal and to Withdraw Prior Motions by United States. (Benson, Thomas) (Entered: 11/18/2010)
11/18/2010	60	SEALED EXHIBIT 13-E Economizer Presentation re 58 Reply to Response to Motion,,, 59 MOTION for Leave to File Exhibits under Seal and to Withdraw Prior Motions by United States. (Benson, Thomas) (Entered: 11/18/2010)
11/18/2010	61	SEALED EXHIBIT 13-F Reheater Presentation re 58 Reply to Response to Motion,,, 59 MOTION for Leave to File Exhibits under Seal and to Withdraw Prior Motions by United States. (Benson, Thomas) (Entered: 11/18/2010)
11/22/2010	62	ORDER granting 54 Motion for Leave to File Excess Pages. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 11/22/2010)
11/22/2010	63	ORDER granting 59 Motion for Leave to File under seal and withdraw motions. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 11/22/2010)
11/23/2010	64	ORDER granting 34 Joint MOTION to Intervene as Plaintiffs filed by Natural Resources Defense Council and Sierra Club. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 11/23/2010)
11/23/2010	65	NOTICE of Appearance by Justin Savage on behalf of United States. (Savage, Justin) (Entered: 11/23/2010)
11/24/2010	66	MOTION for Protective Order and Brief in Support by All Defendants. (Attachments: # 1 Index of Exhibits Index of Exhibits, # 2 Exhibit Exhibit A: E-mail from Benson to Bierbower 8/17/10, # 3 Exhibit Exhibit B: EPA's First Set of Discovery, # 4 Exhibit Exhibit C: Letter from Benson to Bierbower 11/5/10, # 5 Exhibit Exhibit D: Detroit Edison's Objections & Responses to EPA's First Set of Discovery, # 6 Exhibit Exhibit E: Letter from Benson to Bierbower 11/15/10, # 7 Exhibit Exhibit F: Subpoenas and Deposition Notices, # 8 Exhibit Exhibit G: Detroit Edison's First Set of Interrogatories and Requests for Production) (Brownell, F.) (Entered: 11/24/2010)
11/30/2010	67	NOTICE of Appearance by Kristin M Furrie on behalf of United States. (Furrie, Kristin) (Entered: 11/30/2010)
11/30/2010		Minute Entry - Telephone Conference held on 11/30/2010, Set Hearings:(Telephone Conference set for 1/10/2011 02:00 PM before District Judge Bernard A Friedman) before District Judge Bernard A Friedman. (Court Reporter Carol Sapala) (CMul) (Entered: 11/30/2010)
12/02/2010	68	RESPONSE to 66 MOTION for Protective Order and Brief in Support filed by United States. (Furrie, Kristin) (Entered: 12/02/2010)
12/10/2010	69	REPLY to Response re 66 MOTION for Protective Order and Brief in Support filed by All Defendants. (Attachments: # 1 Exhibit Exhibit A: Excerpts from Plaintiffs' Proposed Conclusions of Law (Remedy Phase), filed in U.S. v. Cinergy (S.D. Ind.)) (Brownell, F.) (Entered: 12/10/2010)
12/27/2010	70	ORDER granting 66 Defendants' Motion for Protective Order. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 12/27/2010)
01/06/2011	71	STIPULATION re 39 Protective Order by Natural Resources Defense Council, Sierra Club (Bressett - NOT SWORN, Holly) (Entered: 01/06/2011)
01/10/2011	72	ERRATA Sheet re: 58 Reply to Response to Motion,,, filed by United States. by United States (Furrie, Kristin) (Entered: 01/10/2011)
01/10/2011		Minute Entry - Status Telephone Conference held on 1/10/2011 before District Judge Bernard A Friedman. (FMos) (Entered: 01/11/2011)
01/11/2011	73	ORDER. Signed by District Judge Bernard A Friedman. (FMos) (Entered: 01/11/2011)
01/12/2011	74	NOTICE of Appearance by Lucinda M. Langworthy - NOT SWORN on behalf of DTE Energy, Detroit Edison Company. (Langworthy - NOT SWORN, Lucinda) (Entered: 01/12/2011)
01/14/2011	75	ORDER allowing Defendant's to bring two laptops into the Courthouse. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 01/14/2011)
01/19/2011		Minute Entry - Motion Hearing held on 1/19/2011 re 8 MOTION for Preliminary Injunction filed by United States before District Judge Bernard A Friedman. Disposition: held in abeyance pending expedited trial(Court Reporter Joan Morgan) (CMul) (Entered: 01/27/2011)
01/19/2011		Minute Entry - Scheduling Conference held on 1/19/2011 before District Judge Bernard A Friedman. (CMul) (Entered: 01/27/2011)
01/27/2011	76	SCHEDULING ORDER: Final Pretrial Tele-Conference set for 5/3/2011 01:00 PM to be initiated by Defendants; Jury Selection, if necessary set for 5/10/2011 at 9:00 a.m. and Jury/Bench Trial set for 5/11/2011 09:00 AM before District Judge Bernard A Friedman Signed by District Judge Bernard A Friedman. (Refer to image for additional dates) (CMul) (Entered: 01/27/2011)
01/28/2011	77	NOTICE of Appearance by James A Lofton on behalf of United States. (Lofton, James) (Entered: 01/28/2011)

01/28/2011	78	ORDER denying 8 Motion for Preliminary Injunction. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 01/28/2011)
02/17/2011		Set Deadlines/Hearings: Telephone Conference set for 2/22/2011 at 1:00 PM before District Judge Bernard A Friedman (FMos) (Entered: 02/17/2011)
02/22/2011		Minute Entry - Telephone Conference held on 2/22/2011 before District Judge Bernard A Friedman. Disposition: held(Court Reporter: Joan Morgan) (DOpa) (Entered: 02/22/2011)
03/01/2011	79	SCHEDULING ORDER: Substantive Motion Cut-off set for 6/1/2011 Final Pretrial Conference set for 9/6/2011 01:00 PM before District Judge Bernard A. Friedman Bench Trial set for 9/12/2011 09:00 AM before District Judge Bernard A. Friedman Signed by District Judge Bernard A. Friedman. (Refer to image for additional dates) (CMul) (Entered: 03/01/2011)
03/21/2011	80	Joint MOTION to Amend/Correct Scheduling Order by All Parties. (Rosser, Brent) (Entered: 03/21/2011)
03/23/2011	81	MOTION for Protective Order by DTE Energy, Detroit Edison Company. (Attachments: # 1 Index of Exhibits, # 2 Exhibit 1 - Notice of Violation, # 3 Exhibit 2 - Monroe Power Plant Unit #2 Periodic Outage Preparation Status Report, # 4 Exhibit 3 - Excerpts of January 19, 2011 Hearing Transcript, # 5 Exhibit 4(a) - Plaintiff's First Set of Interrogatories, # 6 Exhibit 4(b) - Plaintiff's First Set of Document Requests, # 7 Exhibit 5 - Letter from Thomas Benson, # 8 Exhibit 6 - Letter from Brent Rosser, # 9 Exhibit 7 - EKPC Order, # 10 Exhibit 8 - Notice of Intent (TVA), # 11 Exhibit 9 - Notice of Violation (TVA), # 12 Exhibit 10 - Cinergy Order, # 13 Exhibit 11 - Glossary of Acronyms Referenced in Brief) (Brownell, F.) (Entered: 03/23/2011)
03/23/2011	82	AMENDED SCHEDULING ORDER re 80 Joint Motion: Final Pretrial Conference set for 9/6/2011 01:00 PM before District Judge Bernard A. Friedman. Bench Trial set for 9/12/2011 09:00 AM before District Judge Bernard A. Friedman. Signed by District Judge Bernard A. Friedman. (Refer to image for additional dates) (DOpa) (Entered: 03/24/2011)
03/30/2011	83	NOTICE of hearing on 81 MOTION for Protective Order. Motion Hearing set for Wednesday, 4/20/2011 02:00 PM before District Judge Bernard A. Friedman. Parties may arrange to participate by telephone. (CMul) (Entered: 03/30/2011)
04/06/2011	84	NOTICE of Appearance by Harry M. Johnson - NOT SWORN on behalf of DTE Energy, Detroit Edison Company. (Johnson - NOT SWORN, Harry) (Entered: 04/06/2011)
04/06/2011	85	RESPONSE to 81 MOTION for Protective Order filed by United States. (Attachments: # 1 Index of Exhibits, # 2 Ex. 1, June 1, 2010 Solo Letter, # 3 Ex. 2, June 15, 2010 Solo Letter, # 4 Ex. 3, February 15, 1989 Clay Letter, # 5 Ex. 4, November 6, 1987 Howekamp Letter, # 6 Ex. 5, Preliminary Injunction Hearing Transcript Excerpts, # 7 Ex. 6, DTE Preliminary Injunction Hearing Demonstrative, # 8 Ex. 7, January 31, 2011 Bierbower Letter) (Benson, Thomas) (Entered: 04/06/2011)
04/07/2011	86	ATTORNEY APPEARANCE: George P. Sibley - NOT SWORN appearing on behalf of DTE Energy, Detroit Edison Company (Sibley - NOT SWORN, George) (Entered: 04/07/2011)
04/08/2011	87	MOTION to Compel Plaintiff's Compliance with Rules 33 and 34 of the Federal Rules of Civil Procedure by DTE Energy, Detroit Edison Company. (Attachments: # 1 Index of Exhibits Index of Exhibits, # 2 Exhibit Ex. A: U.S.' First Set of Document Requests, # 3 Exhibit Ex. B: Hearing Transcript Excerpts 1/19/01, # 4 Exhibit Ex. C: Defendants' First Set of Interrogatories, # 5 Exhibit Ex. D: Defendants' First Set of Requests for Production, # 6 Exhibit Ex. E: Furrie Letter to Bierbower 2/10/11, # 7 Exhibit Ex. F: Smith Letter to Furrie 2/23/11, # 8 Exhibit Ex. G: U.S.' Responses and Objections to Defendants' First Set of Requests for Production, # 9 Exhibit Ex. H: U.S.' Responses and Objections to Defendants' First Set of Interrogatories, # 10 Exhibit Ex. I: First Production Inventory, # 11 Exhibit Ex. J: Second Production Inventory, # 12 Exhibit Ex. K: Walinskas Letter to Smith 3/14/11, # 13 Exhibit Ex. L: Rosser Letter to Benson 3/18/11, # 14 Exhibit Ex. M: Benson Letter to Rosser 3/24/11, # 15 Exhibit Ex. N: Furrie Letter to Smith 2/28/11, # 16 Exhibit Ex. O: Rosser Letter to Benson 3/31/11, # 17 Exhibit Ex. P: Furrie Letter to Rosser 4/4/11, # 18 Exhibit Ex. Q: Duke Energy Order 12/13/01, # 19 Exhibit Ex. R: Duke Energy Order 2/5/02, # 20 Exhibit Ex. S: Illinois Power Order 10/23/01, # 21 Exhibit Ex. T: U.S.' First Set of Interrogatories, # 22 Exhibit Ex. U: Furrie Email to Rosser et al. 4/6/11, # 23 Exhibit Ex. V: Illinois Power Order 1/10/01) (Rosser, Brent) (Entered: 04/08/2011)
04/08/2011	88	MOTION to Expedite Briefing and Consideration of Motion to Compel Plaintiffs' Compliance with Rules 33 and 34 of the Federal Rules of Civil Procedure by DTE Energy, Detroit Edison Company. (Rosser, Brent) (Entered: 04/08/2011)
04/11/2011	89	RESPONSE to 88 MOTION to Expedite Briefing and Consideration of Motion to Compel Plaintiffs' Compliance with Rules 33 and 34 of the Federal Rules of Civil Procedure filed by United States. (Furrie, Kristin) (Entered: 04/11/2011)
04/13/2011	90	REPLY to Response re 88 MOTION to Expedite Briefing and Consideration of Motion to Compel Plaintiffs' Compliance with Rules 33 and 34 of the Federal Rules of Civil Procedure filed by DTE Energy, Detroit Edison Company. (Rosser, Brent) (Entered: 04/13/2011)
04/13/2011	91	STIPULATION re 71 Stipulation, 39 Protective Order Stipulated Disclosure Agreement Regarding Section 114 Documents by DTE Energy, Detroit Edison Company, Natural Resources Defense Council, Sierra Club (Rosser, Brent) (Entered: 04/13/2011)

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04/15/2011	92	REPLY to Response re 81 MOTION for Protective Order filed by All Defendants. (Attachments: # 1 Exhibit 12 - 1993 EPA Memo) (Sibley - NOT SWORN, George) (Entered: 04/15/2011)
04/18/2011		TEXT-ONLY ORDER granting 88 MOTION to Expedite Briefing and Consideration of Motion to Compel Plaintiffs' Compliance with Rules 33 and 34 of the Federal Rules of Civil Procedure by DTE Energy, Detroit Edison Company. Signed by District Judge Bernard A. Friedman. (SJa) (Entered: 04/18/2011)
04/18/2011	93	NOTICE of hearing on 81 MOTION for Protective Order and 87 MOTION to Compel Plaintiff's Compliance with Rules 33 and 34 of the Federal Rules of Civil Procedure. Motion Hearing set for 5/3/2011 01:45 PM before District Judge Bernard A. Friedman. (SJa) (Entered: 04/18/2011)
04/22/2011	94	MOTION for Protective Order by United States. (Furrie, Kristin) (Entered: 04/22/2011)
04/22/2011	95	RESPONSE to 87 MOTION to Compel Plaintiff's Compliance with Rules 33 and 34 of the Federal Rules of Civil Procedure filed by United States. (Attachments: # 1 Index of Exhibits, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 2-A, # 5 Exhibit 2-B, # 6 Exhibit 2-C, # 7 Exhibit 2-D, # 8 Exhibit 2-E, # 9 Exhibit 2-F, # 10 Exhibit 2-G Part 1, # 11 Document Continuation 2-G Part 2, # 12 Exhibit 2-H, # 13 Exhibit 2- I, # 14 Exhibit 2-J, # 15 Exhibit 2-K, # 16 Exhibit 2-L, # 17 Exhibit 3, # 18 Exhibit 4, # 19 Exhibit 5, # 20 Exhibit 6, # 21 Exhibit 7, # 22 Exhibit 8, # 23 Exhibit 9, # 24 Exhibit 10, # 25 Exhibit 11) (Furrie, Kristin) (Entered: 04/22/2011)
04/22/2011	96	NOTICE of Appearance by James W. Beers, Jr on behalf of United States. (Beers, James) (Entered: 04/22/2011)
04/25/2011	97	NOTICE of Hearing on 94 MOTION for Protective Order, 81 MOTION for Protective Order, 87 MOTION to Compel Plaintiff's Compliance with Rules 33 and 34 of the Federal Rules of Civil Procedure. Motion Hearing set for 5/3/2011 01:45 PM before District Judge Bernard A. Friedman. (SJa) (Entered: 04/25/2011)
04/29/2011	98	Ex Parte MOTION for Leave to File Exhibits in the Traditional Manner by All Defendants. (Johnson - NOT SWORN, Harry) (Entered: 04/29/2011)
04/29/2011	99	REPLY to Response re 87 MOTION to Compel Plaintiff's Compliance with Rules 33 and 34 of the Federal Rules of Civil Procedure filed by All Defendants. (Attachments: # 1 Index of Exhibits, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Exhibit F (Placeholder for CD-ROM to be filed traditionally if leave granted), # 8 Exhibit G (Placeholder for CD-ROM to be filed traditionally if leave granted)) (Johnson - NOT SWORN, Harry) (Entered: 04/29/2011)
04/29/2011	100	RESPONSE to 94 MOTION for Protective Order filed by DTE Energy, Detroit Edison Company. (Attachments: # 1 Index of Exhibits, # 2 Exhibit A - US Opposition to Def. Mot. to Compel Disc. (Illinois Power), # 3 Exhibit B - US Response to EKPC Motion for Part. Summ. Judgment (EKPC)) (Rosser, Brent) (Entered: 04/29/2011)
05/02/2011	101	ORDER granting 98 Ex Parte Motion for Leave to File Exhibits in the Traditional Manner. Signed by District Judge Bernard A. Friedman. (SJa) (Entered: 05/02/2011)
05/02/2011	102	NOTICE by DTE Energy, Detroit Edison Company of Filing Exhibits in the Traditional Manner (Johnson - NOT SWORN, Harry) (Entered: 05/02/2011)
05/03/2011	103	ORDER denying as moot 88 MOTION to Expedite Briefing and Consideration of Motion to Compel Plaintiffs' Compliance with Rules 33 and 34 of the Federal Rules of Civil Procedure filed by Detroit Edison Company, DTE Energy . Signed by District Judge Bernard A. Friedman. (SJa) (Entered: 05/03/2011)
05/03/2011	104	ORDER granting 81 Defendant's Motion for Protective Order. Signed by District Judge Bernard A. Friedman. (SJa) (Entered: 05/03/2011)
05/03/2011	105	ORDER denying defendant's 87 Motion to Compel Plaintiff's Compliance with Rules 33 and 34 of the Federal Rules of Civil Procedure. Signed by District Judge Bernard A. Friedman. (SJa) (Entered: 05/03/2011)
05/03/2011	106	ORDER denying as moot 94 Plaintiff's Motion for Protective Order. Signed by District Judge Bernard A. Friedman. (SJa) (Entered: 05/03/2011)
05/03/2011		Minute Entry - Motion Hearing held on 5/3/2011 re 88 MOTION to Expedite Briefing and Consideration of Motion to Compel Plaintiffs' Compliance with Rules 33 and 34 of the Federal Rules of Civil Procedure filed by Detroit Edison Company, DTE Energy, 94 MOTION for Protective Order filed by United States, 81 MOTION for Protective Order filed by Detroit Edison Company, DTE Energy, 87 MOTION to Compel Plaintiff's Compliance with Rules 33 and 34 of the Federal Rules of Civil Procedure filed by Detroit Edison Company, DTE Energy before District Judge Bernard A. Friedman. (Court Reporter Joan Morgan) (SJa) Modified on 5/6/2011 (CMul). (Entered: 05/04/2011)
06/09/2011	107	MOTION for Summary Judgment by DTE Energy, Detroit Edison Company. (Attachments: # 1 Index of Exhibits Appendix A: Index of Exhibits, # 2 Exhibit Exhibit 1: Boyd Declaration, # 3 Exhibit Exhibit 2: Usitalo Declaration) (Brownell, F.) (Entered: 06/09/2011)
06/23/2011	108	NOTICE of determination on briefs re 107 MOTION for Summary Judgment. (CMul) (Entered: 06/23/2011)

06/29/2011	109	NOTICE of Appearance by Elias L. Quinn on behalf of United States. (Quinn, Elias) (Entered: 06/29/2011)
06/29/2011	110	MOTION for Extension of Time to File Response/Reply to Defendant's Motion for Summary Judgment Based on the 2002 NSR Reform Rules by United States. (Attachments: # 1 Proposed Order) (Quinn, Elias) (Entered: 06/29/2011)
06/30/2011	111	ORDER granting 110 Motion for Extension of Time to File Response/Reply. Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 06/30/2011)
07/07/2011	112	MOTION for Leave to File Brief and Exhibits under Seal (Unopposed Motion) by United States. (Benson, Thomas) (Entered: 07/07/2011)
07/08/2011	113	ORDER Granting 112 Motion for Leave to File. Signed by District Judge Bernard A. Friedman. (DOpa) (Entered: 07/08/2011)
07/08/2011	114	RESPONSE to 107 MOTION for Summary Judgment filed by United States. (Attachments: # 1 Index of Exhibits, # 2 Exhibit Ex. 3 -- Monroe 2 Outage Facts, # 3 Exhibit Ex. 4 -- Fessler Email, # 4 Exhibit Ex. 5 -- Notice Letter, # 5 Exhibit Ex. 6 -- 2005 Notice Letter, # 6 Exhibit Ex. 9 -- NSR TSD Excerpts, # 7 Exhibit Ex. 12 -- Northampton Letter, # 8 Exhibit Ex. 13 -- Columbia Generating) (Benson, Thomas) (Entered: 07/08/2011)
07/08/2011	115	SEALED EXHIBIT re 114 Response to Motion, by United States. (Attachments: # 1 Exhibit Ex. 1 -- Dep. Ex. 92, # 2 Exhibit Ex. 2 -- Monroe 2 Short Form Report, # 3 Exhibit Ex. 7 -- Rugenstein Deposition Excerpts, # 4 Exhibit Ex. 8 -- Boyd 30(b)(6) Deposition Excerpts Vol. 2, # 5 Exhibit Ex. 10 -- Boyd Personal Deposition Excerpts, # 6 Exhibit Ex. 11 -- Boyd 30(b)(6) Deposition Excerpts Vol. 1) (Benson, Thomas) (Entered: 07/08/2011)
07/18/2011	116	MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) by DTE Energy, Detroit Edison Company. (Attachments: # 1 Index of Exhibits Index of Exhibits, # 2 Exhibit Exhibit 1: S. Rep. No. 91-1196, # 3 Exhibit Exhibit 2: 40 CFR section 60.14(1)(1) (1976), # 4 Exhibit Exhibit 3: WEPCo NSR Applicability Determination (9/9/1988), # 5 Exhibit Exhibit 4: Final WEPCo Determination (10/14/1988), # 6 Exhibit Exhibit 5: Revised WEPCo Determination (2/15/1989), # 7 Exhibit Exhibit 6: GAO Report (1990), # 8 Exhibit Exhibit 7: Tiber Memo (4/10/1990), # 9 Exhibit Exhibit 8: Dingell Letter (10/9/1990), # 10 Exhibit Exhibit 9: Rosenberg Letter (6/19/1991), # 11 Exhibit Exhibit 10: Nichols Letter w/ Attachment (May 1995), # 12 Exhibit Exhibit 11: DOJ Press Release (11/3/1999), # 13 Exhibit Exhibit 12: Alabama Power Order (2/25/2008), # 14 Exhibit Exhibit 13: Declaration of Regina McCarthy (1/31/2011)) (Brownell, F.) (Entered: 07/18/2011)
07/18/2011	117	MOTION for Partial Summary Judgment on the Legal Standards in this Case by United States. (Attachments: # 1 Index of Exhibits, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 3-A, # 6 Exhibit 3-B, # 7 Exhibit 3-C, # 8 Exhibit 3-D, # 9 Exhibit 3-E, # 10 Exhibit 3-F, # 11 Exhibit 3-G, # 12 Exhibit 3-H, # 13 Exhibit 3-I, # 14 Exhibit 3-J, # 15 Exhibit 3-K, # 16 Exhibit 3-L, # 17 Exhibit 4, # 18 Exhibit 5, # 19 Exhibit 6, # 20 Exhibit 7, # 21 Exhibit 8, # 22 Exhibit 9, # 23 Proposed Order) (Quinn, Elias) (Entered: 07/18/2011)
07/22/2011	118	MOTION for Leave to File Excess Pages by All Defendants. (Attachments: # 1 Exhibit Proposed Order) (Sibley - NOT SWORN, George) (Entered: 07/22/2011)
07/25/2011	119	REPLY to Response re 107 MOTION for Summary Judgment filed by DTE Energy, Detroit Edison Company. (Attachments: # 1 Index of Exhibits, # 2 Exhibit Exhibit 3: Letter from NRG to EPA (3/10/2005), # 3 Exhibit Exhibit 4: Letter from EPA to NRG (5/16/2005)) (Brownell, F.) (Entered: 07/25/2011)
07/25/2011	120	NOTICE of Change of Address/Contact Information by Mark B Bierbower on behalf of DTE Energy, Detroit Edison Company. (Bierbower, Mark) (Entered: 07/25/2011)
07/25/2011	121	NOTICE of Change of Address/Contact Information by Lucinda M. Langworthy on behalf of DTE Energy, Detroit Edison Company. (Langworthy, Lucinda) (Entered: 07/25/2011)
07/25/2011		Attorney James W Rubin is discontinued from receiving Notices of Electronic Filing. Reason: no longer with Hunton & Williams LLP. (Rubin, James) (Entered: 07/25/2011)
07/26/2011	122	NOTICE of Change of Address/Contact Information by Makram B Jaber on behalf of DTE Energy, Detroit Edison Company. (Jaber, Makram) (Entered: 07/26/2011)
07/26/2011	123	NOTICE of Change of Address/Contact Information by F. William Brownell on behalf of DTE Energy, Detroit Edison Company. (Brownell, F.) (Entered: 07/26/2011)
07/26/2011	124	ORDER granting 118 Motion for Leave to File Excess Pages. Signed by District Judge Bernard A. Friedman. (MWil) (Entered: 07/26/2011)
07/28/2011	125	RESPONSE to 116 MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) filed by Natural Resources Defense Council, Sierra Club. (Attachments: # 1 Exhibit, # 2 Exhibit) (Bressett - NOT SWORN, Holly) (Entered:

		07/28/2011)
08/01/2011	126	RESPONSE to 116 MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) filed by United States. (Attachments: # 1 Index of Exhibits, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5) (Quinn, Elias) (Entered: 08/01/2011)
08/01/2011	127	RESPONSE to 117 MOTION for Partial Summary Judgment on the Legal Standards in this Case Defendants' Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment filed by DTE Energy, Detroit Edison Company. (Attachments: # 1 Index of Exhibits Index of Exhibits, # 2 Exhibit Exhibit 1: Letter from Rosenberg to Dingell (6/19/1991), # 3 Exhibit Exhibit 2: U.S. Resp. & Objections to Detroit Edison's First Set of Req. for Admis. (excerpts), # 4 Exhibit Exhibit 3: Transcript of 30(b)(6) Deposition of Michael Sewell, U.S. v. Ky. Utilities (excerpts)) (Brownell, F.) (Entered: 08/01/2011)
08/01/2011	128	MOTION for Leave to File Exhibit Under Seal by DTE Energy, Detroit Edison Company. (Brownell, F.) (Entered: 08/01/2011)
08/01/2011	129	SEALED EXHIBIT Exhibit 4 - Supplemental Expert Report of J. Golden (June 3, 2011) (excerpt) (Confidential) re 128 MOTION for Leave to File Exhibit Under Seal, 127 Response to Motion,, 117 MOTION for Partial Summary Judgment on the Legal Standards in this Case by DTE Energy, Detroit Edison Company. (Brownell, F.) (Entered: 08/01/2011)
08/04/2011	130	ORDER for Additional Briefing., (Brief due by 8/8/2011) Signed by District Judge Bernard A. Friedman. (MWil) (Entered: 08/04/2011)
08/05/2011	131	ORDER granting 128 Motion for Leave to File. Signed by District Judge Bernard A. Friedman. (MWil) (Entered: 08/05/2011)
08/05/2011	132	MOTION in Limine to Strike Defendants' Experts' Sur-Rebuttal Reports by United States. (Benson, Thomas) (Entered: 08/05/2011)
08/05/2011	133	ORDER REFERRING MOTION to Magistrate Judge R. Steven Whalen: 132 MOTION in Limine to Strike Defendants' Experts' Sur-Rebuttal Reports filed by United States. Signed by District Judge Bernard A. Friedman. (MWil) (Entered: 08/05/2011)
08/05/2011	134	MOTION in Limine to Exclude the Opinions of Edward Rothman by DTE Energy, Detroit Edison Company. (Attachments: # 1 Index of Exhibits Index of Exhibits, # 2 Exhibit Exhibit 4: Rothman Spreadsheet) (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	135	MOTION for Leave to File Exhibits Under Seal [Rothman] by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	136	SEALED EXHIBIT 1: Deposition Transcript of Edward Rothman (7/20/2011) re 135 MOTION for Leave to File Exhibits Under Seal [Rothman], 134 MOTION in Limine to Exclude the Opinions of Edward Rothman by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	137	SEALED EXHIBIT 2: Expert Report of Dr. Edward Rothman (4/22/2011) re 135 MOTION for Leave to File Exhibits Under Seal [Rothman], 134 MOTION in Limine to Exclude the Opinions of Edward Rothman by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	138	SEALED EXHIBIT 3: Expert Report of Philip Hayet (4/22/2011) re 135 MOTION for Leave to File Exhibits Under Seal [Rothman], 134 MOTION in Limine to Exclude the Opinions of Edward Rothman by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	139	SEALED EXHIBIT 5: Rebuttal & Supplemental Expert Report of Philip Hayet (7/5/2011 revised) re 135 MOTION for Leave to File Exhibits Under Seal [Rothman], 134 MOTION in Limine to Exclude the Opinions of Edward Rothman by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	140	SEALED EXHIBIT 6: Surrebuttal Expert Report of Mike King (8/1/2011) re 135 MOTION for Leave to File Exhibits Under Seal [Rothman], 134 MOTION in Limine to Exclude the Opinions of Edward Rothman by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	141	MOTION in Limine to Exclude the Opinions of Robert H. Koppe and Ranajit Sahu by DTE Energy, Detroit Edison Company. (Attachments: # 1 Index of Exhibits Index of Exhibits, # 2 Exhibit Exhibit 1: U.S. v. Ala. Power Co. (3/14/2011), # 3 Exhibit Exhibit 2: GADS Data Reporting Instructions, # 4 Exhibit Exhibit 4: U.S. v. Cinergy Trial Transcript Vol. 3 (5/13/2009), # 5 Exhibit Exhibit 5: U.S. v. Cinergy Trial Transcript Vol. 7 (5/13/2008), # 6 Exhibit Exhibit 6: U.S. v. Cinergy Order (12/29/2010), # 7 Exhibit Exhibit 7: U.S. v. Ala Power Co. Final Judgment Order (3/15/2011)) (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	142	MOTION for Leave to File Exhibits Under Seal [Koppe/Sahu] by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)

08/05/2011	143	SEALED EXHIBIT 3: Expert Report of Ranajit (Ron) Sahu (Apr. 22, 2011) re 141 MOTION in Limine to Exclude the Opinions of Robert H. Koppe and Ranajit Sahu, 142 MOTION for Leave to File Exhibits Under Seal [Koppe/Sahu] by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	144	SEALED EXHIBIT 8: Expert Report of Robert Koppe (Apr. 22, 2011) re 141 MOTION in Limine to Exclude the Opinions of Robert H. Koppe and Ranajit Sahu, 142 MOTION for Leave to File Exhibits Under Seal [Koppe/Sahu] by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	145	SEALED EXHIBIT 9: Supplemental Expert Report of Mike King (June 3, 2011) re 141 MOTION in Limine to Exclude the Opinions of Robert H. Koppe and Ranajit Sahu, 142 MOTION for Leave to File Exhibits Under Seal [Koppe/Sahu] by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	146	SEALED EXHIBIT 10: Deposition of Paul Fessler (June 8, 2011) re 141 MOTION in Limine to Exclude the Opinions of Robert H. Koppe and Ranajit Sahu, 142 MOTION for Leave to File Exhibits Under Seal [Koppe/Sahu] by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	147	SEALED EXHIBIT 11: Rebuttal and Supplemental Expert Report of Robert Koppe (July 6, 2011) re 141 MOTION in Limine to Exclude the Opinions of Robert H. Koppe and Ranajit Sahu, 142 MOTION for Leave to File Exhibits Under Seal [Koppe/Sahu] by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	148	MOTION in Limine to Exclude the Opinions of Philip Hayet by DTE Energy, Detroit Edison Company. (Attachments: # 1 Index of Exhibits) (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	149	MOTION for Leave to File Exhibits Under Seal [Hayet] by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	150	SEALED EXHIBIT 1: Expert Report of Philip Hayet (4/22/2011) re 148 MOTION in Limine to Exclude the Opinions of Philip Hayet, 149 MOTION for Leave to File Exhibits Under Seal [Hayet] by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	151	SEALED EXHIBIT 2: Rebuttal and Supplemental Expert Report of Philip Hayet (July 5, 2011 revised) re 148 MOTION in Limine to Exclude the Opinions of Philip Hayet, 149 MOTION for Leave to File Exhibits Under Seal [Hayet] by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	152	SEALED EXHIBIT 3: Deposition of Philip Hayet (7/15/2011) (excerpts) re 148 MOTION in Limine to Exclude the Opinions of Philip Hayet, 149 MOTION for Leave to File Exhibits Under Seal [Hayet] by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/08/2011	153	RESPONSE to 130 Order, Set Deadlines/Hearings Joint Response to Order for Additional Briefing Entered August 4, 2011 by DTE Energy, Detroit Edison Company, Natural Resources Defense Council, Sierra Club, United States. (Johnson, Harry) (Entered: 08/08/2011)
08/10/2011	154	MOTION for Leave to File Certain Exhibits Under Seal, MOTION for Leave to File Excess Pages on Reply in Support of Plaintiff's Motion for Partial Summary Judgment on the Legal Standards at Issue in This Case by United States. (Quinn, Elias) (Entered: 08/10/2011)
08/10/2011	155	REPLY to Response re 117 MOTION for Partial Summary Judgment on the Legal Standards in this Case filed by United States. (Attachments: # 1 Index of Exhibits, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4) (Quinn, Elias) (Entered: 08/10/2011)
08/10/2011	156	SEALED EXHIBIT S 1, 5, and 6 re 155 Reply to Response to Motion by United States. (Attachments: # 1 Exhibit Sealed Exhibit 1 to ECF No. 155, # 2 Exhibit Sealed Exhibit 5 to ECF No. 155, # 3 Exhibit Sealed Exhibit 6 to ECF No. 155) (Quinn, Elias) (Entered: 08/10/2011)
08/10/2011	157	REPLY to Response re 116 MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) filed by DTE Energy, Detroit Edison Company. (Attachments: # 1 Index of Exhibits Index of Exhibits, # 2 Exhibit Exhibit 1: Stipulation of Dismissal in U.S. v. Duke Energy (M.D.N.C.), # 3 Exhibit Exhibit 2: Complaint in U.S. v. Duke Energy (M.D.N.C.), # 4 Exhibit Exhibit 3: Slip Opinion in Sierra Club v. TVA (N.D. Ala.)) (Brownell, F.) (Entered: 08/10/2011)
08/10/2011	158	REPLY to Response re 116 MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) Reply in Response to Intervenor-Plaintiffs' Opposition filed by DTE Energy, Detroit Edison Company. (Attachments: # 1 Exhibit Exhibit

		1: BNA article (5/10/2004) (excerpt)) (Brownell, F.) (Entered: 08/10/2011)
08/18/2011	159	ORDER Staying Deadlines. Signed by District Judge Bernard A. Friedman. (MWil) (Entered: 08/18/2011)
08/23/2011	160	MEMORANDUM OPINION and ORDER granting 107 Defendants' MOTION for Summary Judgment Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 08/23/2011)
08/23/2011	161	JUDGMENT in favor of Defendants against Plaintiff Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 08/23/2011)
10/20/2011	162	NOTICE OF APPEAL by United States. Fee Status: No Fee Paid. (Benson, Thomas) (Entered: 10/20/2011)
10/21/2011	163	CERTIFICATE OF SERVICE re 162 Notice of Appeal. (DPer) (Entered: 10/21/2011)
03/28/2013	164	JUDGMENT from U.S. Court of Appeals - Sixth Circuit re 162 Notice of Appeal filed by United States - Disposition: The judgment of the district court is REVERSED, and the case is REMANDED for further proceedings consistent with the opinion of this court. [Appeal Case Number 11-2328] (KKra) (Entered: 04/08/2013)
05/20/2013	167	MANDATE from U.S. Court of Appeals - Sixth Circuit as to 162 Notice of Appeal filed by United States [Appeal Case Number 11-2328] (KKra) (Entered: 05/23/2013)
05/22/2013	165	MOTION for Leave to File Motion for Summary Judgment and for Scheduling Order by All Defendants. (Attachments: # 1 Index of Exhibits, # 2 Exhibit Ex. 1: U.S. v. DTE Energy Co. (6th Cir. Mar. 28, 2013), # 3 Exhibit Ex. 2: Transcript PI Hearing (E.D. Mich. Jan. 19, 2011) (excerpt)) (Brownell, F.) (Entered: 05/22/2013)
05/22/2013	166	MOTION for Summary Judgment Based on Compliance with Pre-Construction Projection Requirements by All Defendants. (Attachments: # 1 Index of Exhibits, # 2 Exhibit Ex. 1: EPA, Notice and Finding of Violation (June 4, 2010), # 3 Exhibit Ex. 2: Declaration of Skiles Boyd (Nov. 3, 2010), # 4 Exhibit Ex. 3: Notification Letter (Mar. 12, 2010), # 5 Exhibit Ex. 4: Supplemental Declaration of Skiles Boyd (May 20, 2013), # 6 Exhibit Ex. 5: Transcript of Usitalo 30(b)(6) Deposition (excerpt)) (Brownell, F.) (Entered: 05/22/2013)
05/24/2013	168	MOTION Requesting Status Conference by United States. (Attachments: # 1 Exhibit P.I. Hearing Transcript Excerpt) (Quinn, Elias) (Entered: 05/24/2013)
05/28/2013	169	NOTICE TO APPEAR : Status/Scheduling Conference set for 6/5/2013 01:00 PM before District Judge Bernard A. Friedman (CMul) (Entered: 05/28/2013)
06/03/2013	170	STIPULATION AND ORDER re 169 Notice to Appear (Status/ Scheduling Conference reset for Thursday, 6/20/2013 01:00 PM before District Judge Bernard A. Friedman) Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 06/03/2013)
06/12/2013	171	ATTORNEY APPEARANCE: Nicholas J. Schroeck appearing on behalf of Natural Resources Defense Council, Sierra Club (Schroeck, Nicholas) (Entered: 06/12/2013)
06/13/2013	172	DTE's Report in Advance of Status Conference REPORT by All Defendants (Attachments: # 1 Exhibit P.I. Hearing Transcript 1/19/2011 (excerpt)) (Brownell, F.) (Entered: 06/13/2013)
06/14/2013	173	NOTICE of Appearance by Shannon W. Fisk on behalf of Sierra Club. (Fisk, Shannon) (Entered: 06/14/2013)
06/20/2013		Minute Entry for proceedings held before District Judge Bernard A. Friedman: Motion Hearing held on 6/20/2013 re 165 MOTION for Leave to File Motion for Summary Judgment and for Scheduling Order filed by Detroit Edison Company, DTE Energy Disposition: Motion granted and briefing dates established.(Court Reporter Joan Morgan) (CMul) (Entered: 06/20/2013)
07/03/2013	174	ORDER granting 165 Motion for Leave to File. Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 07/03/2013)
07/03/2013	175	ORDER on briefing re 166 MOTION for Summary Judgment Based on Compliance with Pre-Construction Projection Requirements filed by Detroit Edison Company, DTE Energy. Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 07/03/2013)
07/03/2013	176	NOTICE TO APPEAR BY TELEPHONE: Status Conference set for 10/9/2013 02:00 PM before District Judge Bernard A. Friedman (CMul) (Entered: 07/03/2013)
08/01/2013	177	MOTION for Leave to File Opposition Brief and Supporting Documents Under Seal by United States. (Attachments: # 1 Proposed Order) (Quinn, Elias) (Entered: 08/01/2013)
08/02/2013	178	SEALED RESPONSE re 166 Motion for Summary Judgment,, regarding DTE's Preconstruction Compliance by United States. (Attachments: # 1 Index of Exhibits, # 2 Exhibit A - Project Authorization Documents, # 3 Exhibit B - Capital Plan Summary, # 4 Exhibit C - DTE RFA Responses, # 5 Exhibit D - Final ROR Inputs, # 6 Exhibit E - White Email, # 7 Exhibit F - Reliability Improvement Study, # 8 Exhibit G - Hayett Report, # 9 Exhibit H - Fessler Depo Excerpt) (Quinn, Elias) (Entered: 08/02/2013)
08/02/2013	179	RESPONSE to 166 MOTION for Summary Judgment Based on Compliance with Pre-Construction Projection Requirements - Opposition to Motion filed by Sierra Club. (Fisk, Shannon) (Entered: 08/02/2013)
08/06/2013	180	ORDER granting 177 Motion for Leave to File. Signed by District Judge Bernard A. Friedman.

		(CMul) (Entered: 08/06/2013)
08/16/2013	181	NOTICE by United States re 178 Sealed Response to Motion,, of Redacted Filing (Attachments: # 1 U.S. Opposition Brief, # 2 Index of Exhibits, # 3 Exhibit A (redacted), # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Exhibit G (redacted), # 8 Exhibit H) (Quinn, Elias) (Entered: 08/16/2013)
08/19/2013	182	MOTION for Leave to File Excess Pages for Reply Brief in Support of Defendants' Motion for Summary Judgment by All Defendants. (Sibley - NOT SWORN, George) (Entered: 08/19/2013)
08/23/2013	183	REPLY to Response re 166 MOTION for Summary Judgment Based on Compliance with Pre-Construction Projection Requirements filed by DTE Energy, Detroit Edison Company. (Attachments: # 1 Exhibit Ex. 1 - Complaint in U.S. v. OGE, No. 13-690 (W.D. Okla.)) (Brownell, F.) (Entered: 08/23/2013)
09/03/2013	184	MOTION for Leave to File First Amended Complaint by United States. (Attachments: # 1 Index of Exhibits, # 2 Att. 1 (Proposed Amended Complaint), # 3 Att. 2 (Excerpts of Preliminary Injunction Transcript), # 4 Att. 3 (3.September 19, 2007 Letter, W. Rugenstein to W. Presson), # 5 Att. 4 (4.March 6, 2007 Letter, W. Rugenstein to L. Fiedler), # 6 Att. 5 (5.February 26, 2010 Letter, K. Guertin to T. Seidel)) (Benson, Thomas) (Entered: 09/03/2013)
09/06/2013	185	STIPULATION of Dismissal of Natural Resources Defense Council's Claims in Intervention Pursuant to FRCP 41(A)(1) by Natural Resources Defense Council, Sierra Club (Schroeck, Nicholas) (Entered: 09/06/2013)
09/06/2013	186	MOTION for Leave to File a First Amended Complaint by Sierra Club. (Attachments: # 1 Exhibit First Amended Complaint) (Fisk, Shannon) (Entered: 09/06/2013)
09/20/2013	187	RESPONSE to 184 MOTION for Leave to File First Amended Complaint filed by DTE Energy, Detroit Edison Company. (Attachments: # 1 Index of Exhibits Index of Exhibits, # 2 Exhibit Ex. 1: 2009 NOV, # 3 Exhibit Ex. 2: MDEQ PSD Workbook (Oct. 2003) (excerpt), # 4 Exhibit Ex. 3: Letter to EPA (June 23, 2010), # 5 Exhibit Ex. 4: Boyd Declaration (Nov. 3, 2010), # 6 Exhibit Ex. 5: DTE Presentation (July 23, 2007), # 7 Exhibit Ex. 6: DTE Presentation (Apr. 23, 2008), # 8 Exhibit Ex. 7: 2008 NSR Emissions Report for Trenton Channel (Feb. 21, 2009)) (Brownell, F.) (Entered: 09/20/2013)
09/20/2013	188	STIPULATION of Parties Extending the Dealines to File Reply Briefs in Support of Motions to Amend the Complaint by Sierra Club, United States (Furrie, Kristin) (Entered: 09/20/2013)
09/23/2013	189	RESPONSE to 186 MOTION for Leave to File a First Amended Complaint filed by DTE Energy, Detroit Edison Company. (Brownell, F.) (Entered: 09/23/2013)
10/01/2013	190	MOTION to Stay the Briefing Schedule and Reschedule the Status Conference due to a Lack in Appropriations by United States. (Furrie, Kristin) (Entered: 10/01/2013)
10/02/2013		TEXT-ONLY NOTICE: Hearing on October 9, 2013 is Cancelled (CMul) (Entered: 10/02/2013)
10/03/2013	191	ORDER granting 190 Motion to Stay. Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 10/03/2013)
10/18/2013	192	NOTICE by United States of Restored Appropriations and Stipulated Order Extending Deadlines for Reply Briefs (Quinn, Elias) (Entered: 10/18/2013)
10/21/2013	193	STIPULATION AND ORDER LIFTING STAY and establishing briefing deadlines Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 10/21/2013)
10/25/2013	194	REPLY to Response re 184 MOTION for Leave to File First Amended Complaint filed by United States. (Furrie, Kristin) (Entered: 10/25/2013)
10/25/2013	195	REPLY to Response re 186 MOTION for Leave to File a First Amended Complaint filed by Sierra Club. (Fisk, Shannon) (Entered: 10/25/2013)
03/03/2014	196	OPINION AND ORDER granting 166 Motion for Summary Judgment. Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 03/03/2014)
03/04/2014	197	Notice of E-mail Delivery Failure as to attorney Justin Savage. Bounced NEF for 196 Order on Motion for Summary Judgment. (SSch) (Entered: 03/04/2014)
03/11/2014	198	Ex Parte MOTION for Withdrawal of Attorney Justin Savage by United States. (Benson, Thomas) (Entered: 03/11/2014)
03/11/2014	199	ORDER granting 198 Motion to Withdraw as Attorney.. Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 03/11/2014)
04/02/2014	200	MOTION for Leave to File Any Rule 54(b) Motion by June 30, 2014 by United States. (Benson, Thomas) (Entered: 04/02/2014)
04/02/2014	201	MOTION Certification of Partial Final Judgment by Sierra Club. (Attachments: # 1 Index of Exhibits, # 2 Exhibit A, # 3 Exhibit B) (Fisk, Shannon) (Entered: 04/02/2014)
04/09/2014	202	ORDER granting 184 Motion for Leave to File;and granting 186 Motion for Leave to File Amended Complaints. Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 04/09/2014)

04/09/2014	203	AMENDED COMPLAINT filed by United States against DTE Energy, Detroit Edison Company. NO NEW PARTIES ADDED. (Benson, Thomas) (Entered: 04/09/2014)
04/11/2014	204	RESPONSE to 201 MOTION Certification of Partial Final Judgment , 200 MOTION for Leave to File Any Rule 54(b) Motion by June 30, 2014 filed by DTE Energy, Detroit Edison Company. (Brownell, F.) (Entered: 04/11/2014)
04/11/2014	205	MOTION for Reconsideration re 202 Order on Motion for Leave to File, Motion for Reconsideration or Clarification by DTE Energy, Detroit Edison Company. (Brownell, F.) (Entered: 04/11/2014)
04/16/2014	206	NOTICE of Appearance by Susan L. Williams on behalf of Sierra Club. (Williams, Susan) (Entered: 04/16/2014)
04/18/2014	207	(STRICKEN 4/23/2014) RESPONSE to 205 MOTION for Reconsideration re 202 Order on Motion for Leave to File, Motion for Reconsideration or Clarification filed by Sierra Club. (Fisk, Shannon) Modified on 4/23/2014 (CMul). (Entered: 04/18/2014)
04/23/2014	208	NOTICE TO APPEAR BY TELEPHONE: Tele/Status Conference set for 5/13/2014 01:00 PM before District Judge Bernard A. Friedman Plaintiff to initiate call/ or circulate call-in number. (CMul) (Entered: 04/23/2014)
04/23/2014	209	ORDER to Strike 207 Response to Motion filed by Sierra Club. Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 04/23/2014)
04/24/2014	210	MOTION for Leave to File Response to Defendants' Motion for Reconsideration or Clarification by Sierra Club. (Attachments: # 1 Exhibit A) (Fisk, Shannon) (Entered: 04/24/2014)
04/24/2014	211	MOTION for Extension of Time to File Answer re 203 Amended Complaint by DTE Energy, Detroit Edison Company. (Brownell, F.) (Entered: 04/24/2014)
04/30/2014	212	NOTICE of Appearance by Mary M. Whittle on behalf of Sierra Club. (Whittle, Mary) (Entered: 04/30/2014)
05/13/2014	213	ORDER granting 200 Motion for Leave to File; and stay ruling on 201 intervenor-plaintiffs motion for certification ofpartial final judgment. Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 05/13/2014)
05/13/2014		Minute Entry for proceedings held before District Judge Bernard A. Friedman: Telephonic Status Conference held on 5/13/2014 Disposition: Motion for leave to file response to reconsideration is granted. Motion for reconsideration is granted. Motion for extension of time to answer amended complaint is granted.(Court Reporter Joan Morgan) (CMul) (Entered: 05/14/2014)
05/22/2014	214	AMENDED COMPLAINT filed by Sierra Club against DTE Energy, Detroit Edison Company. NO NEW PARTIES ADDED. (Fisk, Shannon) (Entered: 05/22/2014)
05/27/2014	215	MOTION for Extension of Time to File Answer re 214 Amended Complaint by DTE Energy, Detroit Edison Company. (Brownell, F.) (Entered: 05/27/2014)
06/17/2014	216	ORDER granting 215 Motion for Extension of Time to Answer. Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 06/17/2014)
06/30/2014	217	ORDER granting in part 205 Motion for Reconsideration ; granting 210 Motion for Leave to File; and granting 211 Motion for Extension of Time to Answer All Defendants.. Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 06/30/2014)
06/30/2014	218	MOTION for Judgment Pursuant to Rule 54(b) by United States. (Benson, Thomas) (Entered: 06/30/2014)
06/30/2014	219	MOTION to Stay District Court Proceedings Pending Resolution of Appeals by DTE Energy, Detroit Edison Company. (Brownell, F.) (Entered: 06/30/2014)
08/05/2014	220	ORDER granting 201 Motion for partial summary judgment; granting 218 Motion for partial summary judgment; and granting 219 Motion to Stay pending appeals. Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 08/05/2014)
10/03/2014	221	NOTICE OF APPEAL by United States. Fee Status: No Fee Paid. (Benson, Thomas) (Entered: 10/03/2014)
10/03/2014	222	NOTICE OF APPEAL by Sierra Club re 196 Order on Motion for Summary Judgment, 220 Order on Motion - Free, Order on Motion for Judgment, Order on Motion to Stay. Receipt No: 0645-4843691 - Fee: $ 505 - Fee Status: Fee Paid. (Fisk, Shannon) (Entered: 10/03/2014)
10/03/2014	223	Certificate of Service re 221 Notice of Appeal. (KKra) (Entered: 10/03/2014)
10/03/2014	224	Certificate of Service re 222 Notice of Appeal,. (KKra) (Entered: 10/03/2014)
10/15/2014		Court Reporter Acknowledgment of Transcript Order Form received on October 13, 2014. Transcript for court proceeding held on: June 20, 2013; May 13, 2014. Estimated transcript completion date: Sept. 22, 2014. Estimated number of pages: 50. Payment arrangements were made on October 13, 2014. (Morgan, J) (Entered: 10/15/2014)
10/21/2014	225	TRANSCRIPT of Telephonic Conference held on May 13, 2014. (Court Reporter/Transcriber:

		Joan L. Morgan) (Number of Pages: 6) (Appeal Purposes) The parties have 21 days to file with the court and Court Reporter/Transcriber a Redaction Request of this transcript. If no request is filed, the transcript may be made remotely electronically available to the public without redaction after 90 days. Redaction Request due 11/12/2014. Redacted Transcript Deadline set for 11/21/2014. Release of Transcript Restriction set for 1/20/2015. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date, the transcript is publicly available. (Morgan, J) (Entered: 10/21/2014)
10/21/2014	226	TRANSCRIPT of Telephonic Conference held on June 20, 2013. (Court Reporter/Transcriber: Joan L. Morgan) (Number of Pages: 20) (Appeal Purposes) The parties have 21 days to file with the court and Court Reporter/Transcriber a Redaction Request of this transcript. If no request is filed, the transcript may be made remotely electronically available to the public without redaction after 90 days. Redaction Request due 11/12/2014. Redacted Transcript Deadline set for 11/21/2014. Release of Transcript Restriction set for 1/20/2015. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date, the transcript is publicly available. (Morgan, J) (Entered: 10/21/2014)
10/24/2014		Court Reporter Acknowledgment of Transcript Order Form received on October 22, 2014. Transcript for court proceeding held on: June 20, 2013, May 13, 2014. Estimated transcript completion date: on file. Estimated number of pages: 26. Payment arrangements were made on October 22, 204. (Morgan, J) (Entered: 10/24/2014)
11/18/2014	227	Letter from Thomas A. Benson (CMul) (Entered: 11/18/2014)
01/10/2017	228	OPINION and JUDGMENT from U.S. Court of Appeals - Sixth Circuit re 222 Notice of Appeal, filed by Sierra Club, 221 Notice of Appeal filed by United States [Appeal Case Number 14-2274/14-2275] (Ahmed, N) Modified on 1/10/2017 (Ahmed, N). (Entered: 01/10/2017)
03/07/2017	229	ATTORNEY APPEARANCE: Andrea E. Hayden appearing on behalf of DTE Energy, Detroit Edison Company (Hayden, Andrea) (Entered: 03/07/2017)
05/16/2017	230	ORDER from U.S. Court of Appeals - Sixth Circuit re 222 Notice of Appeal, filed by Sierra Club, 221 Notice of Appeal filed by United States [Appeal Case Number 14-2274/14-2275] (Ahmed, N) (Entered: 05/16/2017)
08/02/2017	231	Ex Parte MOTION for Withdrawal of Attorney Mary M. Whittle by Sierra Club. (Fisk, Shannon) (Entered: 08/02/2017)
08/03/2017	232	(VACATED 8/4/17)ORDER granting 231 Motion to Withdraw as Attorney.. Signed by District Judge Bernard A. Friedman. (CMul) Modified on 8/4/2017 (CMul). (Entered: 08/03/2017)
08/04/2017	233	ORDER granting 231 Ex Parte MOTION for Withdrawal of Attorney Mary M. Whittle filed by Sierra Club. Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 08/04/2017)
08/04/2017		TEXT-ONLY ORDER vacating 232 Order on Motion to Withdraw as Attorney. (Wrong image attached). Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 08/04/2017)
08/07/2017	234	LETTER from the US Supreme Court that a petition for writ of certiorari was filed on 7/31/2017. [Supreme Court Case Number: 17-170] [Court of Appeals Case Number: 14-2274, 14-2275] (Ahmed, N) (Entered: 08/07/2017)
12/14/2017	235	LETTER from the US Supreme Court denying the petition for writ of certiorari [Supreme Court Case Number: 17-170] [Court of Appeals Case Number: 14-2274, 14-2275] (DWor) (Entered: 12/14/2017)
12/14/2017	236	MANDATE from U.S. Court of Appeals - Sixth Circuit as to 222 Notice of Appeal, filed by Sierra Club, 230 Appeal Order/Opinion/Judgment, 221 Notice of Appeal filed by United States [Appeal Case Number 14-2275/14-2274] (DWor) (Entered: 12/14/2017)
01/24/2018	237	NOTICE TO APPEAR: Status Conference set for 2/7/2018 01:00 PM before District Judge Bernard A. Friedman (JCur) (Entered: 01/24/2018)
02/01/2018	238	Joint MOTION to Stay Pending Settlement Negotiations by All Defendants. (Johnson, Harry) (Entered: 02/01/2018)
02/02/2018	239	ORDER granting 238 Joint Motion to Stay for 120 Days Pending Settlement Negotiations. Signed by District Judge Bernard A. Friedman. (JCur) (Entered: 02/02/2018)
02/02/2018		TEXT-ONLY NOTICE: Status Conference on 2/7/2018 is Cancelled 237 . (JCur) (Entered: 02/02/2018)
04/11/2018	240	NOTICE of Change of Address/Contact Information by F. William Brownell on behalf of DTE Energy, Detroit Edison Company. (Brownell, F.) (Entered: 04/11/2018)
06/11/2018	241	Joint MOTION Stay of Litigation by All Parties by United States. (Benson, Thomas) (Entered: 06/11/2018)
06/14/2018	242	ORDER granting 241 Joint Motion to Stay Case 180 days pending settlement negotiations. Signed by District Judge Bernard A. Friedman. (JCur) (Entered: 06/14/2018)
12/12/2018	243	Joint MOTION to Stay Litigation on Behalf of All Parties by United States. (Benson, Thomas) (Entered: 12/12/2018)

12/13/2018	244	ORDER granting 243 Joint Motion to Stay the Case for Six Months. Signed by District Judge Bernard A. Friedman. (JCur) (Entered: 12/13/2018)

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EXHIBIT B

Search documents in this case: Search

No. 17-170

Title:	**DTE Energy Company, et al., Petitioners** **v.** **United States, et al.**
Docketed:	August 2, 2017
Lower Ct:	United States Court of Appeals for the Sixth Circuit
Case Numbers:	(14-2274, 14-2275)
Decision Date:	January 10, 2017
Rehearing Denied:	May 1, 2017

DATE	PROCEEDINGS AND ORDERS
Jul 31 2017	Petition for a writ of certiorari filed. (Response due September 1, 2017)
Aug 22 2017	Order extending time to file response to petition to and including October 2, 2017, for all respondents.
Aug 31 2017	Brief amici curiae of The Electric Reliability Corrdinating Council, et al. filed.
Sep 26 2017	Order further extending time to file response to petition to and including November 1, 2017, for all respondents.

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Nov 01 2017	Brief of respondent United States in opposition filed.
Nov 01 2017	Brief of respondent Sierra Club in opposition filed.
Nov 15 2017	Reply of petitioners DTE Energy Company, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2017	DISTRIBUTED for Conference of 12/8/2017.
Dec 08 2017	Letter received from counsel for petitioners December 8, 2017. (Distributed)
Dec 11 2017	Petition DENIED.

NAME	ADDRESS	PHONE
Attorneys for Petitioners		
F. William Brownell Counsel of Record	Hunton & Williams LLP 2200 Pennsylvania Avenue, NW Washington, DC 20037 bbrownell@hunton.com	(202) 955-1500
Party name: DTE Energy Company, et al.		
Attorneys for Respondents		

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Noel Francisco Counsel of Record	Solicitor General United States Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-0001 SupremeCtBriefs@USDOJ.gov	202-514-2217
Party name: United States		
Michael Soules Counsel of Record	Earthjustice 1625 Massachusetts Avenue NW Suite 702 Washington , DC 20036 msoules@earthjustice.org	2026674500
Party name: Sierra Club		
Other		
Scott Howard Segal Counsel of Record	Bracewell, LLP 2001 M Street, NW Suite 900 Washington, DC 20036 scott.segal@bracewell.com	(202)-828-5845
Party name: The Electric Reliability Corrdinating Council, et al.		

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EXHIBIT C

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Mr. Kevin S. Minoli
Designated Agency Ethics Official
U.S. EPA (2310A)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Mr. Minoli:

The purpose of this letter is to describe the steps that I will take to avoid any actual or apparent conflict of interest in the event that I am confirmed for the position of Assistant Administrator for the Office of Air and Radiation of the United States Environmental Protection Agency.

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

Upon confirmation, I will resign from my position with the law firm of with Hunton & Williams LLP. I currently have a capital account with the firm, and I will receive a refund of that account after my resignation. Until I have received this refund, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of the firm to pay this refund, unless I first obtain a written waiver, pursuant to 18 U.S.C. 208(b)(1). I will continue to receive my monthly draw at the current rate until I resign from the law firm. I will not qualify for any additional partnership payments. If the law firm decides to pay me a discretionary partnership distribution for work I performed during the firm's fiscal year ending March 31, 2018, I will not accept that distribution and will forfeit it, unless I receive it before I assume the duties of the position of Assistant Administrator for the Office of Air and Radiation. If I receive the discretionary partnership distribution, I will not participate personally and substantially in any particular matter involving specific parties in which I know the law firm is a party or represents a party for a period of two years from the date on which I receive the distribution. If I do not receive the distribution, I will not participate personally and substantially in any particular matter involving specific parties in which I know the firm is a party or represents a party for a period of one year from the date of my resignation, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

If I have a managed account or otherwise use the services of an investment professional during my appointment, I will ensure that the account manager or investment professional obtains my prior approval on a case-by-case basis for the purchase of any assets other than cash, cash equivalents, investment funds that qualify for the exemption at 5 C.F.R. § 2640.201(a), obligations of the United States, or municipal bonds.

I will meet in person with you during the first week of my service in the position of Assistant Administrator in order to complete the initial ethics briefing required under 5 C.F.R. § 2638.305. Within 90 days of my confirmation, I will document my compliance with this ethics agreement by notifying you in writing when I have completed the steps described in this ethics agreement.

I understand that as an appointee I will be required to sign the Ethics Pledge (Exec. Order No. 13770) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this ethics agreement.

I have been advised that this ethics agreement will be posted publicly, consistent with 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with ethics agreements of other Presidential nominees who file public financial disclosure reports.

Sincerely yours,

William L. Wehrum

8-28-17

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EXHIBIT D

MEMORANDUM

SUBJECT: Recusal Statement

FROM: William L. Wehrum
Assistant Administrator

9-17-18

TO: Andrew R. Wheeler
Acting Administrator

I have previously consulted with the Office of General Counsel/Ethics (OGC/Ethics) and been advised about my ethics obligations. This memorandum formally notifies you of my continuing obligations to recuse myself from participating personally and substantially in certain matters in which I have a financial interest, or a personal or business relationship. I also understand that I have obligations pursuant to Executive Order 13770 and the Trump Ethics Pledge that I signed, as well as my own bar obligations.

FINANCIAL CONFLICTS OF INTEREST

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

I have consulted with OGC/Ethics and been advised that I do not currently have any financial conflicts of interest but will remain vigilant and notify OGC/Ethics immediately should my financial situation change.

OBLIGATIONS UNDER EXECUTIVE ORDER 13770

Pursuant to Section 1, Paragraph 6 of the Executive Order, I understand that I am prohibited from participating in any particular matter involving specific parties in which my former employer, **Hunton & Williams LLP** (now Hunton Andrews Kurth LLP), or any former client to whom I provided legal services during the past two years, is a party or represents a party. I understand that my recusal lasts for two years from the date that I joined federal service.

I have been advised by OGC/Ethics that, for the purposes of this pledge obligation, the term "particular matters involving specific parties" is broadened to include any meetings or other communication relating to the performance of my official duties, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties. I am further advised that the term "open to all interested parties" means five or more parties.

RECUSAL LIST In effect until November 12, 2019	
FORMER EMPLOYER: Hunton & Williams LLP (now Hunton Andrews Kurth LLP)	
FORMER CLIENTS:[1] Agrium Inc.; Agrium U.S. Inc.; Nu-West Industries, Inc. American Forest & Paper Association American Fuel & Petrochemical Manufacturers American Petroleum Institute B10 Litigation Coalition Brick Industry Association CEMEX USA, Inc. Champion Power Equipment, Inc. Chemical Safety Advocacy Group (CSAG) Chevron Corporation Diageo Dominion Resources Services, Inc. Duke Energy Corporation Enbridge, Inc. Evonik Corporation[2] ExxonMobil Corporation Flint Hills Resources, LP GPA Midstream Association (formally known as Gas Processors Association)	 General Electric Company Georgia-Pacific LLC Kinder Morgan, Inc. Koch Companies Public Sector, LLC Koch Industries, Inc. Lehigh Hanson, Inc. Lowe's Companies, Inc. National Stone, Sand and Gravel Association Pfizer Inc. Phillips 66 Company Portland Cement Association Prinoth Ltd. Salt River Project Spectra Energy Corp. Sunflower Electric Power Corporation, Inc. Tile Council of North America Utility Air Regulatory Group Utility Water Act Group Whitaker Greer Company

[1] Two confidential clients are not listed. Both clients have a written confidentiality agreement expressly prohibiting disclosure.

[2] Includes but not limited to an ongoing settlement negotiation.

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ATTORNEY BAR OBLIGATIONS

Pursuant to my obligations under my bar rules, I recognize that I am obliged to protect the confidences of my former clients. I also understand that I cannot participate in any matter that is the same as or substantially related to the same specific party matter that I participated in personally and substantially while in private practice, unless my bar provides for and I first obtain informed consent and notify OGC/Ethics. Attached is a list of cases I am recused from given my participation at Hunton Andrews Kurth LLP.

SCREENING ARRANGEMENT

In order to ensure that I do not participate in matters relating to any of the entities listed above or matters identified in the Attachment, I will instruct Josh Lewis, Chief of Staff, and Mandy Gunasekara, Principal Deputy Assistant Administrator, to assist in screening EPA matters directed to my attention that involve those entities. All inquiries and comments involving the entities or matters on my recusal list should be directed to Josh and Mandy without my knowledge or involvement until after my recusal period ends.

If Josh or Mandy determine that a particular matter will directly involve any of the entities or matters listed on my "specific party" recusal list, then they will refer it for action or assignment to another, without my knowledge or involvement. In the event that they are unsure whether an issue is a particular matter from which I am recused, then they will consult with OGC/Ethics for a determination. I will provide a copy of this memorandum to my principal subordinates with a copy to Justina Fugh, Senior Counsel for Ethics.

UPDATE AS NECESSARY

In consultation with OGC/Ethics, I will revise and update my recusal statement whenever warranted by changed circumstances, including changes in my financial interests, changes in my personal or business relationships, or any changes to my EPA duties. In the event of any changes to my recusal or screening arrangement, I will provide a copy of the revised recusal statement to OGC/Ethics.

Attachment

cc: Matthew Z. Leopold, General Counsel
Ryan Jackson, Chief of Staff
Mandy Gunesakara, Deputy Assistant Administrator
Clint Woods, Deputy Assistant Administrator
Elizabeth Shaw, Deputy Assistant Administrator
David Harlow, Senior Counsel
Josh Lewis, Chief of Staff
Kevin Minoli, Designated Agency Ethics Official
Justina Fugh, Senior Counsel for Ethics

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William L. Wehrum RECUSAL LIST – ATTORNEY BAR OBLIGATIONS	
CASE NAME:	CITATION:
American Petroleum Institute v. EPA	No. 08-1277 (D.C. Cir.)
Environmental Integrity Project v. EPA	No. 08-1281 (D.C. Cir.) (consolidated with No. 08-1277)
Kinder Morgan CO2 Co., LP v. EPA	No. 09-1332 (D.C. Cir.)
Gas Processors Association v. EPA	No. 11-1023 (D.C. Cir.)
American Petroleum Institute, *et al.* v. EPA	No. 11-1309 (D.C. Cir.)
National Rural Electric Coop. v. EPA	No. 12-1208 (D.C. Cir.) (consolidated with No. 12-1163)
National Rural Electric Coop. v. EPA	No. 12-1352 (D.C. Cir.) (consolidated with No. 12-1346)
American Petroleum Institute v. EPA	No. 12-1405 (D.C. Cir.)
Gas Processors Association v. EPA	No. 12-1406 (D.C. Cir.) (consolidated with No. 12-1405)
American Petroleum Institute, *et al.* v. EPA	No. 12-1442 (D.C. Cir.)
American Petroleum Institute v. EPA	No. 13-1063 (D.C. Cir.) (consolidated with No. 11-1309)
American Petroleum Institute v. EPA	No. 13-1108 (D.C. Cir.)
Conservation Law Foundation, *et al.* v. EPA	No. 13-1233 (D.C. Cir.)
Sierra Club, *et al.* v. EPA	No. 13-1256 (D.C. Cir.) (consolidated with No. 16-1021)
American Petroleum Institute v. EPA	No. 13-1289 (D.C. Cir.) (consolidated with No. 13-1108)
PSEG Power LLC, *et al.* v. EPA	No. 14-1199 (D.C. Cir.) (consolidated with No. 13-1233)
Georgia-Pacific LLC v. EPA	No. 14-1267 (D.C. Cir.)
Gas Processors Association v. EPA	No. 15-1021 (D.C. Cir.) (consolidated with No. 15-1020)
American Petroleum Institute v. EPA	No. 15-1044 (D.C. Cir.) (consolidated with No. 13-1108)
American Petroleum Institute v. EPA	No. 15-1197 (D.C. Cir.)
Gas Processors Association v. EPA	No. 15-1473 (D.C. Cir.)
Sierra Club, *et al.* v. EPA, *et al.*	No. 15-1487 (D.C. Cir.)
Brick Industry Association v. EPA	No. 15-1492 (D.C. Cir.) (consolidated with No. 15-1487)
Sierra Club, *et al.* v. EPA, *et al.*	No. 16-1021 (D.C. Cir.)
American Fuel & Petrochemical, *et al.* v. EPA	No. 16-1033 (D.C. Cir.)
Air Alliance Houston, *et al.* v. EPA, *et al.*	No. 16-1035 (D.C. Cir.) (consolidated with No. 16-1033)
Brick Industry Association v. EPA	No. 16-1179 (D.C. Cir.) (consolidated with No. 15-1487)

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American Petroleum Institute v. EPA	No. 16-1270 (D.C. Cir.) (consolidated with No. 13-1108)
American Petroleum Institute v. EPA	No. 16-1271 (D.C. Cir.)
American Petroleum Institute v. EPA	No. 16-1345 (D.C. Cir.) (consolidated with No. 16-1344)
Natural Resources Defense Council v. EPA	No. 16-1425 (D.C. Cir.)
Utility Air Regulatory Group v. EPA	No. 17-1088 (D.C. Cir.) (consolidated with No. 17-1085)

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EXHIBIT E

To: Jackson, Ryan[jackson.ryan@epa.gov]
From: Wehrum, William L.
Sent: Fri 8/11/2017 2:28:01 PM
Subject: David Harlow

Ryan – Following up:

dharlow@hunton.com

cell: [redacted]

HUNTON & WILLIAMS **Bill Wehrum**

Partner

wwehrum@hunton.com
p 202.955.1637

bio | vCard | blog | LinkedIn

Hunton & Williams LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037

hunton.com

EXHIBIT F

Executive Branch Personnel
Public Financial Disclosure Report (OGE Form 278e)

Filer's Information

Harlow, David

Senior Counsel to the Assistant Administrator for Air and Radiation, Environmental Protection Agency

Date of Appointment: 10/01/2017

Other Federal Government Positions Held During the Preceding 12 Months:
None

Electronic Signature - I certify that the statements I have made in this form are true, complete and correct to the best of my knowledge.

/s/ Harlow, David [electronically signed on 10/28/2017 by Harlow, David in Integrity.gov]

Agency Ethics Official's Opinion - On the basis of information contained in this report, I conclude that the filer is in compliance with applicable laws and regulations (subject to any comments below).
/s/ Fugh, Justina, Certifying Official [electronically signed on 12/18/2017 by Fugh, Justina in Integrity.gov]

Other review conducted by

U.S. Office of Government Ethics Certification

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Data Revised 12/07/2017

Data Revised 11/17/2017

Data Revised 11/13/2017

Data Revised 11/12/2017

Released via FOIA EPA-2019-008216

1. Filer's Positions Held Outside United States Government

#	ORGANIZATION NAME	CITY, STATE	ORGANIZATION TYPE	POSITION HELD	FROM	TO
1	Hunton & Williams, LLP	Washington, District of Columbia	Law Firm	Counsel	8/1986	9/2017

2. Filer's Employment Assets & Income and Retirement Accounts

#	DESCRIPTION	EIF	VALUE	INCOME TYPE	INCOME AMOUNT
1	Hunton & Williams, LLP (law firm)	N/A		Salary	$421,189
2	Fidelity 401(k)				
2.1	Neuberger Berman Genesis Fund Class R6 (NRGSX)	Yes	$100,001 - $250,000		None (or less than $201)
2.2	Dodge & Cox Stock Fund (DODGX)	Yes	$100,001 - $250,000		None (or less than $201)
2.3	Fidelity Puritan Fund (FPURX)	Yes	$100,001 - $250,000		None (or less than $201)
2.4	Fidelity Managed Income Portfolio Class 1	Yes	$50,001 - $100,000		None (or less than $201)
2.5	Fidelity Diversified International Fund Class K (FDIKX)	Yes	$15,001 - $50,000		None (or less than $201)
2.6	Wells Fargo Stable Value Fund Q	Yes	$1,001 - $15,000		None (or less than $201)

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3. Filer's Employment Agreements and Arrangements

#	EMPLOYER OR PARTY	CITY, STATE	STATUS AND TERMS	DATE
1	Hunton & Williams LLP	Richmond, Virginia	I will continue to participate in this defined contribution plan, but the plan sponsor no longer makes contributions.	8/1986

4. Filer's Sources of Compensation Exceeding $5,000 in a Year

#	SOURCE NAME	CITY, STATE	BRIEF DESCRIPTION OF DUTIES
1	Hunton & Williams, LLP	Washington, District of Columbia	Provide legal advice and other services to clients.
2	Agrium Inc. & NU-West Industries, Inc.	Bellevue, Washington	Provide legal advice and services.
3	Chevron Corporation	San Ramon, California	Provide legal advice and services.
4	George R. Jarkesy, Jr.	Unknown	Provide legal advice and services.
5	LG&E and KU Energy, LLC	Louisville, Kentucky	Provide legal advice and services.
6	National Stone, Sand & Gravel Association	Alexandria, Virginia	Provide legal advice and services.
7	Sunflower Electric Power Corp.	Hays, Kansas	Provide legal services and services.
8	Utility Air Regulatory Group	Washington, District of Columbia	Provide legal advice and services.

5. Spouse's Employment Assets & Income and Retirement Accounts

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#	DESCRIPTION	EIF	VALUE	INCOME TYPE	INCOME AMOUNT
1	American Century Heritage TWHIX IRA	Yes	$50,001 - $100,000		None (or less than $201)

6. Other Assets and Income

#	DESCRIPTION	EIF	VALUE	INCOME TYPE	INCOME AMOUNT
1	American Century Ultra Fund Investor Class (TWCUX)	Yes	$15,001 - $50,000		$1,001 - $2,500
2	Charles Schwab Brokerage Account	No	$15,001 - $50,000		None (or less than $201)
2.1	Cash/Money Market Account	N/A	$15,001 - $50,000		None (or less than $201)
3	Merrill Lynch AXA	No	$500,001 - $1,000,000		None (or less than $201)
3.1	AXA Large Cap Growth Managed Vola	Yes	$50,001 - $100,000		None (or less than $201)
3.2	AXA Large Cap Value Managed Vol	Yes	$50,001 - $100,000		None (or less than $201)
3.3	EQ/Core Bond In	Yes	$50,001 - $100,000		None (or less than $201)
3.4	AXA Large Cap Core Managed Vol	Yes	$15,001 - $50,000		None (or less than $201)
3.5	Multimanager Technot	Yes	$15,001 - $50,000		None (or less than $201)
3.6	EQ/International Equity Index	Yes	$15,001 - $50,000		None (or less than $201)
3.7	EQ/Quality Bond PLUS	Yes	$50,001 - $100,000		None (or less than $201)

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#	DESCRIPTION	EIF	VALUE	INCOME TYPE	INCOME AMOUNT
3.8	AXA Moderate Allocation	Yes	$15,001 - $50,000		None (or less than $201)
3.9	AXA International Core Managed Volatility	Yes	$15,001 - $50,000		None (or less than $201)
3.10	AXA Mid Cap Value Managed Volatility	Yes	$15,001 - $50,000		None (or less than $201)
3.11	EQ/Mid Cap Index	Yes	$15,001 - $50,000		None (or less than $201)
3.12	AXA 2000 Managed Volati	Yes	$15,001 - $50,000		None (or less than $201)
3.13	AXA/AB Short Duration Government Bond	Yes	$15,001 - $50,000		None (or less than $201)
4	Invesco IRA	Yes	$15,001 - $50,000		None (or less than $201)
4.1	Invesco American Franchise Fund - Class A	Yes	$15,001 - $50,000		None (or less than $201)
4.2	Invesco Developing Markets Fund - Class A	Yes	$15,001 - $50,000		None (or less than $201)
4.3	Invesco Mid Cap Growth Fund - Class A	Yes	$1,001 - $15,000		None (or less than $201)

7. Transactions

(N/A) - Not required for this type of report

8. Liabilities

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#	CREDITOR NAME		TYPE	AMOUNT	YEAR INCURRED	RATE	TERM
1	Bank of America		Exercised Line of Credit	$50,001 - $100,000	2015	5.285	240 months
2	USAA Savings Bank	See Endnote	Credit Card	$15,001 - $50,000	2017	7.9	N/A
3	USAA Savings Bank	See Endnote	Credit Card	$15,001 - $50,000	2016	7.9	N/A
4	Bank of America	See Endnote	Credit Card	$10,001 - $15,000	2017	11.24	N/A
5	Bank of America	See Endnote	Credit Card	$10,001 - $15,000	2016	11.24	N/A

9. Gifts and Travel Reimbursements

(N/A) - Not required for this type of report

Endnotes

PART	#	ENDNOTE
8.	2	The outstanding balance on this card occasionally exceeded the specified amount during the calendar year.
8.	3	The outstanding balance on this card occasionally exceeded the specified amount during the calendar year.
8.	4	The outstanding balance on this card occasionally exceeded the specified amount during the calendar year.
8.	5	The outstanding balance on this card occasionally exceeded the specified amount during the calendar year.

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Summary of Contents

1. Filer's Positions Held Outside United States Government

Part 1 discloses positions that the filer held at any time during the reporting period (excluding positions with the United States Government). Positions are reportable even if the filer did not receive compensation.

This section does not include the following: (1) positions with religious, social, fraternal, or political organizations; (2) positions solely of an honorary nature; (3) positions held as part of the filer's official duties with the United States Government; (4) mere membership in an organization; and (5) passive investment interests as a limited partner or non-managing member of a limited liability company.

2. Filer's Employment Assets & Income and Retirement Accounts

Part 2 discloses the following:

- Sources of earned and other non-investment income of the filer totaling more than $200 during the reporting period (e.g., salary, fees, partnership share, honoraria, scholarships, and prizes)
- Assets related to the filer's business, employment, or other income-generating activities that (1) ended the reporting period with a value greater than $1,000 or (2) produced more than $200 in income during the reporting period (e.g., equity in business or partnership, stock options, retirement plans/accounts and their underlying holdings as appropriate, deferred compensation, and intellectual property, such as book deals and patents)

This section does not include assets or income from United States Government employment or assets that were acquired separately from the filer's business, employment, or other income-generating activities (e.g., assets purchased through a brokerage account). Note: The type of income is not required if the amount of income is $0 - $200 or if the asset qualifies as an excepted investment fund (EIF).

3. Filer's Employment Agreements and Arrangements

Part 3 discloses agreements or arrangements that the filer had during the reporting period with an employer or former employer (except the United States Government), such as the following:

- Future employment
- Leave of absence
- Continuing payments from an employer, including severance and payments not yet received for previous work (excluding ordinary salary from a current employer)
- Continuing participation in an employee welfare, retirement, or other benefit plan, such as pensions or a deferred compensation plan
- Retention or disposition of employer-awarded equity, sharing in profits or carried interests (e.g., vested and unvested stock options, restricted stock, future share of a company's profits, etc.)

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4. Filer's Sources of Compensation Exceeding $5,000 in a Year

Part 4 discloses sources (except the United States Government) that paid more than $5,000 in a calendar year for the filer's services during any year of the reporting period.

The filer discloses payments both from employers and from any clients to whom the filer personally provided services. The filer discloses a source even if the source made its payment to the filer's employer and not to the filer. The filer does not disclose a client's payment to the filer's employer if the filer did not provide the services for which the client is paying.

5. Spouse's Employment Assets & Income and Retirement Accounts

Part 5 discloses the following:

- Sources of earned income (excluding honoraria) for the filer's spouse totaling more than $1,000 during the reporting period (e.g., salary, consulting fees, and partnership share)
- Sources of honoraria for the filer's spouse greater than $200 during the reporting period
- Assets related to the filer's spouse's employment, business activities, other income-generating activities that (1) ended the reporting period with a value greater than $1,000 or (2) produced more than $200 in income during the reporting period (e.g., equity in business or partnership, stock options, retirement plans/accounts and their underlying holdings as appropriate, deferred compensation, and intellectual property, such as book deals and patents)

This section does not include assets or income from United States Government employment or assets that were acquired separately from the filer's spouse's business, employment, or other income-generating activities (e.g., assets purchased through a brokerage account). Note: The type of income is not required if the amount of income is $0 - $200 or if the asset qualifies as an excepted investment fund (EIF). Amounts of income are not required for a spouse's earned income (excluding honoraria).

6. Other Assets and Income

Part 6 discloses each asset, not already reported, that (1) ended the reporting period with a value greater than $1,000 or (2) produced more than $200 in investment income during the reporting period. For purposes of the value and income thresholds, the filer aggregates the filer's interests with those of the filer's spouse and dependent children.

This section does not include the following types of assets: (1) a personal residence (unless it was rented out during the reporting period); (2) income or retirement benefits associated with United States Government employment (e.g., Thrift Savings Plan); and (3) cash accounts (e.g., checking, savings, money market accounts) at a single financial institution with a value of $5,000 or less (unless more than $200 of income was produced). Additional exceptions apply. Note: The type of income is not required if the amount of income is $0 - $200 or if the asset qualifies as an excepted investment fund (EIF).

7. Transactions

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Part 7 discloses purchases, sales, or exchanges of real property or securities in excess of $1,000 made on behalf of the filer, the filer's spouse or dependent child during reporting period.

This section does not include transactions that concern the following: (1) a personal residence, unless rented out; (2) cash accounts (e.g., checking, savings, CDs, money market accounts) and money market mutual funds; (3) Treasury bills, bonds, and notes; and (4) holdings within a federal Thrift Savings Plan account. Additional exceptions apply.

8. Liabilities

Part 8 discloses liabilities over $10,000 that the filer, the filer's spouse or dependent child owed at any time during the reporting period.

This section does not include the following types of liabilities: (1) mortgages on a personal residence, unless rented out (limitations apply for PAS filers); (2) loans secured by a personal motor vehicle, household furniture, or appliances, unless the loan exceeds the item's purchase price; and (3) revolving charge accounts, such as credit card balances, if the outstanding liability did not exceed $10,000 at the end of the reporting period. Additional exceptions apply.

9. Gifts and Travel Reimbursements

This section discloses:

- Gifts totaling more than $375 that the filer, the filer's spouse, and dependent children received from any one source during the reporting period.
- Travel reimbursements totaling more than $375 that the filer, the filer's spouse, and dependent children received from any one source during the reporting period.

For purposes of this section, the filer need not aggregate any gift or travel reimbursement with a value of $150 or less. Regardless of the value, this section does not include the following items: (1) anything received from relatives; (2) anything received from the United States Government or from the District of Columbia, state, or local governments; (3) bequests and other forms of inheritance; (4) gifts and travel reimbursements given to the filer's agency in connection with the filer's official travel; (5) gifts of hospitality (food, lodging, entertainment) at the donor's residence or personal premises; and (6) anything received by the filer's spouse or dependent children totally independent of their relationship to the filer. Additional exceptions apply.

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Privacy Act Statement

Title I of the Ethics in Government Act of 1978, as amended (the Act), 5 U.S.C. app. § 101 et seq., as amended by the Stop Trading on Congressional Knowledge Act of 2012 (Pub. L. 112-105) (STOCK Act), and 5 C.F.R. Part 2634 of the U. S. Office of Government Ethics regulations require the reporting of this information. The primary use of the information on this report is for review by Government officials to determine compliance with applicable Federal laws and regulations. This report may also be disclosed upon request to any requesting person in accordance with sections 105 and 402(b)(1) of the Act or as otherwise authorized by law. You may inspect applications for public access of your own form upon request. Additional disclosures of the information on this report may be made: (1) to any requesting person, subject to the limitation contained in section 208(d)(1) of title 18, any determination granting an exemption pursuant to sections 208(b)(1) and 208(b)(3) of title 18; (2) to a Federal, State, or local law enforcement agency if the disclosing agency becomes aware of violations or potential violations of law or regulation; (3) to another Federal agency, court or party in a court or Federal administrative proceeding when the Government is a party or in order to comply with a judge-issued subpoena; (4) to a source when necessary to obtain information relevant to a conflict of interest investigation or determination; (5) to the National Archives and Records Administration or the General Services Administration in records management inspections; (6) to the Office of Management and Budget during legislative coordination on private relief legislation; (7) to the Department of Justice or in certain legal proceedings when the disclosing agency, an employee of the disclosing agency, or the United States is a party to litigation or has an interest in the litigation and the use of such records is deemed relevant and necessary to the litigation; (8) to reviewing officials in a new office, department or agency when an employee transfers or is detailed from one covered position to another; (9) to a Member of Congress or a congressional office in response to an inquiry made on behalf of an individual who is the subject of the record; (10) to contractors and other non-Government employees working on a contract, service or assignment for the Federal Government when necessary to accomplish a function related to an OGE Government-wide system of records; and (11) on the OGE Website and to any person, department or agency, any written ethics agreement filed with OGE by an individual nominated by the President to a position requiring Senate confirmation. See also the OGE/GOVT-1 executive branch-wide Privacy Act system of records.

Public Burden Information

This collection of information is estimated to take an average of three hours per response, including time for reviewing the instructions, gathering the data needed, and completing the form. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Program Counsel, U.S. Office of Government Ethics (OGE), Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917.

Pursuant to the Paperwork Reduction Act, as amended, an agency may not conduct or sponsor, and no person is required to respond to, a collection of information unless it displays a currently valid OMB control number (that number, 3209-0001, is displayed here and at the top of the first page of this OGE Form 278e).

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EXHIBIT G

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
AIR AND RADIATION

MEMORANDUM

SUBJECT: Recusal Statement

FROM: David S. Harlow
Senior Counsel

TO: William L. Wehrum
Assistant Administrator

DATE: December 28, 2017

I have previously consulted with the Office of General Counsel/Ethics (OGC/Ethics) and been advised about my ethics obligations. This memorandum formally notifies you of my continuing obligations to recuse myself from participating personally and substantially in certain matters in which I have a financial interest, or a personal or business relationship. I also understand that I have obligations pursuant to Executive Order 13770 and the Trump Ethics Pledge that I signed, as well as my own bar obligations.

FINANCIAL CONFLICTS OF INTEREST

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

I have consulted with OGC/Ethics and been advised that I do not currently have any financial conflicts of interest but will remain vigilant and notify OGC/Ethics immediately should my financial situation change.

OBLIGATIONS UNDER EXECUTIVE ORDER 13770

Pursuant to Section 1, Paragraph 6 of the Executive Order, I understand that I am

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prohibited from participating in any particular matter involving specific parties in which my former employer, **Hunton & Williams LLP**, or any former client to whom I provided legal services during the past two years is a party or represents a party. I understand that my recusal lasts for two years from the date that I joined federal service.

I have been advised by OGC/Ethics that, for the purposes of this pledge obligation, the term "particular matters involving specific parties" is broadened to include any meetings or other communication relating to the performance of my official duties, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties. I am further advised that the term "open to all interested parties" means five or more parties. Set forth below are my former clients identified in consultation with OGC/Ethics that have or may have environmental interests that could potentially arise with respect to my duties here at EPA.[1]

RECUSAL LIST In effect until October 1, 2019	
FORMER EMPLOYER: Hunton & Williams LLP	
FORMER CLIENTS:[2] Agrium Inc.; Nu-West Industries, Inc. Chevron Corporation DTE Energy Company LG&E and KU Energy, LLC	 National Stone, Sand and Gravel Association Sunflower Electric Power Corporation, Inc. Utility Air Regulatory Group

ATTORNEY BAR OBLIGATIONS

Pursuant to my obligations under my bar rules, I recognize that I am obliged to protect the confidences of my former clients. I also understand that I cannot participate in any matter that is the same as or substantially related to the same specific party matter that I participated in personally and substantially while in private practice, unless my bar provides for and I first obtain informed consent and notify OGC/Ethics. Attached is a list of cases I am recused from given my participation at Hunton & Williams LLP.

SCREENING ARRANGEMENT

In order to ensure that I do not participate in matters relating to any of the entities listed above, I will instruct Josh Lewis, Chief of Staff, and Mandy Gunasekara, Principal Deputy

[1] For my former clients who are not listed, I understand that I am personally obliged not to participate in specific party matters for the duration of my ethics obligations.
[2] One confidential client is not listed. This client has a written confidentiality agreement expressly prohibiting disclosure.

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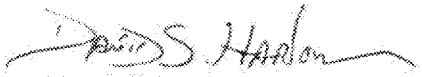
Assistant Administrator, to assist in screening EPA matters directed to my attention that involve these entities. All inquiries and comments involving the entities on my recusal list should be directed to Josh and Mandy without my knowledge or involvement until after my recusal period ends.

If Josh or Mandy determine that a particular matter will directly involve any of the entities listed on my "specific party" recusal list, then he/she will refer it for action or assignment to another, without my knowledge or involvement. In the event that he/she is unsure whether an issue is a particular matter from which I am recused, then he/she will consult with OGC/Ethics for a determination. I will provide a copy of this memorandum to my principal subordinates with a copy to Justina Fugh, Senior Counsel for Ethics.

UPDATE AS NECESSARY

In consultation with OGC/Ethics, I will revise and update my recusal statement whenever warranted by changed circumstances, including changes in my financial interests, changes in my personal or business relationships, or any changes to my EPA duties. In the event of any changes to my recusal or screening arrangement, I will provide a copy of the revised recusal statement to you and OGC/Ethics.



David S. Harlow
Senior Counsel

cc: Elizabeth Shaw, Deputy Assistant Administrator
Justina Fugh, Senior Counsel for Ethics

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David S. Harlow RECUSAL LIST – ATTORNEY BAR OBLIGATIONS	
CASE NAME:	CITATION:
Utility Air Regulatory Group v. EPA	No. 12-1166 (D.C. Cir.) (consolidated with No. 12-1100)
American Petroleum Institute v. EPA	No. 13-1063 (D.C. Cir.) (consolidated with No. 11-1309)
Utility Air Regulatory Group v. EPA	No. 15-1370 (D.C. Cir.) (consolidated with No. 15-1363)
LG&E and KU Energy v. EPA	No. 15-1418 (D.C. Cir.)
Utility Air Regulatory Group v. EPA	No. 17-1018 (D.C. Cir.) (consolidated with No. 17-1015)

EXHIBIT H

E. SCOTT PRUITT
ADMINISTRATOR

December 7, 2017

MEMORANDUM

SUBJECT: New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability

FROM: E. Scott Pruitt

TO: Regional Administrators

I. Introduction and Purpose of Memorandum

In accordance with presidential priorities for streamlining regulatory permitting requirements for manufacturing and other types of facilities, the U.S. Environmental Protection Agency is conducting a review of the agency's implementation of the preconstruction permitting requirements under the Clean Air Act, which are generally known as the New Source Review program. This review will involve an assessment of opportunities for the EPA to make improvements by clarifying or revising the EPA regulations implementing the NSR program, providing technical support and oversight to the states that administer the program and evaluating the agency's enforcement of the NSR requirements. With respect to the latter, there continue to be disputes pending in the United States courts in NSR enforcement cases that began before the EPA initiated the current review of the NSR program. The United States is represented in those matters by the Department of Justice and the Office of Solicitor General. As those cases proceed toward resolution, the EPA continues to have implementation and oversight responsibilities for the NSR program.

Based on an initial assessment, I understand that two recent appellate court decisions[1] in the pending enforcement proceeding against DTE Energy have created uncertainty regarding the applicability of NSR permitting requirements in circumstances where the owner or operator of an existing major stationary source projects that proposed construction will not cause an increase in actual emissions that triggers NSR requirements. As we begin the EPA's current review of the

[1] These appellate decisions are *U.S. v. DTE Energy Co.*, 711 F.3d 643 (6th Cir. 2013) and *U.S. v. DTE Energy Co.*, 845 F.3d 735 (6th Cir. 2017).

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NSR program, this memorandum communicates how the EPA intends to apply and enforce certain aspects of the applicability provisions of the NSR regulations that have been addressed in these appellate decisions.

In particular, this memorandum addresses the EPA's intended approach concerning the procedures contained in the NSR Reform Rules[2] (and approved state regulations that reflect the content of those rules) for sources that have used or intend to use "projected actual emissions" in determining NSR applicability and the associated pre- and post-project source obligations. While this memorandum describes our current intended approach for future matters, decisions about how to proceed in ongoing enforcement matters will be made on a case-by-case basis. We believe this memorandum is necessary to provide greater clarity for sources and states implementing the NSR regulations. The guidance is also generally consistent with the NSR Reform Rules and with EPA objectives and ongoing efforts to clarify and streamline the NSR program requirements and reduce burden on regulated sources in accordance with recent Presidential actions.[3]

The remainder of this memorandum is organized into two sections. Section II contains relevant CAA, regulatory and litigation background. Section III contains a discussion of the issues raised by the DTE litigation and addresses the EPA's current intended approach concerning the following specific topics: 1) consideration of post-project emissions management in determining NSR applicability; 2) the role of post-project actual emissions in major modification applicability; 3) the EPA oversight and enforcement of pre-project NSR applicability analyses involving the actual-to-projected-actual applicability test; and 4) the role of EPA-approved state and local NSR programs in implementing NSR requirements.

This memorandum explains how the EPA intends to apply and enforce certain requirements of the NSR regulations as we begin review of that program. This document is not a rule or regulation, and the guidance it contains may not apply to a particular situation based upon the individual facts and circumstances. This memorandum does not change or substitute for any law, regulation or other legally binding requirement and is not legally enforceable. This memorandum is not final agency action, but merely clarifies the EPA's current understanding regarding certain elements of the NSR regulations.

II. Background on CAA and Regulatory Provisions and DTE Litigation

A. Relevant CAA and EPA Regulatory Provisions

The NSR provisions of the CAA and of the EPA's implementing regulations require new major stationary sources and major modifications at existing major stationary sources to, among other things, obtain an air quality permit before beginning construction. This permitting process for major stationary sources is required whether the major source or major modification is planned for an area where the national ambient air quality standards (NAAQS) are exceeded

[2] In 2002, the EPA issued a final rule that revised the regulations governing the major NSR program. 67 FR 80186. We refer generally to these rule provisions as "NSR Reform."

[3] *See e.g.*, Presidential Memorandum: Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing (January 24, 2017); Executive Order 13777: Enforcing the Regulatory Reform Agenda (February 24, 2017).

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(nonattainment areas) or an area where the NAAQS have not been exceeded (attainment and unclassifiable areas). In general, permits for sources in attainment areas and for other pollutants regulated under the major source program are referred to as prevention of significant deterioration (PSD) permits, while permits for major sources emitting nonattainment pollutants and located in nonattainment areas are referred to as nonattainment NSR (NNSR) permits. The entire preconstruction permitting program, which includes the PSD and the NNSR permitting programs, is referred to as the NSR program.[4]

The CAA defines a "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4). A "major modification" is defined in the regulations as "any physical change in or change in the method of operation of a major stationary source that would result in: a significant emissions increase (as defined in paragraph (b)(40) of this section) of a regulated NSR pollutant (as defined in paragraph (b)(50) of this section); and a significant net emissions increase of that pollutant from the major stationary source." 40 C.F.R. § 52.21(b)(2)(i).

The NSR applicability procedures in the regulations reaffirm the role of the "project" emissions increase[5] and "net emissions increase"[6] in determining major modification applicability: "...a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases – a significant emissions increase (as defined in paragraph (b)(40) of this section), and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(*a*).

Prior to beginning construction of a project the owner or operator of the major stationary source must calculate the emissions increases that it projects will be caused by the project and potentially the net emissions increase to determine if NSR permitting is required. The procedure for calculating whether a significant emissions increase will occur as a result of a modification is emission unit specific and depends upon whether the emissions unit is new or existing. For new emissions units, increases are calculated using the "actual-to-potential" test, and for existing emissions units, increases are calculated using the "actual-to-projected-actual" applicability test.

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[4] The CAA requirements for PSD programs set forth under at 42 U.S.C. §§ 7470-7479 are implemented by the EPA's PSD regulations found at 40 C.F.R. § 51.166 (minimum requirements for an approvable PSD State Implementation Plan) and 40 C.F.R. § 52.21 (PSD permitting program for permits issued under the EPA's federal permitting authority). The CAA sets forth requirements for state implementation plans for nonattainment areas at 42 U.S.C. §§ 7501-7515, and the general provisions include NNSR permitting requirements at 42 U.S.C. §§ 7502(c)(5) and 7503. The CAA's NNSR permitting requirements are implemented by the EPA's NNSR regulations found at 40 C.F.R. § 51.165, § 52.24 and part 51 of Appendix S. This memorandum cites certain definitions and requirements in the federal PSD regulations at 40 C.F.R. § 52.21. However, the other NSR regulations identified contain analogous definitions and requirements, and the statements in this memorandum also apply to those analogous provisions.

[5] A "project" is defined as "a physical change in, or change in the method of operation of, an existing major stationary source." 40 C.F.R § 52.21(b)(52).

[6] The net emissions increase is calculated as the sum of the project emissions increase, calculated pursuant to 40 C.F.R. § 52.21(a)(2)(iv), and any other increases and decreases in actual emissions at the major stationary source that are contemporaneous and otherwise creditable. *See* 40 C.F.R. § 52.21(b)(3).

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See 40 C.F.R § 52.21(a)(2)(iv). Under both applicability tests, pre-project actual emissions are established using "baseline actual emissions," which are defined specifically for existing electric utility steam generating units and separately for all other existing emissions units. *See* 40 C.F.R § 52.21(b)(48). Under the actual-to-potential test, an emissions increase is calculated as the difference between the potential to emit (as defined at 40 C.F.R § 52.21(b)(4)) following completion of the project and the baseline actual emissions. Under the actual-to-projected-actual applicability test, an emissions increase is calculated as the difference between the projected actual emissions (as defined at 40 C.F.R § 52.21(b)(41)) and the baseline actual emissions.[7]

The focus of this memorandum is on the actual-to-projected-actual applicability test and associated requirements in the NSR regulations. "Projected actual emissions" is defined as "the maximum annual rate, in tons per year, at which an existing emissions unit is projected to emit a regulated NSR pollutant in any one of the 5 years following the date the unit resumes regular operation after the project, or in any one of the 10 years following that date, if the project involves increasing the emissions unit's design capacity or its potential to emit that regulated NSR pollutant and full utilization of the unit would result in a significant emissions increase or a significant net emissions increase at the major stationary source." 40 C.F.R § 52.21(b)(41)(i). In making a projection, the owner or operator "[s]hall consider all relevant information, including but not limited to, historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the State or Federal regulatory authorities, and compliance plans under the approved State Implementation Plan." 40 C.F.R § 52.21(b)(41)(ii)(*a*). In order to determine the projected increase that results from the particular change consistent with the definition of "major modification," the owner or operator "[s]hall exclude, in calculating any increase in emissions that results from the particular project, that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions under paragraph (b)(48) of this section and that are also unrelated to the particular project, including any increased utilization due to product demand growth."[8] 40 C.F.R § 52.21(b)(41)(ii)(*c*). Finally, the rules contain objective calculation requirements (e.g. for electric utility steam generating units, baseline actual emissions must be based on a consecutive 24-month period in the 5-year period immediately preceding the project, and in order not to trigger NSR permitting requirements, the calculated emissions increase may not equal or exceed numerical "significance" thresholds). *See* 40 C.F.R. §52.21(b)(23). (48).

With respect to the role of post-project actual emissions in the major modification applicability provisions, the regulations state the following: "Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(*b*). In addition, the regulations contain specific recordkeeping, monitoring and reporting provisions set forth at 40 C.F.R. § 52.21(r)(6) that apply in circumstances where there is a "reasonable

[7] In lieu of using projected actual emissions, owners or operators may use potential to emit. *See* 40 C.F.R § 52.21(b)(41)(ii)(*d*).

[8] This provision is sometimes referred to as the "demand growth exclusion," when used in the context of utilities or the "independent factors exclusion," when used in the context of other manufacturing operations, and qualifying emissions are sometimes referred to as "excludable emissions." There is no presumption that an emissions increase following that change was caused by the change, but rather, this is the analysis required under §52.21(b)(41)(ii)(c).

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possibility," as that term is defined at 40 C.F.R. § 52.21(r)(6)(vi), that a project that is not projected to cause a significant emissions increase may nevertheless result in an actual significant emissions increase of a regulated NSR pollutant.[9] Depending on the reasonable possibility criteria applicable to a project and the type of emissions unit(s) involved, owners or operators must comply with one or more of the following requirements: 1) document and maintain a pre-project record of the NSR applicability information identified at 40 C.F.R. §52.21(r)(6)(i); 2) for electric utility steam generating units only, submit the information set out in paragraph (r)(6)(i); 3) monitor and record emissions, on a calendar-year basis, for a period of five or 10 years after the unit resumes regular operations after the change (depending on whether there is an increase in the design capacity or potential to emit); 4) for electric utility steam generating units only, submit a report of annual emissions for each year that monitoring is required; and 5) for all other units, submit a report if annual emissions exceed the baseline actual emissions by a significant amount and if such emissions differ from the pre-construction projection. *See* 40 C.F.R. § 52.21(r)(6)(i) - (v). For projects subject to 5-year post-change emissions tracking, the EPA indicated in the NSR Reform rule preamble that it would "presume that any increases that occur after 5 years are not associated with the physical or operational changes."[10]

B. DTE Litigation

Since 2010, the EPA has been involved in an enforcement action and litigation concerning a construction project at the DTE Monroe, Michigan power plant. At issue in that litigation has been a dispute between the EPA and DTE on the relationship between the requirements in the regulations that govern pre-project NSR emission projections and the role of post-project emissions monitoring.

The DTE litigation has resulted in two separate decisions by the same panel of three judges on the U.S. Court of Appeals for the Sixth Circuit. Neither of these decisions were unanimous, and in the second decision, each judge wrote a separate opinion. In the first decision, two of the three judges agreed that the EPA could pursue enforcement based solely on a claim that the source had failed to properly project, in accordance with the regulations, future emissions, even though actual emissions from the source had not increased after the construction was completed and the source resumed operation. *See U.S. v. DTE Energy Co.*, 711 F.3d 643, 649-650, 652 (6th Cir. 2013). In allowing enforcement based solely on violations of EPA regulations governing future emission projections, the majority opinion cautioned against EPA "second guessing" a projection. The third judge dissented based on her view that there was no enforceable violation of the EPA's projection regulations when there was no post-construction emissions increase. *See id.* at 652-53. After the case reached the Sixth Circuit for the second time, the two judges who had agreed in the first case (that the EPA could pursue enforcement based solely on an allegedly improper projection) were unable to agree on the extent to which the EPA could "second guess" such a projection. *United States v. DTE Energy Co.*, 845 F.3d 735 (6th Cir. 2017). One of these two judges concluded that DTE had satisfied the basic requirements for making projections and the other concluded DTE had not. *Compare id.* at 738-740 *with id.* at 751-55. The third judge (the same one who dissented in the first case) concluded that she was required to follow the majority holding in the first case that the EPA could pursue enforcement based solely on an improper projection and then sided with the

[9] These provisions are sometimes referred to as the "reasonable possibility" rule provisions.
[10] 67 FR 80197 (December 31, 2002).

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judge who found DTE had not adequately justified its projection (while declining to support the parts of her colleague's opinion that could be read to expand the majority opinion in the first case). *See id.* at 742.

The matters at issue in the DTE litigation are complex, and the appellate court decisions have left ambiguity regarding the scope of the applicable regulations and what sources must do to comply. Further, the Supreme Court has been asked to review the second appellate court opinion. Considering this uncertainty, the EPA believes it would be helpful to explain to stakeholders how the EPA plans to proceed in implementing and exercising its authority under those regulations pending further review of these issues by the EPA.

III. Discussion

As described previously, the NSR regulations require owners or operators to perform a pre-construction applicability analysis to determine whether a proposed project would result in a significant emissions increase and a significant net emissions increase, thus triggering the requirement to obtain an NSR permit. The regulations also specify the information used in that analysis that, when certain criteria in the "reasonable possibility" rule provisions are met, shall be documented, maintained and in certain cases submitted to the reviewing authority prior to beginning construction. *See* 40 C.F.R. §§ 52.21(a)(2), 52.21(r)(6)(i), (ii). If required, the pre-project record must contain: 1) a description of the project; 2) identification of the emissions unit(s) whose emissions of a regulated NSR pollutant could be affected by the project; and 3) a description of the applicability test used to determine that the project is not a major modification for any regulated NSR pollutant, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded under paragraph (b)(41)(ii)(c) and an explanation for why such amount was excluded and any netting calculations,[11] if applicable. *See* 40 C.F.R. § 52.21(r)(6)(i).

One issue that has arisen with respect to determining projected actual emissions resulting from a proposed project is whether it is permissible under the regulations for an owner or operator to factor into the projection an intent to actively manage future emissions from the project on an ongoing basis to prevent a significant emissions increase or a significant net emissions increase from occurring. The EPA notes that the rule language specifically provides that "all relevant information" shall be considered in making a projection. *See* 40 C.F.R § 52.21(b)(41)(ii)(*a*). Pending further review of the issues described above by the EPA, the EPA intends to apply the NSR regulations in accordance with this language such that the intent of an owner or operator to manage emissions from a unit in that manner after a project is completed represents relevant information in the context of projecting future actual emissions from that unit that could be considered along with other relevant information in making an emissions projection, as provided in the NSR regulations.

In finalizing the 2002 NSR rule revisions, the EPA explained that owners or operators "will not be required to make the projected actual emissions projection through a permitting action" and

[11] The term "netting" refers to determining the net emissions increase. The net emissions increase is calculated as the sum of the projected emissions increase, calculated pursuant to 40 C.F.R. § 52.21(a)(2)(iv), and any other increases and decreases in actual emissions at the major stationary source that are contemporaneous and otherwise creditable. *See* 40 C.F.R. § 52.21(b)(3).

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that it "also believe[d] that it is not necessary to make … future projections enforceable in order to adequately enforce the major NSR requirements. The Act provides ample authority to enforce the major NSR requirements if … physical or operational change results in a significant net emissions increase at [a] major stationary source." 68 FR 80204 (December 31, 2002). Moreover, the regulations are clear that owners or operators need not obtain approval of their pre-project NSR applicability analyses from the reviewing authority before construction.[12]

As the EPA explained in 2002, a key objective of the projected actual emissions provisions was to avoid the need for permitting authority review of NSR applicability determinations prior to implementation of a project. The rules instruct the affected source to consider "all relevant information," (as defined in 40 C.F.R. §52.21(b)(41)(ii)) in making an applicability determination. They also include specific instructions as to when and how actual emissions projections must be documented and when post-project emissions monitoring and reporting is required. If an affected source complies with those requirements, it has satisfied the source obligations that are required under our NSR rules.

The NSR rules instruct the source to exclude from a projection those emissions that both could have been accommodated during the baseline period and that are unrelated to the project. Because increased emissions may be caused by multiple factors, the EPA has recognized that the source must exercise judgement to exclude increases for which the project is not the "predominant cause." 45 Fed. Reg. 32,327 (1992). The NSR rules provide no mechanism for agency review of procedurally compliant emission projections. To infer the existence of such a mechanism would be tantamount to inferring agency authority to require pre-approval of emissions projections. Such an outcome is inconsistent with the text of the EPA rules and with the agency's clearly stated intent in adopting those rules.

Consistent with these regulations, the EPA intends to focus on the fact that it is the obligation of source owners or operators to perform pre-project NSR applicability analyses and document and maintain records of such analyses as required by the regulations. It also intends to focus on the fact that the post-project monitoring, recordkeeping and reporting requirements provide a means to evaluate a source's pre-project conclusion that NSR does not apply and that the NSR applicability procedures make clear that post-project actual emissions can ultimately be used to determine major modification applicability. This is reflected in the following sentence: "Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(*b*). In addition, the post-project monitoring and recordkeeping requirements under the "reasonable possibility" rule provisions described previously further confirm the important role that actual post-project emissions data play in determining NSR applicability.

Based on the foregoing, and while further review of these issues by the EPA is pending, the EPA intends to implement and exercise its authority under the NSR provisions to clarify that

[12] With respect to existing electric utility steam generating unit(s), for which submittal of the pre-project record is required before beginning actual construction, the regulations explicitly state: "Nothing in this paragraph … shall be construed to require the owner or operator or such a unit to obtain any determination from the Administrator before beginning actual construction." 40 C.F.R. § 52.21(r)(6)(ii). For all other emissions unit categories, there is no requirement to submit the pre-project applicability record before construction.

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when a source owner or operator performs a pre-project NSR applicability analysis in accordance with the calculation procedures in the regulations, and follows the applicable recordkeeping and notification requirements in the regulations, that owner or operator has met the pre-project source obligations of the regulations, unless there is clear error (e.g. the source applies the wrong significance threshold). The EPA does not intend to substitute its judgement for that of the owner or operator by "second guessing" the owner or operator's emissions projections.

Furthermore, when an owner or operator projects that a project will result in an emission increase or a net emissions increase less than the significant emissions rate in accordance with the NSR regulations, the EPA intends to focus on the level of actual emissions during the 5- or 10-year recordkeeping or reporting period after the project for purposes of determining whether to exercise its enforcement discretion and pursue an enforcement action. That is, the EPA does not presently intend to initiate enforcement in such future situations unless post-project actual emissions data indicate that a significant emissions increase or a significant net emissions increase did in fact occur. Although the majority in the first DTE opinion held that the EPA may pursue enforcement of its projection regulation where a source owner or operator has failed to perform a required pre-project applicability analysis or has failed to follow the objective calculation requirements of the regulations regardless of the level of post-project emissions, the court decision does not compel the EPA to pursue enforcement in such situations. The EPA has substantial discretion regarding prosecution of violations of the CAA and the first DTE opinion does not limit the EPA's discretion to consider whether prosecution of other sources is warranted in similar circumstances. Thus, pending further review of these issues by the courts and the EPA, the agency does not intend to pursue new enforcement cases in circumstances such as those presented in the DTE matter.

Finally, the EPA notes that while this memorandum refers to federal NSR regulations at 40 C.F.R. § 52.21, in states with EPA-approved NSR programs, the state and local regulations that the EPA has approved into the SIP are the governing federal law. To be approvable, the NSR requirements in a state plan must be at least as stringent as the federal rule requirements in 40 C.F.R. §§ 51.165 and 51.166 for NNSR and PSD programs, respectively, but may be more stringent at the state's discretion. The implementation of the NSR program is one example of cooperative federalism under the CAA under which the state regulations have primacy once they are approved by the EPA. However, if it is later determined that the NSR program approved into the SIP is deficient, the EPA has the authority under 42 U.S.C. § 7410(k)(5) to call for a state to revise its regulations. In the absence of such a SIP call, it is the EPA-approved state regulations that govern NSR applicability.

cc: Ryan Jackson
Mandy Gunasekara

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EXHIBIT I

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,*	No. 11-2328
v.	>
DTE ENERGY COMPANY; DETROIT EDISON COMPANY, *Defendants-Appellees.*	

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 2:10-cv-13101—Bernard A. Friedman, District Judge.

Argued: November 27, 2012

Decided and Filed: March 28, 2013

Before: BATCHELDER, Chief Judge; DAUGHTREY and ROGERS, Circuit Judges.

COUNSEL

ARGUED: Thomas A. Benson, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. F. William Brownell, HUNTON & WILLIAMS LLP, Washington, D.C., for Appellees.

ON BRIEF: Thomas A. Benson, Sambhav N. Sankar, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. F. William Brownell, Mark B. Bierbower, Makram B. Jaber, HUNTON & WILLIAMS LLP, Washington, D.C., Harry M. Johnson III, George P. Sibley III, HUNTON & WILLIAMS LLP, Richmond, Virginia, Michael J. Solo, DTE ENERGY COMPANY, Detroit, Michigan, for Appellees. William L. Wehrum, HUNTON & WILLIAMS LLP, Washington, D.C., Jessie J. Rossman, NATURAL RESOURCES DEFENSE COUNCIL, Chicago, Illinois, for Amici Curiae.

ROGERS, J., delivered the opinion of the court, in which DAUGHTREY, J., joined. BATCHELDER, C. J. (pp. 14–16), delivered a separate dissenting opinion.

OPINION

ROGERS, Circuit Judge. Environmental Protection Agency regulations implementing the Clean Air Act require owners and operators of any major pollutant emitting source who plan construction projects at the source to make a preconstruction projection of whether and to what extent emissions from the source will increase following construction. That projection determines whether the project constitutes a "major modification" and thus requires a permit. This appeal raises a single question: can EPA challenge that projection before there is post-construction data to prove or disprove it? The district court held that it cannot and granted summary judgment to

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EXHIBIT J

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Certification of Ethics Agreement Compliance

Senate Confirmed Presidential Appointee

1. Appointee's Information	a. Appointee's Name:	to be completed by OGE William L. Wehrum
	b. Position Title:	to be completed by OGE Assistant Administrator for the Office of Air and Radiation
	c. Agency:	to be completed by OGE U.S. Environmental Protection Agency
	d. Date Ethics Agreement Signed:	to be completed by OGE August 28, 2017
	e. Date Confirmed:	to be completed by OGE November 9, 2017
	f. Due Date for Certification of Ethics Agreement Compliance:	to be completed by OGE **February 14, 2018**
2. Resignations	*I completed all of the resignations indicated in my ethics agreement before I assumed the duties of my current government position.*	☒ Yes ☐ No ☐ N/A
3. Divestitures	a. *I have completed all of the divestitures indicated in my ethics agreement. I also understand that I may not repurchase these assets during my appointment without OGE's prior approval.*	☐ Yes ☐ No ☒ N/A
	b. *I have filed a period transaction report, or periodic transaction reports, (OGE Form 278-T) to disclose the completion of these agreed upon divestitures.*	☐ Yes ☐ No ☒ N/A Filing Date(s) of OGE Form 278-T Report(s):
4. Managed Accounts	*If I have a managed account or use the services of an investment professional, I have notified the manager or professional of the limitations indicated in my ethics agreement. In addition, I am continuing to monitor purchases.*	☐ Yes ☐ No ☒ N/A
5. Interim Recusals	*I complied with my interim recusal obligations pending the divestitures required by my ethics agreement.*	☐ Yes ☐ No ☒ N/A

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William L. Wehrum

6. Recusals *(Note: These factual statements describe the appointee's current status. They are not intended to modify ethics agreement commitments or create new recusal obligations.)*	a. *I am recusing from particular matters in which I know I have a personal or imputed financial interest directly and predictably affected by the matter, unless I have received a waiver or qualify for a regulatory exemption.*	○ Yes ○ No ☒ N/A
	b. *I am recusing from particular matters in which any former employer or client I served in the past year is a party or represents a party, unless I have been authorized under 5 C.F.R. § 2635.502(d).*	☒ Yes ○ No ○ N/A
	c. *I am recusing from particular matters in which any former employer or client I served in the two years prior to my appointment is a party or represents a party, unless I have received a waiver under Exec. Order 13770.*	☒ Yes ○ No ○ N/A
7. Waivers and Authorizations	a. *I received a waiver pursuant to 18 U.S.C. § 208.* If yes, indicate the date of the waiver and indicate the financial interest covered by the waiver.	○ Yes ☒ No Date: Financial interest:
	b. *I received a waiver pursuant to Executive Order 13770.* If yes, indicate the date of the waiver and the subject of the waiver (i.e., applicable paragraph of the ethics pledge, parties, particular matters, specific issue areas, as applicable).	○ Yes ☒ No Date: Subject:
	c. *I received an authorization pursuant to 5 C.F.R. § 2635.502(d).* If yes, indicate date of authorization and identify the covered person(s) as to whom you have been authorized (e.g., former employer, former client, spouse's employer, spouse's current client, etc.).	○ Yes ☒ No Date: Covered person(s):
	d. *I received a waiver pursuant to 5 C.F.R. § 2635.503(c).* If yes, indicate the date of the waiver and identify the former employer or payer.	○ Yes ☒ No Date: Former employer or payer:

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William L. Wehrum

8. Payments, Accelerations, or Divestitures Required to be Completed Prior to Entering Government Service	Mark this box if not applicable: ☐	a. *If I committed that I would forfeit a financial interest or payment, unless it was received or accelerated prior to my assumption of the duties of the government position:*	☒ *I received it (or it was accelerated) prior to my assumption of the duties of the position.* ○ *I received it (or it was accelerated) after my assumption of the duties of the position.* ○ *I forfeited it.*
		b. Financial interest or payment at issue:	
9. Requirements for Regular Appointees	*I have completed my initial ethics briefing, pursuant to 5 C.F.R. § 2638.305.* If you are a Special Government Employee (SGE) or career Foreign Service Officer (FSO), select N/A.		☒ Yes ○ No ○ N/A
	I have signed the ethics pledge pursuant to Executive Order 13770. If you are a SGE or career FSO or previously signed the pledge, select N/A.		☒ Yes ○ No ○ N/A
10. Additional Ethics Agreement Requirements	to be completed by OGE		to be completed by appointee: *I am complying with these requirements as described in the adjacent box.* ○ Yes ○ No ☒ N/A
11. Comments of Appointee			

Any intentionally false or misleading statement or response provided in this certification is a violation of law punishable by a fine or imprisonment, or both, under 18 U.S.C. § 1001.

I certify that the information I have provided is complete and accurate.	Appointee's Signature:	Date: 12-7-17

THIS CERTIFICATION WILL BE POSTED FOR PUBLIC VIEWING ON OGE'S WEBSITE. 3

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EXHIBIT K

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

SEP 29 2016

The Honorable Sheldon Whitehouse
United States Senate
Washington, D.C. 20510

Dear Senator Whitehouse:

On behalf of the U.S. Environmental Protection Agency (EPA), I am writing in response to your letters of April 25, 2018 and September 4, 2018, in which you sought information regarding the recusal statement of EPA's Assistant Administrator for Air and Radiation, William L. Wehrum.

I want to assure you that EPA has taken diligent steps to ensure that Mr. Wehrum has been advised of his ethics obligations. Following Mr. Wehrum's initial ethics training on November 14, 2017, my staff in the Ethics Law Office in the Office of General Counsel (OGC/Ethics) and I have met with Mr. Wehrum in person, communicated with him via email correspondence and the telephone, and coordinated with his staff about his ethics obligations. As part of these discussions and consistent with our responsibilities found at 5 C.F.R. §§ 2638.305(f)(2) and (3), OGC/Ethics explained his recusal obligations, the importance of a recusal statement, and the other commitments contained in Mr. Wehrum's ethics agreement. OGC/Ethics also counseled Mr. Wehrum about his ethics obligations pursuant to Executive Order 13770 and the Trump Ethics Pledge, which he signed on November 14, 2017. Our counsel included guidance on paragraph 6 of the Pledge, which states that he cannot "participate in any particular matter involving specific parties that is directly and substantially related to [his] former employer or former clients, including regulations and contracts." We have provided him with advice consistent with that offered by the Office of Government Ethics (OGE), including OGE Advisories DO-09-011 (3/26/09) and DO-09-020 (5/26/09), which apply to Exec. Order 13770 pursuant to OGE Legal Advisories LA-17-02 & LA-17-03 (3/20/17).

Since he re-joined EPA, OGC/Ethics has worked with Mr. Wehrum and his staff on a written recusal statement. In my role as the Designated Agency Ethics Official, I personally communicated with Mr. Wehrum about the importance of signing a recusal statement. Mr. Wehrum initially chose to use other tools that he deemed effective in helping him comply with the ethics requirements, such as use of a screening official. OGC/Ethics continued to work with him and his staff and recently Mr. Wehrum completed and signed the enclosed recusal statement. His statement formally memorializes Mr. Wehrum's understanding of his obligation to recuse himself from certain matters involving his former employer or former clients.

To date, Mr. Wehrum has not received any waivers or authorizations issued pursuant to Executive Order 13770, 18 U.S.C. § 207(b)(1), or 5 C.F.R. § 2635.502(d). As described in his

recusal statement, for meetings or invitations involving his former employer or former clients, Mr. Wehrum's staff coordinates with OGC/Ethics, particularly when paragraph 6 of the Ethics Pledge might be implicated. When OGC/Ethics is consulted by Mr. Wehrum or his staff on meetings involving his former employer or former clients, we provide appropriate counsel and case-specific advice based on the subject matter of the meeting, the attendees, the location, the purpose, the capacity under which the individuals or entities are present, and any other relevant information.

Mr. Wehrum filed a Certification of Ethics Agreement Compliance with the OGE dated December 7, 2017. Originally, he answered "no" in response to the form's query on recusals related to financial conflicts of interest. He made a clarifying edit to the form on December 19, 2017, changing his response from "no" to "N/A." Enclosed is a further-updated version of that form that includes a comment Mr. Wehrum added on September 27, 2018, explaining that at the time he signed the form he did not have any financial conflicts of interest from which to recuse, so he did not believe that answering "no" was sufficient to explain his situation. Because he has no existing financial conflicts, nor does he expect to have any in the future, he explains that his answer meant that this question does not apply to his individual situation. My staff provided the recently-updated form to OGE.

With respect to the documents that you requested, EPA has a centralized search currently underway that it expects to yield documents responsive to your request. The agency anticipates releasing those documents to you on a rolling basis, as they become available.

Finally, I have resigned from EPA and my role as the Designated Agency Ethics Official, effective September 30, 2018, to pursue a career transition to the private sector. If I can be of assistance after that date, however, you may contact me through the agency's Office of Congressional and Intergovernmental Affairs. I appreciate your sustained interest in, and support of, a strong ethics program at EPA. If you have further questions for EPA, please contact Kristien Knapp in the Office of Congressional and Intergovernmental Relations at (202) 564-3277 or Knapp.Kristien@epa.gov.

Sincerely,

Kevin S. Minoli
Designated Agency Ethics Official &
Principal Deputy General Counsel

Enclosures

cc: The Honorable John Barrasso
Chairman, Senate Environment and Public Works Committee

EXHIBIT L

CERTIFICATION OF ETHICS AGREEMENT COMPLIANCE

Senate Confirmed Presidential Appointee

1. Appointee's Information	a. Appointee's Name:	(to be completed by OGE) William L. Wehrum
	b. Position Title:	(to be completed by OGE) Assistant Administrator for the Office of Air and Radiation
	c. Agency:	(to be completed by OGE) U.S. Environmental Protection Agency
	d. Date Ethics Agreement Signed:	(to be completed by OGE) August 28, 2017
	e. Date Confirmed:	(to be completed by OGE) November 9, 2017
	f. Due Date for Certification of Ethics Agreement Compliance:	(to be completed by OGE) **February 14, 2018**
2. Resignations	*I completed all of the resignations indicated in my ethics agreement before I assumed the duties of my current government position.*	☒ Yes ☐ No ☐ N/A
3. Divestitures	a. *I have completed all of the divestitures indicated in my ethics agreement. I also understand that I may not repurchase these assets during my appointment without OGE's prior approval.*	☐ Yes ☐ No ☒ N/A
	b. *I have filed a period transaction report, or periodic transaction reports, (OGE Form 278-T) to disclose the completion of these agreed upon divestitures.*	☐ Yes ☐ No ☒ N/A Filing Date(s) of OGE Form 278-T Report(s):
4. Managed Accounts	*If I have a managed account or use the services of an investment professional, I have notified the manager or professional of the limitations indicated in my ethics agreement. In addition, I am continuing to monitor purchases.*	☐ Yes ☐ No ☒ N/A
5. Interim Recusals	*I complied with my interim recusal obligations pending the divestitures required by my ethics agreement.*	☐ Yes ☐ No ☒ N/A

THIS CERTIFICATION WILL BE POSTED FOR PUBLIC VIEWING ON OGE'S WEBSITE.

Released via FOIA EPA-2019-008216

William L. Wehrum

6. Recusals *(Note: These factual statements describe the appointee's current status. They are not intended to modify ethics agreement commitments or create new recusal obligations.)*	a. *I am recusing from particular matters in which I know I have a personal or imputed financial interest directly and predictably affected by the matter, unless I have received a waiver or qualify for a regulatory exemption.*	◯ Yes ◯ No ☒ N/A
	b. *I am recusing from particular matters in which any former employer or client I served in the past year is a party or represents a party, unless I have been authorized under 5 C.F.R. § 2635.502(d).*	◯ Yes ◯ No ◯ N/A
	c. *I am recusing from particular matters in which any former employer or client I served in the two years prior to my appointment is a party or represents a party, unless I have received a waiver under Exec. Order 13770.*	◯ Yes ◯ No ◯ N/A
7. Waivers and Authorizations	a. *I received a waiver pursuant to 18 U.S.C. § 208.* If yes, indicate the date of the waiver and indicate the financial interest covered by the waiver.	◯ Yes ◯ No Date: Financial interest:
	b. *I received a waiver pursuant to Executive Order 13770.* If yes, indicate the date of the waiver and the subject of the waiver (i.e., applicable paragraph of the ethics pledge, parties, particular matters, specific work, etc., as applicable).	◯ Yes ◯ No Date: Subject:
	c. *I received an authorization pursuant to 5 C.F.R. § 2635.502(d).* If yes, indicate date of authorization and identify the covered person(s) to whom you have been authorized (e.g., former employer, former client, spouse's employer, spouse's former client, etc.).	◯ Yes ◯ No Date: Covered person(s):
	d. *I received a waiver pursuant to 5 C.F.R. § 2635.503(c).* If yes, indicate the date of the waiver and identify the former employer or payer.	◯ Yes ◯ No Date: Former employer or payer:

THIS CERTIFICATION WILL BE POSTED FOR PUBLIC VIEWING ON OGE'S WEBSITE.

Released via FOIA EPA-2019-008216

William L. Wehrum

8. Payments, Accelerations, or Divestitures Required to be Completed Prior to Entering Government Service	Mark this box if not applicable: ☐	a. *If I committed that I would forfeit a financial interest or payment, unless it was received or accelerated prior to my assumption of the duties of the government position:*	☒ *I received it (or it was accelerated) prior to my assumption of the duties of the position.* ○ *I received it (or it was accelerated) after my assumption of the duties of the position.* ○ *I forfeited it.*
		b. Financial interest or payment at issue:	
9. Requirements for Regular Appointees	*I have completed my initial ethics briefing, pursuant to 5 C.F.R. § 2638.305.*		☒ Yes ○ No ○ N/A
	I have signed the ethics pledge pursuant to Executive Order 13770.		☒ Yes ○ No ○ N/A
10. Additional Ethics Agreement Requirements	[illegible]	[illegible] *I am complying with these requirements as described in the adjacent box.*	○ Yes ○ No ☒ N/A
11. Comments of Appointee	I answered "N/A" to No. 6 because I have no existing conflicts and I do not expect to have any in the future, so this question does not apply to my situation. 9.27.18		

Any intentionally false or misleading statement or response provided in this certification is a violation of law punishable by a fine or imprisonment, or both, under 18 U.S.C. § 1001.

I certify that the information I have provided is complete and accurate.	Appointee's Signature:	Date: 12-7-17

THIS CERTIFICATION WILL BE POSTED FOR PUBLIC VIEWING ON OGE'S WEBSITE.

Released via FOIA EPA-2019-008216

OGE STATEMENT REGARDING CERTIFICATION OF ETHICS AGREEMENT COMPLIANCE Senate Confirmed Presidential Appointee		
Appointee's Information	Appointee's Name:	William l. Wehrum
	Position Title:	Assistant Administrator for the Office of Air and Radiation
	Agency:	U.S. Environmental Protection Agency
	Date Ethics Agreement Signed:	August 28, 2017
	Date Confirmed:	November 9, 2017
	Due Date for Certification of Ethics Agreement Compliance:	February 14, 2018

Statement

OGE received the Assistant Administrator's original Certification of Ethics Agreement Compliance (Certification) on January 16, 2018. The Assistant Administrator submitted a revised Certification on September 27, 2018. The only revision to the Certification was the Assistant Secretary's comment in Box 11, Comments of Appointee.

Date of Statement: October 10, 2018

EXHIBIT M

To: Lewis, Josh[Lewis.Josh@epa.gov]
From: Gunasekara, Mandy
Sent: Mon 12/4/2017 3:19:06 PM
Subject: Fwd: NSR Memo
NSR policy memo_draft_2017.12.2.edits.docx
ATT00001.htm

FYI

Sent from my iPhone

Begin forwarded message:

From: "Gunasekara, Mandy" <Gunasekara.Mandy@epa.gov>
Date: December 4, 2017 at 9:02:53 AM EST
To: "Bodine, Susan" <bodine.susan@epa.gov>, "Patrick Traylor (traylor.patrick@epa.gov)" <traylor.patrick@epa.gov>
Cc: "Jackson, Ryan" <jackson.ryan@epa.gov>, "Dravis, Samantha" <dravis.samantha@epa.gov>, "Schwab, Justin" <schwab.justin@epa.gov>
Subject: NSR Memo

Good Morning –

Attached is the latest version of the NSR Memo pertaining to the issues at issue in the DTE case. I thought we may have more time, but know now that the cert hearing is planned for Wednesday. This memo needs to go out before. I'd like to send it with the Administrator this evening for him to review and then follow-up tomorrow with a meeting/discussion if necessary. I gave Hayley a heads up and she said we can work in time. Please run the traps on this from your end. I apologize for the short notice, but will move items around and make myself available to discuss this afternoon if necessary.

Thanks,

Mandy

Mandy M. Gunasekara

Principal Deputy Assistant Administrator

EXHIBIT N

To: Dravis, Samantha[dravis.samantha@epa.gov]
Cc: Jackson, Ryan[jackson.ryan@epa.gov]; White, Elizabeth[white.elizabeth@epa.gov]; Lewis, Josh[Lewis.Josh@epa.gov]
Sent: Thur 12/7/2017 3:47:45 PM
Subject: RE: NSR Memo

Thanks, Sam.

Elizabeth and Josh – do either of you need anything else to get this done? Give me a c

From: Dravis, Samantha
Sent: Thursday, December 7, 2017 10:46 AM
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>
Cc: Jackson, Ryan <jackson.ryan@epa.gov>; White, Elizabeth <white.elizabeth@epa.gov>; Lewis, Josh <Lewis.Josh@epa.gov>
Subject: Re: NSR Memo

Let's get this autopenned thank you

Sent from my iPhone

On Dec 7, 2017, at 10:15 AM, Gunasekara, Mandy <Gunasekara.Mandy@epa.gov> wrote:

> Attached is the final version of the NSR memo discussed with the Administrator yesterday. He would like to get this out today. Can we go ahead with auto-pen, since he's at the hearing? Once this is signed, we can send it out to the RAs and post to the website. I'm cc'ing Josh Lewis who is helping to coordinate.

Mandy M. Gunasekara

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

<NSR policy memo_FINAL for Admin Signature 2017 12 07.docx>

Released via FOIA EPA-2019-008216

EXHIBIT O

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
From: Lewis, Josh
Sent: Thur 12/7/2017 6:09:38 PM
Subject: RE: Signed NSR Memo

Got it, and will do

From: Gunasekara, Mandy
Sent: Thursday, December 07, 2017 12:36 PM
To: Lewis, Josh <Lewis.Josh@epa.gov>
Subject: Fwd: Signed NSR Memo

Hold tight until after the energy and comment hearing. Please have this ready for posting online once the hearing wraps up.

Sent from my iPhone

Begin forwarded message:

From: "Hope, Brian" <Hope.Brian@epa.gov>
To: "Jackson, Ryan" <jackson.ryan@epa.gov>, "Gunasekara, Mandy" <Gunasekara.Mandy@epa.gov>
Cc: "White, Elizabeth" <white.elizabeth@epa.gov>
Subject: Signed NSR Memo

Let me know if you need anything else. Thanks.

- Brian

Brian T. Hope

Deputy Director

Office of the Executive Secretariat

Office of the Administrator

(202) 564-8212

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EXHIBIT P

Released via FOIA EPA-2019-008216

To: Bodine, Susan[bodine.susan@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]
From: Schwab, Justin
Sent: Sat 12/9/2017 6:48:59 PM
Subject: Fwd: NSR DTE case - Petitioners sent letter to Supreme Court on EPA memo
LetterWithNSRguidance-c.pdf
ATT00001.htm

ICYMI

Sent from my iPhone

Begin forwarded message:

From: "Doster, Brian" <Doster.Brian@epa.gov>
To: "Schwab, Justin" <Schwab.Justin@epa.gov>, "Schmidt, Lorie" <Schmidt.Lorie@epa.gov>, "Srinivasan, Gautam" <Srinivasan.Gautam@epa.gov>
Cc: "Williams, Melina" <Williams.Melina@epa.gov>
Subject: NSR DTE case - Petitioners sent letter to Supreme Court on EPA memo

FYI, DTE's counsel sent the attached to the Supreme Court enclosing EPA's NSR memo.

ED_001598_00025376

HUNTON&
WILLIAMS

HUNTON & WILLIAMS LLP
2200 PENNSYLVANIA AVENUE, NW
WASHINGTON, D.C. 20037-1701

TEL 202 • 955 • 1500
FAX 202 • 778 • 2201

F. WILLIAM BROWNELL
DIRECT DIAL: 202 • 955 • 1355
EMAIL: bbrownell@hunton.com

FILE NO: 55748.000042

December 8, 2017

By Hand

The Honorable Scott S. Harris
Clerk of the Supreme Court
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543-0002

Re: Case No. 17-170, *DTE Energy Company, et al. v. United States*

Dear Mr. Harris:

In its brief in opposition in the above-captioned case, the United States states that "the EPA is currently reviewing its New Source Review policies and regulations" and that "[t]hat review may result in changes." Br. for the United States in Opp'n at 17 (Nov. 1, 2017). A memorandum released by EPA late yesterday addressing the initial results of that review is enclosed.

Sincerely,

F. William Brownell
Counsel of Record for Petitioners
DTE Energy Company and Detroit Edison Company

Enclosure

cc: Noel J. Francisco
Michael Soules
Cynthia Rapp, Deputy Clerk

ED_001598_00025378

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EXHIBIT Q

To: Wehrum, Bill[Wehrum.Bill@epa.gov]; Harlow, David[harlow.david@epa.gov]
Cc: Dominguez, Alexander[dominguez.alexander@epa.gov]; Schwab, Justin[schwab.justin@epa.gov]
From: Gunasekara, Mandy
Sent: Tue 12/5/2017 1:06:07 PM
Subject: NSR Memo
NSR Memo_Redacted Version 2017.12.04.pdf

Hi Bill and David,

Attached is a memo pertinent to tomorrow's NSR discussion. I have redacted the potentially offending language given your recusal issues and had Justin double check to ensure I got everything out. What you will see is our clarification of the actual-to-projected actual applicability test in determining major modification applicability, which has been a key point of discussion surrounding NSR reform efforts.

Bill – I'll look to call you closer to 9 pm to download on RTBT.

Have a good night!

Mandy

Mandy M. Gunasekara

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

EXHIBIT R

To: Doster, Brian[Doster.Brian@epa.gov]; Burke, Marcella[burke.marcella@epa.gov]
Cc: Srinivasan, Gautam[Srinivasan.Gautam@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]
From: Schwab, Justin
Sent: Tue 12/5/2017 1:56:00 PM
Subject: RE: Meeting today with Wehrum on NSR - May address [redacted]

Thank you, Brian. Please forward me the invitation.

From: Doster, Brian
Sent: Tuesday, December 5, 2017 8:48 AM
To: Schwab, Justin <Schwab.Justin@epa.gov>; Burke, Marcella <burke.marcella@epa.gov>
Cc: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>
Subject: Meeting today with Wehrum on NSR - May address [redacted]

I am writing to let you know about a late-breaking meeting today with Bill Wehrum at 1 p.m. on New Source Review. I understand that the purpose of the meeting is to begin talking about the NSR reform initiatives OAR wants to pursue, and one of those includes [Ex. 5 - Deliberative Process] [redacted] Another is [Ex. 5 - Deliberative Process] I have heard about 3 other NSR topics that are on OAR's list and we may hear more about Bill's goals for those areas today.

Ex. 5 - Deliberative Process; Attorney-Client Communications

The meeting information is below. If you'd like to put this on your calendar, let me know and I'll forward the meeting invite so you can accept it.

-----Original Appointment-----
From: Wehrum, Bill
Sent: Monday, December 04, 2017 4:32 PM
To: Wehrum, Bill; Gunasekara, Mandy; Harlow, David; Bodine, Susan; Traylor, Patrick; Lewis, Josh; Page, Steve; Koerber, Mike; Harnett, Bill; Wood, Anna; Kornylak, Vera S.; Santiago,

Juan; Wayland, Richard; Dunham, Sarah; Harvey, Reid; Krieger, Jackie; Vetter, Cheryl; Rao, Raj; Srinivasan, Gautam; Schmidt, Lorie; Doster, Brian
Cc: Brooks, Phillip; Chapman, Apple; Kelley, Rosemarie; Schwab, Justin
Subject: NSR Discussion
When: Tuesday, December 05, 2017 1:00 PM-1:45 PM (UTC-05:00) Eastern Time (US & Canada).
Where: WJC-N 5400 + 1-866-299-3188; Participant Code: 202-256-4000

To: Wehrum, Bill; Harlow, David; Gunasekara, Mandy; Lewis, Josh; Page, Steve; Koerber, Mike; Hamett, Bill; Wood, Anna; Kornylak, Vera S.; Santiago, Juan; Wayland, Richard; Dunham, Sarah; Harvey, Reid; Krieger, Jackie; Vetter, Cheryl; Rao, Raj; Doster, Brian; Schmidt, Lorie; Srinivasan, Gautam

Released via FOIA EPA-2019-008216

EXHIBIT S

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
Cc: Schwab, Justin[Schwab.Justin@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]; Wehrum, Bill[Wehrum.Bill@epa.gov]
From: Bodine, Susan
Sent: Thur 12/7/2017 5:24:37 PM
Subject: RE: NSR Memo

At a minimum the first two of the three sentences Ex. 5 - Deliberative Process/Attorney Client Privilege

Ex. 5 - Deliberative Proces/Attorney Client Privilege

From: Bodine, Susan
Sent: Thursday, December 7, 2017 12:10 PM
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>
Cc: Wehrum, Bill <Wehrum.Bill@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Patrick Traylor (traylor.patrick@epa.gov) <traylor.patrick@epa.gov>
Subject: RE: NSR Memo
Importance: High

Ex. 5 - Deliberative Proces/Attorney Client Privilege

From: Gunasekara, Mandy
Sent: Thursday, December 7, 2017 12:06 PM
To: Bodine, Susan <bodine.susan@epa.gov>
Subject: NSR Memo

Attached is final. Circling back on this Ex. 5 - Deliberative Proces/Attorney Client Privilege

Ex. 5 - Deliberative Proces/Attorney Client Privilege

ED_001598_00006112

EXHIBIT T

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To: Wehrum, Bill[Wehrum.Bill@epa.gov]; Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
Cc: Traylor, Patrick[traylor.patrick@epa.gov]
From: Bodine, Susan
Sent: Fri 12/8/2017 3:46:19 PM
Subject: NSR memo

I spoke to SP about Ex. 5 - Deliberative Process/Attorney Client He suggested Ex. 5 - Deliberative Process/Attorney Client Ex. 5 - Deliberative Process/Attorney Client

My recommendation remains **Ex. 5 - Deliberative Process/Attorney Client**

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EXHIBIT U

Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>	Required
Baptist, Erik <baptist.erik@epa.gov>	Required
Bennett, Tate <Bennett.Tate@epa.gov>	Required
Jackson, Ryan <jackson.ryan@epa.gov>	Required

Saturday, December 09, 2017

Time 11:30 AM – 1:45 PM
Subject Western Caucus Foundation Panel
Location Wynn Encore Hotel
Show Time As Busy
Categories Green Category

Time 2:00 PM – 2:30 PM
Subject Cab to the Airport
Show Time As Busy
Categories Orange Category

Time 2:30 PM – 3:00 PM
Subject TSA Security
Show Time As Busy
Categories Orange Category

Time 3:00 PM – 3:35 PM
Subject Boarding
Show Time As Busy
Categories Orange Category

Time 3:35 PM – 9:01 PM
Subject American Airlines Flight#2536 from Las Vegas to DCA
Location Locator: [redacted]
Show Time As Busy
Categories Orange Category

Monday, December 11, 2017

Time 7:30 AM – 9:14 AM
Subject Delta Flight #1731 from DCA to Detroit
Location Locator [redacted]
Show Time As Busy
Original and reissued ticket attached
Categories Orange Category

Time 9:30 AM – 10:30 AM
Subject Transportation from Detroit (DTW) Airport to Ann Arbor Lab- - Michigan Green Transportation (Confirmation: RES-1FBNFPN)
Location Baggage Claim Area Pick-up
Show Time As Busy
Michigan Green Transportation 1 877-476-8294
Categories Orange Category

Released via FOIA EPA-2019-008216

Time 10:30 AM – 3:30 PM
Subject On Travel || AA Day Trip
Show Time As Busy
Categories Blue Category

Time 1:00 PM – 2:00 PM
Subject Agency-wide Sr. Staff Meeting
Location Alma Room
Show Time As Busy

Time 3:30 PM – 4:00 PM
Subject DOJ/EPA Weekly
Location 4020A
Show Time As Tentative

Time 3:30 PM – 4:30 PM
Subject Transportation from Ann Arbor Lab to Detroit (DTW) Airport - - Michigan Green Transportation
Location Confirmation: [redacted]
Show Time As Busy
Michigan Green Transportation 1 877-476-8294
Categories Orange Category

Time 4:30 PM – 5:00 PM
Subject NSR Memo, conference line, [redacted], code [redacted]
Location 3204WJC-South
Show Time As Busy
To: Bodine, Susan; Traylor, Patrick; Bowman, Liz; Wehrum, Bill; Harlow, David; Gunasekara, Mandy; Lewis, Josh; Schwab, Justin

Attendees

Name <E-mail>	Attendance
Bodine, Susan <bodine.susan@epa.gov>	Organizer
Traylor, Patrick <traylor.patrick@epa.gov>	Required
Bowman, Liz <Bowman.Liz@epa.gov>	Required
Wehrum, Bill <Wehrum.Bill@epa.gov>	Required
Harlow, David <harlow.david@epa.gov>	Required
Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>	Required
Lewis, Josh <Lewis.Josh@epa.gov>	Required
Schwab, Justin <Schwab.Justin@epa.gov>	Required

Time 4:45 PM – 5:30 PM
Subject TSA Security / Boarding
Show Time As Busy
Categories Orange Category

Released via FOIA EPA-2019-008216

EXHIBIT V

Released via FOIA EPA-2019-008216

To: Jackson, Ryan[jackson.ryan@epa.gov]
From: Gunasekara, Mandy
Sent: Thur 12/7/2017 10:57:21 PM
Subject: NSR Memo Email to RAs
NSR Policy Memo.12.7.17.pdf
ATT00001.txt

Memo is attached. There is a "Regional Administrators" list in outlook to send this to all 10. Please cc me (since Bill is recused), Susan, Minoli and Justin. I'd suggest simply stating:

Dear Regional Administrators:
Please see attached for a memo regarding New Source Review the Administrator signed today.
Best,
Ryan

Released via FOIA EPA-2019-008216

EXHIBIT W

To: Harlow, David[harlow.david@epa.gov]
From: Dominguez, Alexander
Sent: Fri 10/6/2017 2:26:09 PM
Subject: Fwd: NSR Policy Memo
OGC NSR DTE issue options analysis 10-4 am draft.docx
ATT00001.htm
NSR policy memo_draft_10-4-17PSLrev.docx
ATT00002.htm

Sent from my iPhone

Begin forwarded message:

From: "Lewis, Josh" <Lewis.Josh@epa.gov>
Date: October 5, 2017 at 12:42:01 PM EDT
To: "Gunasekara, Mandy" <Gunasekara.Mandy@epa.gov>
Cc: "Dominguez, Alexander" <dominguez.alexander@epa.gov>, "Dunham, Sarah" <Dunham.Sarah@epa.gov>
Subject: Fwd: NSR Policy Memo

Ahead of our weekly meeting tomorrow at 9, wanted to send the latest draft NSR policy memo. The other attachment is a document prepared by OGC which is an analysis of options for addressing NSR issues raised by DTE Ex. 5 - Deliberative Process
Ex. 5 - Deliberative Process

Concerning the policy memo, Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

OGC staff attorneys have reviewed this draft. The draft will go shortly to Justin, Lorie, and Gautam for review. Ex. 5 - Deliberative Process
Ex. 5 - Deliberative Process

We can talk more tomorrow about this, including next steps.

ED_001598_00003543

EXHIBIT X

Released via FOIA EPA-2019-008216

To: Harlow, David[harlow.david@epa.gov]; Dominguez, Alexander[dominguez.alexander@epa.gov]
From: Gunasekara, Mandy
Sent: Mon 11/27/2017 2:15:43 PM
Subject: NSR Reform Memo
NSR policy memo_draft_10-4-17PSLrev.docx

First one attached.

Mandy M. Gunasekara

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

Released via FOIA EPA-2019-008216

EXHIBIT Y

Released via FOIA EPA-2019-008216

Time	5:15 PM – 5:45 PM
Subject	FL/GA Media Interviews re: Hurricane Preparedness
Location	Administrator's Office
Reminder	15 minutes
Show Time As	Busy
	POC: Liz/Amy

Attendees	**Name <E-mail>**	**Attendance**
	[redacted] <[redacted]	Organizer
	Bowman, Liz <Bowman.Liz@epa.gov>	Required
	Graham, Amy <graham.amy@epa.gov>	Required
	Lincoln Ferguson (ferguson.lincoln@epa.gov) <ferguson.lincoln@epa.gov>	Required

Friday, September 8, 2017

Time	8:30 AM – 9:15 AM
Subject	Radio Interviews re: Hurricane Preparedness
Location	Administrator's Office
Reminder	15 minutes
Show Time As	Busy

Attendees	**Name <E-mail>**	**Attendance**
	[redacted] <[redacted]	Organizer
	Bowman, Liz <Bowman.Liz@epa.gov>	Required
	Abboud, Michael <abboud.michael@epa.gov>	Required
	Hewitt, James <hewitt.james@epa.gov>	Required

Time	9:15 AM – 10:15 AM
Subject	Briefing: (ESA) Endangered Species Act
Location	Administrator's Office
Reminder	15 minutes
Show Time As	Busy

Attendees	**Name <E-mail>**	**Attendance**
	[redacted] <[redacted]	Organizer
	Beck, Nancy <Beck.Nancy@epa.gov>	Required
	Dravis, Samantha <dravis.samantha@epa.gov>	Required
	Baptist, Erik <baptist.erik@epa.gov>	Required
	Bolen, Brittany <bolen.brittany@epa.gov>	Required

Released via FOIA EPA-2019-008216

Time	10:15 AM – 11:00 AM
Subject	Briefings
Location	Administrator's Office
Reminder	15 minutes
Show Time As	Busy
	Topics to cover will include the following: Philadelphia Energy Solutions Fiat Chrysler Colorado Springs DTE Energy

Attendees	**Name <E-mail>**	**Attendance**
	[redacted] <[redacted]>	Organizer
	Traylor, Patrick <traylor.patrick@epa.gov>	Required
	Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>	Required
	Schwab, Justin <schwab.justin@epa.gov>	Required
	Baptist, Erik <baptist.erik@epa.gov>	Optional
	Bodine, Susan <bodine.susan@epa.gov>	Optional

Time	11:00 AM – 11:05 AM
Subject	Call with Governor of Puerto Rico
Location	Administrator's Office
Reminder	15 minutes
Show Time As	Busy
	POC: Troy

Attendees	**Name <E-mail>**	**Attendance**
	[redacted] <[redacted]>	Organizer
	Lyons, Troy <lyons.troy@epa.gov>	Required
	Lincoln Ferguson (ferguson.lincoln@epa.gov) <ferguson.lincoln@epa.gov>	Required
	Cory, Preston (Katherine) <Cory.Preston@epa.gov>	Required

Time	11:15 AM – 11:45 AM
Subject	HOLD: Media Interviews
Location	Administrator's Office
Reminder	15 minutes
Show Time As	Busy

Attendees	**Name <E-mail>**	**Attendance**
	[redacted] <[redacted]>	Organizer
	Hewitt, James <hewitt.james@epa.gov>	Required

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EXHIBIT Z

To: Lewis, Josh[Lewis.Josh@epa.gov]; Sarah Dunham (Dunham.Sarah@epa.gov)[Dunham.Sarah@epa.gov]
From: Gunasekara, Mandy
Sent: Tue 9/12/2017 5:57:16 PM
Subject: NSR Memo
Emissions Projection Rule_Outline_DRAFT.docx

Following up from Friday, attached are a few points regarding the NSR memo I mentioned. This should get things started.

Mandy M. Gunasekara

Senior Policy Advisor for Office of Air and Radiation

Office of the Administrator

US Environmental Protection Agency

EXHIBIT AA

To: Bodine, Susan[bodine.susan@epa.gov]
From: Gunasekara, Mandy
Sent: Fri 9/22/2017 5:54:06 PM
Subject: NSR Memo
Emissions Projection Rule_Outline_DRAFT.DOCX

Attached is what I sent to program folks last Tuesday.

Mandy M. Gunasekara

Senior Policy Advisor for Office of Air and Radiation

Office of the Administrator

US Environmental Protection Agency

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EXHIBIT BB

To: Koerber, Mike[Koerber.Mike@epa.gov]
From: South, Peter
Sent: Tue 10/3/2017 12:44:59 PM
Subject: ONGOING ISSUES
Ongoing OAQPS issues 9_25_17.docx

ED_001598_00012898

confirming)—Done for now

Texas Regional Haze – NFRM by Region 6 (CD deadline of Sept 30)
Summary: Region 6 developed final rule which includes a FIP. Texas will not be supportive.

NSR DTE Memo—deliver draft memo on DTE by end of Sept/early Oct
Summary: Ongoing OECA issue relating to NSR applicability.
On 9/27, OGC requested more time to review.
Steve asked Sarah if OK to request ext to 10/4. [redacted]

Woodheaters Report to Congress – draft report under development (due date is early November)
Summary: OID working on Woodheater RTC. OID will be meeting via call with OCFO on Sept 26. Chebryll on point.
Adam reported it was a quick meeting. We agreed to provide a cover letter and short report, possibly only 1-4 pages, to the appropriations committee. Most of the meeting we discussed format and what to include in an appendix. OID plans to have draft to Martin by 9/29.

RELATED: OID met with our RWH NSPS attorneys, Scott Jordan (OGC) and Simi Bhat (DOJ), late last week. See Chebryll's summary of meeting. Simi communicated that she needs a decision from EPA on the PFI-related questions by October 6th if possible. This would give her time to communicate EPA's positions to PFI, negotiate if appropriate, while still giving them time to prepare their legal briefs by the Nov 20 deadline if talks break down. Simi also indicated that she is prepared to brief up to the DOJ politicals so they can prod the EPA politicals, if we haven't heard any definitive response by mid-October and we think it will help the situation.

1-on-1 Follow-ups

- Update to SIP backlog—Mike sent SIP paper to Sarah on 9/18 (updated paper that we used to brief Ryan J in June)—[redacted]
- CISWI/OSWI—Mike gave Sarah heads up at 9/18 1-on-1--Done
  Summary: Sierra Club filed lawsuit in December 2016 claiming EPA failed to promulgate federal plan for CISWI by March 2013, and promulgate federal plan and conduct technology review for OSWI by Dec 2010. Sarah to raise with Mandy—[redacted]
- SIP backlog issue (okay to issue disapprovals) – Mike raised with Sarah at 9/18 1-on-1, Sarah to raise with Mandy
  - iSIP disapprovals—table of 12: Vera noted on 9/20, not 12 SIP disapprovals—prob more (in process)—Mike said to hold on 9/21
- NAAQS related sanctions—Mike gave Sarah heads up at 9/18 1-on-1—Done for now
  - Oct 18, mandatory offset sanctions in effect for 5 areas—4 in PA and 1 in LA, know more on 10/2 (no real impact—states expected to submit plans soon)
  - [redacted]

- Petition on CAFOs – Sarah to raise with Mandy—Mike sent Sarah one pager—Done for now
- O&G FIP Minor Sources in Indian Country—Mike made edits to Chris's materials and sent to

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EXHIBIT CC

To: Doster, Brian[Doster.Brian@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Srinivasan, Gautam[Srinivasan.Gautam@epa.gov]
Cc: Williams, Melina[Williams.Melina@epa.gov]
From: Schwab, Justin
Sent: Mon 10/9/2017 10:51:45 PM
Subject: RE: For review: Memos related to DTE NSR case
EDIT NSR policy memo_draft_10-4-17PSL.docx

Please find redline/bubbles attached on the "NSR Policy memo_draft" document.

From: Doster, Brian
Sent: Wednesday, October 4, 2017 3:31 PM
To: Schwab, Justin <Schwab.Justin@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>
Cc: Williams, Melina <Williams.Melina@epa.gov>
Subject: For review: Memos related to DTE NSR case

Attached for review are the current drafts of two memos regarding the issues in the DTE NSR litigation, plus a piece of background information. ARLO would like to discuss this topic at our Hot Issues meeting on Thursday.

The first attachment is the current draft of the memo [redacted]

Ex. 5 - Deliberative Process; Attorney-Client Communications

Ex. 5 - Deliberative Process; Attorney-Client Communications

[redacted] The draft OGC companion memo also identifies some points to consider in evaluating these options. Per the recommendation of Melina and I, [redacted]

Ex. 5 - Deliberative Process; Attorney-Client Communications

The third attachment is a one-page outline that was provided to OAR as a guide to develop the primary draft memo (first attachment). I have added highlights to the third attachment to show the 4 key points that OAR tried to address in the primary memo.

Ex. 5 - Deliberative Process; Attorney-Client Communications

ED_001598_00025166

Ex. 5 - Deliberative Process; Attorney-Client Communications

Brian

Brian L. Doster

Assistant General Counsel for NSR, Radiation, and Emergency Response

Air and Radiation Law Office

Office of General Counsel

(202) 564-1932

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EXHIBIT DD

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
Cc: Dominguez, Alexander[dominguez.alexander@epa.gov]; Dunham, Sarah[Dunham.Sarah@epa.gov]
From: Lewis, Josh
Sent: Thur 10/5/2017 4:42:01 PM
Subject: Fwd: NSR Policy Memo
OGC NSR DTE issue options analysis 10-4 am draft.docx
ATT00001.htm
NSR policy memo_draft_10-4-17PSLrev.docx
ATT00002.htm

Ahead of our weekly meeting tomorrow at 9, wanted to send the latest draft NSR policy memo. The other attachment is a document prepared by OGC which is an analysis of options for addressing NSR issues raised by DTE (you'll see one of the options is the policy memo)

Concerning the policy memo, we initially drafted a brief document just laying out EPA's

Ex. 5 - Deliberative Process/Attorney-Client

OGC staff attorneys have reviewed this draft. The draft will go shortly to Justin, Lorie, and Gautam for review. Thus far OECA and the Regional Offices have not been engaged.

We can talk more tomorrow about this, including next steps.

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EXHIBIT EE

To: Traylor, Patrick[traylor.patrick@epa.gov]
Cc: Bodine, Susan[bodine.susan@epa.gov]
From: Gunasekara, Mandy
Sent: Wed 10/25/2017 6:03:32 PM
Subject: RE: NSR Reform
NSR policy memo_draft_10-4-17PSLrev.docx

Yes – see attached. The team sent this to me a couple weeks ago. I have not yet spent significant time on it. Please take a look and let me know your thoughts. Once we get a further down the process, let's plan to meet and discuss.

Best,

Mandy

From: Traylor, Patrick
Sent: Wednesday, October 25, 2017 10:24 AM
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>
Cc: Bodine, Susan <bodine.susan@epa.gov>
Subject: NSR Reform

Mandy:

Would you please include Susan and me at the very earliest opportunity in the distribution for whatever draft memoranda or guidance documents that [redacted] Ex. 5 - Deliberative Process [redacted]? We have your one-page outline.

Thanks,

Patrick

Patrick Traylor

Deputy Assistant Administrator

Office of Enforcement and Compliance Assurance

ED_001598_00006793

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EXHIBIT FF

Show Time As	Busy	
Attendees	**Name <E-mail>**	**Attendance**
	[redacted] <[redacted]	Organizer
	Kelly, Albert <kelly.albert@epa.gov>	Required

Friday, November 17, 2017

Time	11:15 AM – 12:00 PM
Subject	Speaking Engagement: Federalist Society National Lawyers Convention
Location	Mayflower Hotel, 1127 Connecticut Ave NW, WDC
Attachments	EPA Event Request Form.docx Pruitt Invite.pdf (ETHICS) Federalist Convention - Friday, November 17.pdf
Reminder	15 minutes
Show Time As	Busy

Attendees	**Name <E-mail>**	**Attendance**
	[redacted] <[redacted]	Organizer
	Tate Bennett (Bennett.Tate@epa.gov) <Bennett.Tate@epa.gov>	Required
	Bowman, Liz <Bowman.Liz@epa.gov>	Required
	Hewitt, James <hewitt.james@epa.gov>	Required
	Sarah Greenwalt (greenwalt.sarah@epa.gov) <greenwalt.sarah@epa.gov>	Required

---

Time	12:00 PM – 12:30 PM
Subject	HOLD: On the Record Interview
Location	Mayflower Hotel
Reminder	15 minutes
Show Time As	Busy

Time	2:15 PM – 2:45 PM
Subject	Briefing: WOTUS
Location	Administrator's Office
Reminder	15 minutes
Show Time As	Busy

Attendees	**Name <E-mail>**	**Attendance**
	[redacted] <[redacted]	Organizer
	Sarah Greenwalt (greenwalt.sarah@epa.gov) <greenwalt.sarah@epa.gov>	Required
	Forsgren, Lee <Forsgren.Lee@epa.gov>	Required
	Bodine, Susan <bodine.susan@epa.gov>	Required

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Time	3:00 PM – 3:30 PM
Subject	Briefing: Oil and Gas Proposed Rule
Location	Administrator's Office
Reminder	15 minutes
Show Time As	Busy
Attendees	**Name <E-mail>** — **Attendance**
	[redacted] <[redacted]> — Organizer
	Wehrum, Bill <Wehrum.Bill@epa.gov> — Required
	Dravis, Samantha <dravis.samantha@epa.gov> — Required
	Schwab, Justin <schwab.justin@epa.gov> — Required
	Gunasekara, Mandy <Gunasekara.Mandy@epa.gov> — Required
	Ryan Jackson (jackson.ryan@epa.gov) <jackson.ryan@epa.gov> — Required

Time	3:30 PM – 4:00 PM
Subject	Briefing: New Source Review
Location	Administrator's Office
Reminder	15 minutes
Show Time As	Busy
Attendees	**Name <E-mail>** — **Attendance**
	[redacted] <[redacted]> — Organizer
	Wehrum, Bill <Wehrum.Bill@epa.gov> — Required
	Ryan Jackson (jackson.ryan@epa.gov) <jackson.ryan@epa.gov> — Required
	Dravis, Samantha <dravis.samantha@epa.gov> — Required
	Gunasekara, Mandy <Gunasekara.Mandy@epa.gov> — Required
	Lincoln Ferguson (ferguson.lincoln@epa.gov) <ferguson.lincoln@epa.gov> — Required

Monday, November 20, 2017

Time	8:30 AM – 9:15 AM
Subject	Briefing: Worker Protection Rule
Location	Administrator's Office
Reminder	15 minutes
Show Time As	Busy
Attendees	**Name <E-mail>** — **Attendance**
	[redacted] <[redacted]> — Organizer

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EXHIBIT GG

Time 1:30 PM – 1:50 PM
Subject Call with Tyler Minnich, Toomey's office (Confirmed)
Location Mandy will call Tyler at [redacted]
Show Time As Busy
Categories Blue Category
Attendees

Name <E-mail>	Attendance
Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>	Organizer
Dominguez, Alexander <dominguez.alexander@epa.gov>	Required

Time 2:00 PM – 3:00 PM
Subject Discussion with Alex
Show Time As Busy
Attendees

Name <E-mail>	Attendance
Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>	Organizer
Dominguez, Alexander <dominguez.alexander@epa.gov>	Required

Time 3:15 PM – 4:15 PM
Subject Briefing: SO2
Location Alm Room
Show Time As Busy
To: [redacted] Mathias, Scott; Page, Steve; Wehrum, Bill; Gunasekara, Mandy
Attendees

Name <E-mail>	Attendance
[redacted] <[redacted]scott@epa.gov>	Organizer
Mathias, Scott <Mathias.Scott@epa.gov>	Required
Page, Steve <Page.Steve@epa.gov>	Required
Wehrum, Bill <Wehrum.Bill@epa.gov>	Required
Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>	Required

Thursday, November 30, 2017

Time 8:30 AM – 9:00 AM
Subject Meet with Aaron Flynn and Adrienne Sandoval (Confirmed)
Location Mandy's office
Show Time As Busy
Alex would escort them up from security for this meeting
Categories Blue Category
Attendees

Name <E-mail>	Attendance
Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>	Organizer

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Dominguez, Alexander <dominguez.alexander@epa.gov>	Required

Time 9:30 AM – 10:30 AM
Subject OTAQ Fuels Weekly
Location WJC-N 5400 + Video with AA + [redacted] Participant Code: [redacted] (b)
Show Time As Busy
Attendees

Name <E-mail>	Attendance
Wehrum, Bill <Wehrum.Bill@epa.gov>	Organizer
Grundler, Christopher <grundler.christopher@epa.gov>	Required
Hengst, Benjamin <Hengst.Benjamin@epa.gov>	Required
Argyropoulos, Paul <Argyropoulos.Paul@epa.gov>	Required
Bunker, Byron <bunker.byron@epa.gov>	Required
Dubois, Roland <Dubois.Roland@epa.gov>	Required
Orlin, David <Orlin.David@epa.gov>	Required
Li, Ryland (Shengzhi) <Li.Ryland@epa.gov>	Required
Lewis, Josh <Lewis.Josh@epa.gov>	Required
Charmley, William <charmley.william@epa.gov>	Required
Machiele, Paul <machiele.paul@epa.gov>	Required
Simon, Karl <Simon.Karl@epa.gov>	Required
Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>	Required
Stewart, Gwen <Stewart.Gwen@epa.gov>	Required
Baptist, Erik <baptist.erik@epa.gov>	Required
Harlow, David <harlow.david@epa.gov>	Required
Le, Madison <Le.Madison@epa.gov>	Required
Stahle, Susan <Stahle.Susan@epa.gov>	Optional
Woods, Clinton <woods.clinton@epa.gov>	Required
Burkholder, Dallas <burkholder.dallas@epa.gov>	Required

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Korotney, David <korotney.david@epa.gov>	Required
Michaels, Lauren <Michaels.Lauren@epa.gov>	Required
Parsons, Nick <Parsons.Nick@epa.gov>	Required
Cohen, Janet <cohen.janet@epa.gov>	Required
Dominguez, Alexander <dominguez.alexander@epa.gov>	Optional

Time 11:00 AM – 11:45 AM

Subject NSR Improvement

Location WJC-N 5400 + Video with OAQPS + [redacted] Participant Code: [redacted]

Show Time As Busy

To: Wehrum, Bill; Harlow, David; Gunasekara, Mandy; Lewis, Josh; Page, Steve; Koerber, Mike; Harnett, Bill; Wood, Anna; Kornylak, Vera; Santiago, Juan; Wayland, Richard; Dunham, Sarah; Harvey, Reid; Krieger, Jackie; Vetter, Cheryl; Rao, Raj

Cc: Alston, Lala; Johnson, Yvonnew; Long, Pam

Attendees

Name <E-mail>	Attendance
Wehrum, Bill <Wehrum.Bill@epa.gov>	Organizer
Harlow, David <harlow.david@epa.gov>	Required
Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>	Required
Lewis, Josh <Lewis.Josh@epa.gov>	Required
Page, Steve <Page.Steve@epa.gov>	Required
Koerber, Mike <Koerber.Mike@epa.gov>	Required
Harnett, Bill <Harnett.Bill@epa.gov>	Required
Wood, Anna <Wood.Anna@epa.gov>	Required
Kornylak, Vera S. <Kornylak.Vera@epa.gov>	Required
Santiago, Juan <Santiago.Juan@epa.gov>	Required
Wayland, Richard <Wayland.Richard@epa.gov>	Required
Dunham, Sarah <Dunham.Sarah@epa.gov>	Required
Harvey, Reid <Harvey.Reid@epa.gov>	Required
Krieger, Jackie <Krieger.Jackie@epa.gov>	Required

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Vetter, Cheryl <Vetter.Cheryl@epa.gov>	Required
Rao, Raj <Rao.Raj@epa.gov>	Required
Alston, Lala <Alston.Lala@epa.gov>	Optional
Johnson, Yvonne W <Johnson.Yvonnew@epa.gov>	Optional
Long, Pam <Long.Pam@epa.gov>	Optional

Time 1:00 PM – 1:30 PM
Subject Prep for AHAM Meeting on 12/5
Location WJC-N 5400
Show Time As Busy
To: Wehrum, Bill; Gunasekara, Mandy; Harlow, David; Dominguez, Alex; Dunham, Sarah; Snyder, Carolyn; Newberg, Cindy; Bailey, Ann; Maranion, Bella

Attendees

Name <E-mail>	Attendance
Wehrum, Bill <Wehrum.Bill@epa.gov>	Organizer
Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>	Required
Harlow, David <harlow.david@epa.gov>	Required
Dominguez, Alexander <dominguez.alexander@epa.gov>	Required
Dunham, Sarah <Dunham.Sarah@epa.gov>	Required
Snyder, Carolyn <Snyder.Carolyn@epa.gov>	Required
Newberg, Cindy <Newberg.Cindy@epa.gov>	Required
Bailey, Ann <Bailey.Ann@epa.gov>	Required
Kaplan, Katharine <Kaplan.Katharine@epa.gov>	Optional

Time 1:30 PM – 1:45 PM
Subject Cab to Hunton
Show Time As Busy
Categories Orange Category

Time 1:45 PM – 2:30 PM
Subject Speak on Hunton Meeting Panel - Which Way Does the Wind Blow: Priorities and Developments in Air Quality and Climate Change Regulation (Confirmed)
Location Hunton & Williams Offices, 2200 Pennsylvania Avenue NW - 9th Floor
Show Time As Busy
Categories Green Category

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EXHIBIT HH

From: Traylor, Patrick
Location: WJCS-3216
Importance: Normal
Subject: NSR Memorandum Discussion
Start Date/Time: Mon 12/4/2017 6:00:00 PM
End Date/Time: Mon 12/4/2017 7:00:00 PM

To: Traylor, Patrick; Bodine, Susan; Schwab, Justin; Gunasekara, Mandy
Cc: Atkinson, Emily

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EXHIBIT II

To: Ferguson, Lincoln[ferguson.lincoln@epa.gov]
Cc: Jackson, Ryan[jackson.ryan@epa.gov]
From: Gunasekara, Mandy
Sent: Tue 12/5/2017 12:24:09 AM
Subject: NSR Memo
NSR policy memo_draft_2017 12 2 edits.docx

See attached for SP review.

Mandy M. Gunasekara

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

ED_001598_00006822

EXHIBIT JJ

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
Cc: Traylor, Patrick[traylor.patrick@epa.gov]; Bodine, Susan[bodine.susan@epa.gov]; Burke, Marcella[burke.marcella@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Srinivasan, Gautam[Srinivasan.Gautam@epa.gov]; Doster, Brian[Doster.Brian@epa.gov]; Williams, Melina[Williams.Melina@epa.gov]
From: Schwab, Justin
Sent: Wed 12/6/2017 10:24:02 PM
Subject: NSR memo - OGC comments
NSR policy memo_draft_2017.12.2 edits + mkw bld jls.docx

Dear Mandy,

Please find attached a redline with comment bubbles. Ex. 5 - Deliberative Process/Attorney Work Product/Attorney Client Privilege

Ex. 5 - Deliberative Process/Attorney Work Product/Attorney Client Privilege

Please let me know if you have any questions.

Best,

Justin

ED_001598_00006168

EXHIBIT KK

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
Cc: Bodine, Susan[bodine.susan@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]
From: Schwab, Justin
Sent: Thur 12/7/2017 4:52:54 PM
Subject: NSR memo--general OGC thoughts on legal risk

(Expanding on some of the comments on the draft.)

Ex. 5 - Deliberative Process/Attorney Work Product/Attorney Client Privilege

ED_001598_00006139

Ex. 5 - Deliberative Process/Attorney Work Product/Attorney Client Privilege

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EXHIBIT LL

Released via FOIA EPA-2019-008216

To: Wilcox, Jahan[wilcox.jahan@epa.gov]
Cc: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]; Jackson, Ryan[jackson.ryan@epa.gov]
From: Bowman, Liz
Sent: Thur 12/7/2017 5:43:38 PM
Subject: FW: Signed NSR Memo
NSR Policy Memo 12.7.17.pdf
ATT00001.htm

Can you please help us get this to a few people who might be interested, after the Hearing concludes? I plan to send it to Mary Kissel on the WSJ editorial page, please send it to the reporters you suggest. The program has indicated they are going to give it to Politico, E&E, etc. as soon as they get a copy, so if you want to provide it some folks after the hearing, that would be appreciated. Background on the issue is below:

Draft Desk Statement

Dec. 7 DTE/NSR Memo

Ex. 5 - Deliberative Process

ED_001598_00006375

EXHIBIT MM

HUNTON & WILLIAMS

HUNTON & WILLIAMS LLP
2200 PENNSYLVANIA AVENUE, NW
WASHINGTON, D.C. 20037-1701

TEL 202 • 955 • 1500
FAX 202 • 778 • 2201

ANDREA FIELD
DIRECT DIAL: 202 • 955 • 1558
EMAIL: afield@hunton.com

May 12, 2017

Samantha K. Dravis
Regulatory Reform Officer and
Associate Administrator, Office of Policy
U.S. Environmental Protection Agency
Mail Code 1803A
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Submitted via Electronic Mail and via Regulations.gov

Utility Air Regulatory Group's Response to EPA's Request for Comments on Regulations Appropriate for Repeal, Replacement, or Modification Pursuant to Executive Order 13777, 82 Fed. Reg. 17,793 (Apr. 13, 2017): Docket ID No. EPA-HQ-OA-2017-0190

Dear Ms. Dravis:

This letter is submitted in response to the U.S. Environmental Protection Agency's ("EPA" or "Agency") April 13, 2017 *Federal Register* notice[1] seeking input from the public to inform the Agency's evaluation of existing regulations that may meet the criteria outlined in Executive Order 13777[2] for repeal, replacement, or modification. More specifically, the notice asks commenters to identify regulations that, among other things, "are outdated, unnecessary, or ineffective; impose costs that exceed benefits; . . . or . . . derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified,"[3] in accordance with the language of Executive Order 13777.

The Utility Air Regulatory Group ("UARG") recommends that EPA examine whether the regulations identified below meet the criteria of Executive Order 13777. UARG is a not-for-profit association of individual electric generating companies and national trade associations. Since 1977, UARG has participated on behalf of certain of its members collectively in scores of Clean Air Act ("CAA" or "Act") administrative proceedings that affect electric generators and in litigation arising from those proceedings. UARG's 40 years of participation in CAA rulemakings and litigation has provided it unique insight as to which CAA programs are

[1] 82 Fed. Reg. 17,793 (Apr. 13, 2017).
[2] 82 Fed. Reg. 12,285 (Mar. 1, 2017).
[3] 82 Fed. Reg. at 17,793.

ED_001598_00014012
Page 217 of 701
Released via FOIA EPA-2019-008216

designed and work as Congress intended, which programs are overly burdensome or costly, and which programs are unlawful or unnecessary.

Many of the recommendations set out below are described in greater detail in materials that UARG has previously filed with EPA and reviewing courts. These materials include rulemaking comments, technical expert reports, petitions for reconsideration, and court pleadings concerning Agency actions that UARG believes to be unlawful, unjustified, or unduly burdensome or costly. UARG appreciates the opportunity to provide input on this matter and invites Agency representatives and others in the administration to meet with UARG concerning the information that we are providing today.[4]

[4] Dominion Energy does not join in these comments.

Released via FOIA EPA-2019-008216

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B. Carbon Dioxide New Source Performance Standards for New, Modified, and Reconstructed Electric Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015), codified at 40 C.F.R. Part 60, Subpart TTTT 5

C. Greenhouse Gas Mandatory Reporting Rule ("GHG MRR"), codified at 40 C.F.R. Part 98 6

II. Cross-State Air Pollution Rule ("CSAPR") Update Rule 8

III. Regional Haze and Other Visibility Regulations 10

IV. Regulation of Hazardous Air Pollutants 12

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I. Climate Change-Related Rules

A. Clean Power Plan, 80 Fed. Reg. 64,662 (Oct. 23, 2015), codified at 40 C.F.R. Part 60, Subpart UUUU

EPA has already commenced review of this rule to determine whether it is appropriate to "initiate proceedings to suspend, revise or rescind the Clean Power Plan."[5] Any replacement or revision to the Clean Power Plan under CAA § 111(d) must adhere to the statutory confines of section 111 of the CAA and must: (i) be based on a "best system of emission reduction" that can be applied at the individual electric generating units subject to the rule; (ii) adhere to the requirement of section 111(d) of the CAA and its implementing regulations that states (and EPA when it is acting on behalf of a state) be allowed to prescribe less stringent standards for certain units on an as-needed, case-by-case basis; and (iii) adhere to the requirement of section 111(d) of the CAA that the remaining useful life of the unit be taken into account. Any replacement rule should also allow for compliance flexibility. Likewise, UARG encourages EPA to acknowledge that once it has promulgated emission guidelines for a source category, the CAA does not give the Agency authority to revisit those guidelines and make them more stringent. *See* Section VI.A below.

B. Carbon Dioxide New Source Performance Standards for New, Modified, and Reconstructed Electric Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015), codified at 40 C.F.R. Part 60, Subpart TTTT

EPA has already commenced review of this rule to determine whether it is appropriate to "initiate proceedings to suspend, revise or rescind the Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Generating Units."[6] As part of its comments on EPA's proposed performance standards and its petition for reconsideration of the final standards, UARG engaged experts to prepare numerous technical reports explaining to EPA why the performance standards EPA proposed (and later finalized) were neither based on adequately demonstrated systems of emission reduction nor achievable; these technical reports are available in the rulemaking docket.[7]

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[5] 82 Fed. Reg. 16,329 (Apr. 4, 2017).

[6] 82 Fed. Reg. 16,330 (Apr. 4, 2017).

[7] *See* UARG Comments on Proposed GHG NSPS for New Electric Generating Units ("EGUs") at Attachments 1-3, 5, 9, 11 (May 9, 2014), EPA-HQ-OAR-2013-0495-9666; UARG Comments on Proposed GHG NSPS for Modified and Reconstructed EGUs at Attachments B, C, G, K (Oct. 16, 2014), EPA-HQ-OAR-2013-0603-0215; UARG Petition for Reconsideration of Final GHG NSPS at Exhibit J (Dec. 22, 2015), EPA-HQ-OAR-2013-0495-11894.

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Any replacement or revision to the greenhouse gas ("GHG") standards of performance for new, modified, and reconstructed electric generating units must adhere to the statutory confines of section 111 of the CAA, must be based on a "best system of emission reduction" that has been adequately demonstrated, and must be achievable by the individual electric generating units subject to the rule.

Of particular note, any replacement or revision to these standards of performance cannot, for the purposes of determining the "best system of emission reduction," take into account technology that received funding or tax subsidies under the Energy Policy Act of 2005, as consideration of those technologies for that purpose is prohibited by that Act.

C. Greenhouse Gas Mandatory Reporting Rule ("GHG MRR"), codified at 40 C.F.R. Part 98

Under the fiscal year 2008 Consolidated Appropriations Act, Congress authorized funding for EPA to develop and publish a rule "to require mandatory reporting of greenhouse gas emissions above appropriate thresholds in all sectors of the economy of the United States."[8] The joint explanatory statement accompanying the legislation directed EPA to use its existing authority under the CAA (e.g., authority under CAA § 114) to develop a mandatory GHG reporting rule covering those upstream production and downstream sources the Administrator deems "appropriate," and to determine "appropriate thresholds" and frequency for reporting.[9] Congress also authorized EPA to rely on the "existing reporting requirements for electric generating units under section 821 of the 1990 CAA Amendments."[10]

The reporting program has resulted in facilities expending enormous resources tracking, quality assuring, and reporting vast amounts of information. EPA also continues to spend significant resources for both its own staff and Agency contractors to implement the GHG MRR and its electronic reporting requirements. Since its initial promulgation in October 2009, EPA has revised the regulation dozens of times. Although UARG understands that many of these rule revisions have been directed at correcting errors or simplifying data collection and reporting, the need for so many revisions underscores the complicated nature of the program.

In the past, UARG has questioned the "practical utility"[11] of much of the collected information and offered suggestions for simplification of the program. For example, under

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[8] Pub. L. No. 110–161, 121 Stat. 1844, 2128 (2007).

[9] 74 Fed. Reg. 16,448, 16,454 (Apr. 10, 2009).

[10] *Id.* (internal quotation marks omitted).

[11] EPA's authority to collect information under CAA § 114 is limited by the Paperwork Reduction Act and its implementing regulations. To require a data collection, EPA must

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Subpart C, which covers general "stationary fuel combustion sources," the term is defined simply as a device that combusts fuel and does not require that the device be used for any particular purpose.[12] As a result, facilities with total emissions above the rule's applicability threshold must include in their facility-wide calculation miscellaneous combustion devices, like small gas-fired heaters, stoves, lawn mowers, or even hot water heaters. Reporting GHG emissions from such miscellaneous devices is time consuming and the information is of little value. UARG previously asked EPA either to define more narrowly what type of device triggers reporting or to adopt a *de minimis* threshold for reporting emissions from such devices at a stationary fuel combustion source.[13]

Now that the program has been in place for more than seven years, and EPA has provided Congress the information it sought, EPA should review how all of the information being collected has been used and whether the Agency's assumptions about the information's "practical utility" are correct. EPA should use this information to tailor the program so that it provides a significant "net benefit" consistent with the objectives of Executive Order 13777. At a minimum, UARG encourages EPA to establish a *de minimis* cut-off for reporting emissions from miscellaneous activities and streamline by "auto-populating" any emissions already being reported under another federal regulatory program, such as CO_2 emissions data collected under 40 C.F.R. Part 75.

In addition, as part of the rulemakings discussed in Sections I.A and I.B above, EPA amended Part 98 to impose additional reporting requirements on owners of electric generating units that transfer captured carbon dioxide to sites reporting under Subpart RR, while also requiring units to transfer their captured carbon dioxide to Subpart RR reporting sites if they wish to rely on carbon capture to meet an applicable emission limit or earn emission reduction credits. EPA should reconsider this requirement, which is unduly burdensome, costly, and does not have any environmental benefit.

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demonstrate the "practical utility" of the covered information. 5 C.F.R. § 1320.5(d)(1)(iii). Under 5 C.F.R. § 1320.3(l),

> *Practical utility* means the actual, *not merely the theoretical or potential,* usefulness of information.... In determining whether information will have 'practical utility,' OMB will take into account whether the agency demonstrates *actual timely use* for the information....

(emphases added).

[12] 40 C.F.R § 98.30(a).

[13] *See, e.g.*, UARG Comments on Proposed GHG MRR (June 9, 2009), EPA-HQ-OAR-2008-0508-0493.

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II. Cross-State Air Pollution Rule ("CSAPR") Update Rule

EPA should reconsider and modify certain aspects of the Cross-State Air Pollution Rule Update for the 2008 Ozone National Ambient Air Quality Standards ("NAAQS") (known as the "CSAPR Update Rule").[14] The CSAPR Update Rule establishes stringent "ozone-season" (May-through-September) budgets for additional limits on emissions of nitrogen oxides ("NOx") from fossil fuel-fired electric generating units, beginning this month, in each of 22 states: Alabama, Arkansas, Illinois, Indiana, Iowa, Kansas. Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. The rule is a new regulatory program that imposes costs exceeding any reasonable measure of projected benefits. Indeed, EPA's own modeling showed that the emission reductions required of upwind states under the CSAPR Update Rule are disproportionate to the relatively limited projected reductions in downwind ozone concentrations that the rule's emission limits are estimated to produce.[15] Furthermore, if left unmodified, the CSAPR Update Rule threatens jobs in the energy sector because its stringent emission caps can be expected to have the effect of restricting fuel choice.

UARG filed its petition for reconsideration of the CSAPR Update Rule with EPA on December 23, 2016. At least eight other petitions for reconsideration of the rule are pending before EPA.[16] The CSAPR Update Petition describes several aspects of the rule that EPA should reconsider, including: (i) EPA's reliance on modeling projections to identify downwind areas to be addressed by the rule, in disregard of real-world air quality conditions;[17] (ii) EPA's use of an unjustifiably low one-percent-of-NAAQS "contribution threshold" to "link" upwind states to downwind receptors and thereby to subject those states to additional regulation under the rule;[18] and (iii) EPA's failure, in conducting its air quality modeling, to properly account for effects of emissions from non-U.S. sources, which no state has the authority or ability to regulate.[19] Additional background regarding concerns with EPA's CSAPR Update Rule methodology is provided in the CSAPR Update Petition and in UARG's rulemaking comments submitted to

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[14] 81 Fed. Reg. 74,504 (Oct. 26, 2016).

[15] *See* UARG's Petition for Partial Reconsideration of the CSAPR Update Rule at Section X (Dec. 23, 2016) ("CSAPR Update Petition"), https://www.epa.gov/sites/production/files/2017-01/documents/the_utility_air_regulatory_group_0.pdf.

[16] *See* https://www.epa.gov/airmarkets/petitions-reconsideration-received-csapr-update.

[17] CSAPR Update Petition at Sections I & II.

[18] *Id.* at Section III.

[19] *Id.* at Section IV.

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EPA on the December 2015 proposed version of the CSAPR Update Rule.[20] In addition, several petitions for judicial review of the CSAPR Update Rule have been filed and are pending in the U.S. Court of Appeals for the D.C. Circuit, including petitions for review filed by UARG, Murray Energy Corporation, many other industry parties, and several states (Alabama, Arkansas, Ohio, Texas, Wisconsin, and Wyoming) (*Wisconsin v. EPA*, No. 16-1406 & consolidated cases).

EPA should promptly reconsider and modify key elements of the CSAPR Update Rule, as identified in UARG's CSAPR Update Petition, to alleviate unnecessary, costly, and counterproductive regulatory burdens.[21] In doing so, EPA should, for example, consider, propose, and promulgate changes that would increase the levels of states' emission budgets based on corrections to and further review of the existing rule, as well as changes that would appropriately reform EPA's methodology for addressing interstate transport, as described in the attached CSAPR Update Petition and UARG's rulemaking comments.[22] In addition, based on its review and reconsideration of the CSAPR Update Rule and its methodology, EPA should, to the extent supported by appropriate analysis, issue a determination identifying states that currently are subject to that Rule but that do not contribute significantly to nonattainment of the 2008

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[20] *See* UARG Comments on Proposed CSAPR Update Rule (Feb. 1, 2016), EPA-HQ-OAR-2015-0500-0253. UARG also submitted supplemental comments on June 1, June 9, and August 16, 2016, addressing information that became available after the deadline for submitting comments on the proposed rule. UARG's supplemental comments are attached to the CSAPR Update Petition as Appendix A to that document.

[21] UARG emphasizes that it will be important for EPA, as it reconsiders the CSAPR Update Rule, to ensure that states may continue to rely on compliance with the NOx and sulfur dioxide ("SO_2") emission limits in CSAPR itself to satisfy "best available retrofit technology" ("BART") requirements for EGUs under the CAA's visibility protection program, as provided in 40 C.F.R. § 51.308(e)(4) (as promulgated at 77 Fed. Reg. 33,642, 33,656 (June 7, 2012)). *See also* 81 Fed. Reg. 78,954, 78,961-64 (Nov. 10, 2016) (describing EPA's sensitivity analysis reaffirming the validity of the Agency's determination that participation in CSAPR is a valid BART alternative).

[22] As noted in the CSAPR Update Petition, EPA in reviewing and reconsidering the CSAPR Update Rule should not make any change that would result in imposition of an ozone-season NOx emission budget for any state that is more stringent than the budget for that state under the existing rule. EPA also should not make any change that would affect the continuing validity and effectiveness of the parts of the CSAPR Update Rule in which EPA determined that: (i) Florida, North Carolina, and South Carolina are excluded from the ozone-season NOx program under both the original CSAPR and the CSAPR Update Rule; and (ii) Georgia is not subject to any obligations with respect to interstate transport for ozone NAAQS beyond those established for that state in CSAPR itself.

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ozone NAAQS in (and do not interfere with maintenance of that NAAQS by) any other state and, consequently, remove those states from coverage under the CSAPR Update Rule.

III. Regional Haze and Other Visibility Regulations

EPA should reconsider and modify certain aspects (described below) of its January 10, 2017 visibility rule revisions that, if left unmodified, will impose unnecessary and counterproductive regulatory costs and other burdens.

Sections 169A and 169B of the Act and EPA regulations at 40 C.F.R. §§ 51.300-51.309 require states to adopt and submit state implementation plans ("SIPs") to achieve "reasonable progress" toward a national goal of preventing and remedying impairment of visibility in certain national parks and wilderness areas, to the extent visibility impairment in those areas results from manmade air pollution. The CAA's visibility program generally requires states to evaluate emission sources or source categories for potential emission controls to help achieve reasonable progress. Although Congress intended that states be the principal decisionmakers in this area, in many instances over the past eight years, EPA improperly assumed the states' role.

During the first "planning period" under the visibility program's "regional haze" provisions—a period that began in 2008 and will end in 2018—the primary regulatory driver was the CAA's BART requirement applicable to many EGUs and industrial sources. Now that decisionmaking on BART is complete for most states, the main focus of the upcoming second planning period, which will run from 2018 to 2028, will be implementation of the CAA's reasonable progress requirement.

EPA substantially amended many elements of its visibility protection regulations in its January 10, 2017 rule.[23] Contrary to the version of that final rule as signed on December 14, 2016 (which would have taken effect 30 days after publication in the *Federal Register*), the final rule as published on January 10 was made effective immediately in order to evade the incoming Administration's normal regulatory review and its "regulatory freeze" pending that review. The January 10 rule is the subject of three petitions for administrative reconsideration filed with EPA and eleven petitions for review in the U.S. Court of Appeals for the D.C. Circuit (*Texas v. EPA*, No. 17-1021 and consolidated cases). UARG filed a petition for administrative reconsideration[24] and a petition for judicial review of the rule. EPA has not yet responded to UARG's petition for reconsideration. As described below and in the Visibility Rule Petition, the rule has several provisions that EPA should now reconsider and repeal or modify.

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[23] 82 Fed. Reg. 3078 (Jan. 10, 2017).

[24] *See* UARG Petition for Partial Administrative Reconsideration of Amended Visibility Requirements (Mar. 13, 2017) ("Visibility Rule Petition") (attached as Exhibit 1).

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When Congress enacted the CAA's visibility provisions, it made clear the states have broad discretion in implementing the program. The D.C. Circuit recognized that principle in the leading case in this area, *American Corn Growers Ass'n v. EPA*, 291 F.3d 1 (D.C. Cir. 2002). As the program was implemented during the previous administration, however, EPA frequently failed to give the deference that it owed to state decisions and often supplanted reasonable state regulatory plans with more stringent and costly federal control requirements in many states, including Arizona, Arkansas, Nebraska, New Mexico, North Dakota, Oklahoma, Texas, Utah, and Wyoming.

To address these problems, EPA should modify its January 10, 2017 regional haze rules to emphasize the breadth of state authority and to make clear EPA will not second-guess state determinations. EPA should do this by, for instance, making clear that states are free to decide how to consider and assess each of the statutory "reasonable progress" factors, including the costs associated with additional emission controls, and whether visibility improvements resulting from further controls will be substantial enough to warrant imposing those controls.

Although some parts of the January 10, 2017 rule make common-sense revisions that should be preserved—such as a three-year extension, from July 2018 to July 2021, of states' deadline to develop and submit SIPs for the second planning period—other parts of that rule create problems that require additional regulatory action to make necessary modifications. For example, the rule purports to impose on states an improper interpretation—adopted in the last Administration, over many stakeholders' objections—of the relationship between two key elements of the regional haze program: the requirement that states determine and adopt "reasonable progress goals" and the requirement that states identify specific emission control measures to include in "long-term strategies" to achieve reasonable progress. The January 10, 2017 rule requires states to first identify all measures to be included in the state's long-term strategy and then to calculate reasonable progress goals based on the degree of visibility improvement that computer modeling projects those measures will achieve. This aspect of the rule subverts the normal regulatory process by making states' determinations of reasonable progress goals an afterthought and compelling states to consider regulation even where it is unnecessary to stay on track toward reasonable visibility objectives. States should instead be free to develop reasonable progress goals they deem appropriate for a given area and then to determine which specific measures should be included in long-term strategies to achieve those goals.

The January 10, 2017 rule also has several other provisions that EPA should reconsider and modify—including (among others) provisions concerning the "uniform rate of progress" and provisions addressing states' consultation processes with other states and with federal land

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management agencies. A detailed description of how EPA should address and reform these and other aspects of the rule is in UARG's Visibility Rule Petition.[25]

Consistent with Executive Order 13777, revising EPA's visibility rules as recommended in this comment letter and in UARG's Visibility Rule Petition would alleviate unnecessary regulatory burdens and would be consistent with applicable law. Such revisions would advance the Executive Order's objective of avoiding regulation that unnecessarily imposes costs that outweigh benefits and that inhibit job creation and economic growth.

IV. Regulation of Hazardous Air Pollutants

A. Compliance Provisions of the Mercury and Air Toxics Standards ("MATS") Rule, codified at 40 C.F.R. Part 63, Subpart UUUUU

The MATS Rule, regulating hazardous air pollutants from coal and oil-fired electric generating units, is among the most expensive and burdensome rules EPA has ever promulgated. Although the most significant costs associated with the rule derive from purchase, installation, and use of emission control technologies, the task of demonstrating compliance under the rule through periodic performance testing, continuous emissions monitoring, recordkeeping, and reporting also is costly. Some of those compliance demonstration costs are unavoidable, but other costs and burdens are avoidable. Rules that are written clearly and that offer flexibility—where that can be achieved without sacrificing environmental protections—provide the greatest "net benefit." Unfortunately, the MATS Rule has many provisions that are internally inconsistent, ambiguous, or inflexible, each of which adds significantly to the cost and burden of complying with the rule.

Although the current rule is the product of multiple rulemakings over a period of more than 5 years, those successive rulemakings have not fully addressed the rule's overall compliance burdens. The 2012 rule contained numerous errors and problems, many of which are described in detail in UARG's first petition for administrative reconsideration.[26] When EPA conducted a reconsideration rulemaking on a few of the issues in the rule pertaining to periods of startup and

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[25] As noted above and in the Visibility Rule Petition, one provision of the January 10, 2017 rule is an adjustment, from July 2018 to July 2021, of the deadline by which states must submit SIPs for the second planning period. UARG joins numerous states and other stakeholders in supporting that deadline adjustment and urges EPA *not* to reconsider that element of the rule.

[26] *See* UARG Petition for Reconsideration of MATS Rule at Section VI (Apr. 16, 2012), EPA-HQ-OAR-2009-0234-20180.

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shutdown, the Agency's 2014 reconsideration rule created more problems than it resolved.[27] UARG raised those problems and other longstanding issues in comments on the Agency's 2015 proposed "Technical Corrections" to the MATS Rule.[28] Although EPA resolved some of the issues from the prior two rulemakings in its 2016 Technical Corrections rule, a lot of work remains to be done to make the rule clear, consistent, and appropriately flexible. Even after improvements to the rule in the Technical Corrections, facilities are struggling to interpret and reconcile ambiguous and inconsistent provisions. They also remain subject to overly restrictive requirements for the conduct of performance tests that could result in operation of units that otherwise would not operate, simply to conduct tests to measure emissions. This is unnecessary, costly, and grossly inefficient.

EPA currently is in the middle of another MATS-related rulemaking, this one focused on improving the electronic reporting requirements of the MATS Rule by allowing all reports to be submitted using the Emissions Collection and Monitoring Plan System ("ECMPS") software system already used by utilities under the Acid Rain Program and CSAPR. Although UARG supports that change, UARG members are concerned that the burdens associated with some of the very detailed electronic reporting EPA has proposed will outweigh the cost savings associated with the move to ECMPS. EPA and utilities also cannot successfully implement the electronic reporting requirements without a common understanding of what other substantive compliance provisions in the rule require. As a result, in comments on that proposal, UARG again asked EPA to resolve some of the issues UARG has identified in the existing rule, in addition to requesting changes in the volume of new information EPA has proposed be submitted electronically.[29]

The MATS Rule has the potential to be less costly. EPA should use the opportunity of the ongoing rulemaking to work with UARG to achieve that end by resolving the issues that remain in the existing rule's compliance procedures, and addressing UARG's concerns about the proposed revisions.

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[27] EPA ultimately denied reconsideration on the remainder of UARG's 2012 petition without addressing the merits of UARG's concerns regarding the compliance provisions, concluding only that it had met its procedural obligations under CAA § 307(d)(7) to solicit comment on the rule. EPA, Denial of Petitions for Reconsideration of Certain Issues: MATS and Utility NSPS (Mar. 2015), EPA-HQ-OAR-2009-0234-20493.

[28] *See* UARG Comments on Proposed Technical Corrections (Apr. 3, 2015), EPA-HQ-OAR-2009-0234-20483.

[29] *See* UARG Comments on Proposed MATS Electronic Reporting Rule (Nov. 15, 2016), EPA-HQ-OAR-2009-0234-20609.

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B. Renewed Analysis of Potentially Delisting Natural Gas-Fired Stationary Combustion Turbines from Regulation Under CAA Section 112

Gas-fired combustion turbines make up a large and growing portion of the nation's electric generating fleet, and they are an essential part of maintaining electric reliability in the United States. But for over a decade these sources have been in legal limbo with respect to their regulatory status under the CAA's regulatory provisions governing hazardous air pollutants ("HAPs"). The resulting uncertainty presents risks to combustion turbine owners that should be addressed by EPA.

EPA listed stationary combustion turbines as a source category for regulation under section 112 of the Act in 1992 and promulgated emission standards limiting HAP emissions from new and reconstructed turbines in 2004.[30] However, almost immediately, EPA proposed to remove natural gas-fired combustion turbines from the list of sources subject to regulation under section 112.[31] Based on EPA's own analysis and on a petition for delisting submitted by the Gas Turbine Association, the Agency made a preliminary finding that gas-fired turbines meet the CAA's health-protective criteria for delisting.[32]

EPA's 2004 analysis found that even using conservative assumptions about exposure and risk, emissions from gas-fired combustion turbines would meet these health-protective statutory criteria. Accordingly, EPA proposed to delist gas-fired turbines from section 112 regulation. Recognizing that it would be irrational to require compliance with a rule it intended to revoke, EPA also issued a stay of the emission standards for gas-fired turbines until the Agency could take final action on its delisting proposal.[33]

However, EPA never took final action on its delisting proposal. According to the terms of the stay, if EPA ultimately decides not to delist gas-fired turbines, then the standards will spring into effect for any turbine built after January 2003. This twelve-year waiting period has generated significant regulatory uncertainty for owners of gas-fired combustion turbines, who cannot say for certain whether or not their turbines built in the interim must comply with the emission standards. That uncertainty is compounded by EPA's upcoming Risk and Technology

[30] 69 Fed. Reg. 10,512 (Mar. 5, 2004).
[31] 69 Fed. Reg. 18,327 (Apr. 7, 2004).
[32] *Id.*; *see* CAA § 112(c)(9)(B) (describing criteria).
[33] 69 Fed. Reg. 51,184 (Aug. 18, 2004).

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Review ("RTR") for stationary combustion turbines: turbine owners cannot be sure whether EPA will further tighten the standards that might ultimately apply if the stay is lifted.[34]

EPA should revisit its delisting proposal for gas-fired combustion turbines and assess whether those sources still meet the statutory criteria for delisting. The Agency's previous review showed that gas-fired turbines' HAP emissions posed minuscule risks to health and the environment. If the delisting criteria are still satisfied, EPA should promptly delist gas-fired turbines from regulation under section 112.[35] If gas-fired turbines are not delisted, the Agency should, as appropriate, provide for a transition mechanism for gas-fired turbines constructed since 2003, and EPA should be careful in the RTR proceeding not to impose revised standards that would be unduly burdensome and costly.

C. National Emissions Standards for Hazardous Air Pollutants and New Source Performance Standards for Stationary Reciprocating Internal Combustion Engines ("RICE"), codified at 40 C.F.R. Part 60 Subparts IIII and JJJJ and 40 C.F.R. Part 63 Subpart ZZZZ

EPA has promulgated a set of interrelated regulations for emissions from RICE units pursuant to both CAA § 111 (new source performance standards) and § 112 (national emissions standards for HAPs). Each set of rules identifies numerous subcategories of internal combustion engines and applies varying requirements to each subcategory based on age, size, fuel type, engine design, use, and other factors. The overlapping regulatory programs and range of subcategories have resulted in a complex set of requirements that can be difficult for source owners to navigate.

The RICE regulations generally require manufacturers to install cost-effective state-of-the-art technology to minimize emissions. UARG agrees that requiring manufacturers (rather than source owners or operators) to install these controls is a reasonable approach to regulation for these sources. But EPA has also promulgated extensive and burdensome testing, maintenance, and record-keeping requirements for owners and operators. These requirements

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[34] A federal court recently set a March 2020 deadline for EPA to complete its RTR for stationary combustion turbines (along with 19 other source categories). *Cal. Cmtys. Against Toxics v. Pruitt*, No. 15-cv-512 (TSC), 2017 WL 978974 (D.D.C. Mar. 13, 2017).

[35] Although the D.C. Circuit has ruled that CAA § 112(c)(9)(B)(i) only allows EPA to delist entire source categories (rather than subcategories), *see NRDC v. EPA*, 489 F.3d 1364 (D.C. Cir. 2007), nothing in the Act prohibits EPA from reclassifying gas-fired combustion turbines as a separate source category and delisting them. *See* CAA § 112(c)(1).

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impose substantial costs with little to no benefit. Emissions from RICE sources are already small and do not warrant these onerous and needless regulations.

For example, EPA has placed unnecessary restrictions on the operation of emergency engines. These engines are limited to just 50 hours of non-emergency operation, which count toward the 100 hour annual limit for testing and maintenance. Tracking these independent uses of RICE sources is burdensome and achieves no benefit. In addition, the work practice standards for most RICE sources require servicing the unit more often than manufacturer specifications, which is inefficient and does not provide environmental benefits. Finally, for new Tier 4 engines, EPA adopted redundant requirements for both manufacturers and operators restricting operation when certain emission controls are not working properly, which serve only to hinder operators' ability to address emergency situations. These provisions are burdensome, threaten reliability, and inappropriately place manufacturers in the role of policing emergency situations.

EPA should eliminate the unnecessary requirements applicable to RICE sources and adopt clear, streamlined replacements.

V. Preconstruction Permitting Issues

A. New Source Review ("NSR") Reform

The Act's NSR program requires major stationary sources to go through an extensive, time-consuming, and costly review and permitting process prior to construction. The NSR program also applies to existing facilities if they are modified in substantial ways and if, as a result, emissions increase by significant amounts (these are known as "major modifications"). The NSR program requires, among other things, that the owner or operator of a proposed new major source or a proposed major modification obtain a pre-construction permit, which will be issued only if the owner/operator (i) demonstrates—normally through air quality modeling—that the proposed major new source or modification will not cause or contribute to a violation of air quality standards; (ii) installs the best available control technologies ("BACT") to reduce levels of specific regulated pollutants, and (iii) demonstrates that the proposed new source or modification will not cause an adverse impact on air quality-related values in federally protected lands (*e.g.*, national parks or wilderness areas).

For the first two decades of the NSR program, existing sources rarely triggered it. That is because EPA applied it in a way to be triggered only by unusual projects that would expand the capacity of the source—i.e., projects that create *new* sources of emissions. It is also because NSR is so time-consuming and expensive that sources generally avoided activities that would expand their capacities *because* they could trigger NSR.

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Starting in the late 1990s, however, EPA's enforcement arm, in an effort to drive policy, filed and/or threatened a large number of lawsuits to force the installation of controls not otherwise required by the Act. To achieve this goal, EPA asserted in the lawsuits a theory of universal liability: any maintenance project—anything larger than day-to-day activity akin to changing a car's oil—is a "change" that could trigger NSR; and any such "change," if it addresses reliability, availability, or efficiency issues that the plant might have experienced in the recent past, according to the lawsuits, will "increase" total emissions as compared to the recent past and therefore will trigger NSR. More than a decade and half later, these types of lawsuits continue, with no certainty as to how the NSR program will apply to existing plants. For example, courts have reached diametrically opposite conclusions with respect to whether similar projects are considered routine maintenance, repair, and replacement ("RMRR") and thus excluded from NSR.[36] EPA's latest revision of the emissions increase provisions has, in a single case, generated five different opinions as to how these provisions should apply.[37] At a minimum, the fact that courts—and even judges within the same court—cannot agree on what these regulations mean and how they should apply in particular circumstances highlights the uncertainty these regulations have created and how inefficient their application has been in the recent past.

The NSR rules, as EPA's enforcement arm has sought to apply them to existing facilities for the last decade and a half, discourage—and potentially impose very large costs on—needed projects to maintain and improve existing plants' availability, reliability, safety, and efficiency. Those are precisely the types of projects that maintain American industry's competitiveness and are needed to cost-effectively maintain the reliability of the nation's energy systems. For these reasons, the NSR rules should be revised to remove the uncertainty surrounding their applicability and the perverse incentives they create.

B. Synthetic Minor Sources

Current NSR regulations contain a provision (40 C.F.R. § 52.21(r)(4)) stating that a synthetic minor source—i.e., a source or modification that took operational or other limitations

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[36] *Compare, e.g.*, *Nat'l Parks Conservation Ass'n v. TVA*, No. 3:01-CV-71, 2010 WL 1291335 (E.D. Tenn. Mar. 31, 2010) (finding economizer and superheater replacements RMRR); *with United States v. La. Generating LLC*, No. 09-100-JJB-CN, 2012 WL 4107129, at *4 (M.D. La. Sept. 19, 2012) (finding reheater replacements not RMRR).

[37] *See United States v. DTE Energy Co.*, 845 F.3d 735 (6th Cir. 2017) (three different opinions), 711 F.3d 643 (6th Cir. 2013) (two different opinions). The Sixth Circuit recently denied DTE Energy's petition for rehearing en banc, and currently has pending before it DTE Energy's motion to stay the mandate pending the filing of a petition for certiorari.

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to remain minor—becomes subject to NSR when it "becomes a major source or major modification solely by virtue of relaxation in any enforceable limitation" established in a federally enforceable air permit. This provision was placed in the NSR regulations to prevent circumvention of those regulations—that is, sources taking limitations to avoid NSR review when they are constructed, only to seek to relax these limitations a short period thereafter.

That provision is too broad, however, in that it sweeps into its scope circumstances in which EPA's concerns about circumvention are clearly not implicated: for example, a situation in which a relaxation of the permit limits may be sought years after the initial construction. As a result, this rule unnecessarily limits production and hinders economic growth, even though the increase in emissions from the later construction is very small and would have a *de minimis* impact (i.e., even though the proposed change itself is not major). In the utility industry, the result is that generation is shifted to higher cost units, unnecessarily increasing costs for ratepayers and, in all likelihood, resulting in more (not less) emissions.

This "relaxation" provision should be revised such that it does not apply in situations in which the risk of circumvention is very unlikely or nonexistent. For example, EPA should consider whether, after a certain amount of time has passed (such as five or more years after a permit containing the operational limitation was issued), the relaxation provision should no longer apply. In these circumstances, a proposed physical or operational change should be analyzed under the base NSR rules, as it would be for any other "true" minor source or modification. Such a change to the regulations would sensibly encourage economic growth while simultaneously ensuring that any physical or operational change that is a major source or modification in its own right would be subject to preconstruction review.

C. Prevention of Significant Deterioration ("PSD") Significant Emissions Rate for Greenhouse Gases

In *UARG v. EPA*,[38] the Supreme Court held that EPA's so-called "Tailoring Rule" was unlawful in as much as it would apply the PSD and Title V permitting programs to sources based solely on their GHG emissions. Instead, the Court held, EPA's authority to regulate GHGs under PSD and Title V extends only to "anyway" sources, that is, sources that otherwise would trigger these permitting requirements for non-GHG pollutants. For these "anyway" sources, EPA could require BACT for GHGs "only if the source emits more than a *de minimis* amount of greenhouse gases."[39] On remand, EPA proposed to establish its previous Tailoring Rule threshold, 75,000 tons per year, as that *de minimis* level or "Significant Emissions Rate" (also known as a

[38] 134 S. Ct. 2427 (2014).
[39] *Id.* at 2449.

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significance threshold).[40] UARG and its members filed comments supporting EPA's authority to establish a significance threshold on *de minimis* grounds, but objecting to the proposed rule's approach of merely reverse-engineering a pre-determined result—namely, the Tailoring Rule's 75,000 tons per year level—instead of applying the correct legal standard for *de minimis* authority and properly evaluating the facts and data in the record under that standard.[41] Indeed, as UARG's comments explained, applying EPA's historic and well-established approach would have yielded a significance threshold of 320,000 tons per year, four times higher than EPA's predetermined, "preferred" result. Yet, not only did the proposed rule reject any significance threshold higher than 75,000 tons per year, it arbitrarily declared that EPA would not even accept comments on such higher thresholds.

Establishing an appropriate PSD *de minimis* level for GHGs falls squarely in the category of action that would alleviate unnecessary, costly, and counterproductive regulatory burdens. EPA should withdraw the current proposal, and propose a new, higher significance threshold for GHGs.

VI. New Source Performance Standards ("NSPS") Issues

A. Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 81 Fed. Reg. 59,276 (Aug. 29, 2016), codified at 40 C.F.R. Part 60, Subpart Cf

UARG urges EPA to grant petitions for reconsideration that are pending before the Agency regarding this rule, which revised the existing emissions guidelines for municipal solid waste landfills to make them more stringent. Although EPA possesses authority to amend regulations to correct mistakes or to streamline processes as part of its authority under section 111(d), the Agency lacks authority under that provision to revise its emission guidelines to direct states to make previously promulgated standards of performance for existing sources more stringent. UARG filed comments on EPA's proposed revision to the emission guidelines that are available in the rulemaking docket.[42] UARG is also challenging this rule (along with other Petitioners) in the U.S. Court of Appeals for the District of Columbia Circuit (*Nat'l Waste & Recycling Ass'n v. EPA*, No. 16-1371 and consolidated cases).

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[40] 81 Fed. Reg. 68,110 (Oct. 3, 2016).

[41] UARG Comments on Proposed Significance Threshold (Dec. 16, 2016), EPA-HQ-OAR-2015-0355-0089.

[42] *See* UARG Comments on Proposed Emission Guideline Revisions for Municipal Solid Waste Landfills (Oct. 26, 2015), EPA-HQ-OAR-2014-0451-0198.

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B. Electronic Reporting Under the NSPS, codified at 40 C.F.R. Part 60

New source performance standards establish federally enforceable emission standards and related compliance requirements for new, modified, and reconstructed facilities in specific source categories.[43] NSPS are established by EPA, but their implementation and enforcement usually are delegated to state agencies. Reporting requirements for the NSPS are established in the general provisions in Subpart A and in individual subparts. The general provisions currently require duplicate reporting to EPA Regional Offices and delegated state agencies, generally in hard copy (although use of electronic media also is permitted for submissions to state agencies with their consent).

Electronic reporting of information to a centralized data system has the potential to reduce costs and burdens and improve accessibility of information to regulators, the regulated entities, and the public. Unfortunately, EPA's implementation of such reporting under the NSPS has done the opposite.

Beginning in 2009, EPA started inserting into individual subparts of the NSPS a requirement that facilities electronically submit certain reports to EPA using an EPA-designed software system and website that the Agency was in the process of developing. The first of those requirements took effect July 1, 2011.[44] The requirement to submit existing reports electronically to a central location has not been controversial. However, the software system EPA has specified (called the "Electronic Reporting Tool" or "ERT") is controversial because the program is outdated and difficult to use, and because it requires submission of significant volumes of information that are not necessary to demonstrate compliance with any applicable NSPS.[45] EPA's failure to relieve sources from existing duplicate paper reporting requirements also generated objections.

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[43] UARG members own and operate facilities subject to many NSPS subparts, including those applicable to steam generating units (Subparts D, Da, Db, and Dc), combustion turbines (Subparts GG and KKKK), coal preparation plants (Subpart Y), and nonmetallic mineral processing plants (Subpart OOO).

[44] *See, e.g.*, 40 C.F.R. § 60.49a(v)(4) (Subpart Da), § 60.46b(j)(14) (Subpart Db), § 60.45c(c)(14) (Subpart Dc), § 60.258(d) (Subpart Y).

[45] EPA has said it is collecting the additional information to assist in development of emission factors. Initially, EPA collected the information simply by mandating use of the ERT software. However, in 2016, EPA revised the general provisions to codify some of those reporting requirements. 81 Fed. Reg. 59,800 (Aug. 30, 2016) (revising 40 C.F.R. § 60.8(f)).

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In 2015, EPA proposed to expand the electronic reporting requirement to all but a few NSPS subparts by revising the general provisions.[46] UARG's objections to the ERT and EPA's proposed expansion of the requirement are described in detail in UARG's comments on that proposal.[47]

On December 21, 2016, EPA Administrator Gina McCarthy signed a final rule that would impose many of the burdens to which UARG and others objected. The rule has not yet been published. Although that rule includes some extended deadlines, multiple promises to develop alternatives to the use of the ERT, and other improvements as a result of comments, the basic mandate of the rule is the same. If the rule becomes effective, numerous facilities will be required (at least in the short term) to electronically report significant volumes of information to EPA using the ERT, in addition to providing the same information in hard copy to any delegated state that does not waive the duplicate reporting requirement. The final rule also includes drafting errors that would inadvertently impose the new requirements on facilities EPA said it planned to exclude from the rule. If the rule is published, UARG intends to petition for administrative reconsideration.

The current NSPS electronic reporting requirements, and the planned expansion of those requirements to include many additional subparts, do not provide a "net benefit." EPA should formally withdraw the signed final rule and issue a new proposal to replace existing requirements for reporting using the ERT with a more workable electronic reporting system and to reduce the volume of information that must be reported electronically. For electric utilities, EPA should consider adapting its existing ECMPS software, which already is used by utilities to report information under the Acid Rain Program and CSAPR, to collect any additional information needed for those sources to demonstrate compliance with an applicable NSPS. As discussed further in Section IV.A above, EPA already is doing that for the MATS Rule at 40 C.F.R. Part 63, Subpart UUUUU.

Finally, EPA should act expeditiously—perhaps by direct final rule—to authorize use of electronic reporting (including email submission of electronic media) to EPA Regional Offices and to remove requirements for duplicate reporting to EPA Regions of information already electronically reported to EPA (e.g., to ECMPS or EPA's Central Data Exchange),

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[46] 80 Fed. Reg. 15,100 (Mar. 20, 2015).

[47] *See* UARG Comments on Proposed NSPS Electronic Reporting Rule (June 18, 2015), EPA-HQ-OAR-2009-0174-0093.

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C. Reconsideration of the NSPS for Stationary Combustion Turbines, codified at 40 C.F.R. Part 60, Subpart KKKK

EPA promulgated the NSPS for new, modified, and reconstructed stationary combustion turbines in July 2006 as Subpart KKKK.[48] UARG filed a petition for administrative reconsideration of that rule raising several objections, including that (i) the rule's NOx standards were unachievable for large gas-fired turbines operating in simple cycle mode, (ii) the rule failed to provide a methodology to calculate compliance for operating periods when several different standards apply, and (iii) several other issues related to emissions monitoring.[49]

EPA agreed to reconsider the Subpart KKKK rule and issued a proposed reconsideration rule in August 2012.[50] Instead of simply addressing UARG's reconsideration request, EPA proposed an almost complete rewrite of the rule, creating many new problems. At the same time, the proposal failed to actually address some of the specific issues UARG raised in its reconsideration petition. Further, EPA proposed to radically alter the analysis used to determine whether an existing combustion turbine had been "reconstructed," such that commonplace, insignificant work regularly performed at turbine facilities could subject those units to the stringent standards in Subpart KKKK. UARG submitted comments explaining its objections to the proposed changes to the reconstruction analysis and other problematic aspects of the proposal.[51] EPA never finalized its proposed reconsideration rule.

EPA's proposed reconsideration rule has subjected combustion turbine owners to considerable regulatory uncertainty, making it difficult for them to anticipate the legal consequences of necessary maintenance activities or to predict what standards their turbines will ultimately need to comply with. UARG urges the Agency to address this uncertainty by issuing a supplemental proposal on reconsideration of Subpart KKKK that withdraws the 2012 proposal's changes to the reconstruction analysis and that addresses in full the issues in UARG's petition for reconsideration and its comments on the 2012 proposed rule.

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[48] 71 Fed. Reg. 38,482 (July 6, 2006).

[49] *See* UARG Petition for Reconsideration of Subpart KKKK Rule (Sept. 7, 2006), EPA-HQ-OAR-2004-0490-0325.

[50] 77 Fed. Reg. 52,554 (Aug. 29, 2012).

[51] *See* UARG Comments on Subpart KKKK Reconsideration Proposal (Dec. 28, 2012), EPA-HQ-OAR-2004-0490-0418.

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D. Reconsideration of the NSPS for Coal Preparation and Processing Plants, codified at 40 C.F.R. Part 60, Subpart Y

EPA promulgated revisions to the NSPS for coal preparation and processing plants in October 2009.[52] UARG filed a limited petition for reconsideration of these Subpart Y revisions, noting that the rule was vague as to how one could determine whether an existing coal pile had been "modified" or "reconstructed" and thus become subject to Subpart Y.[53] Because coal piles are always in flux and their emissions are difficult to measure, it is unclear how EPA would determine whether an emissions rate increase occurs for the purposes of modification, or what components would be included in a reconstruction analysis. UARG also asked EPA to reconsider its imposition of the burdensome electronic reporting requirements discussed above in Section VI.B. EPA agreed to reconsider those issues but has never issued a proposed reconsideration rule.

EPA's continued failure to address the treatment of existing coal piles under Subpart Y has created substantial regulatory uncertainty within the industry, making it difficult for them to predict how certain activities at their coal piles might trigger the requirements of Subpart Y. UARG urges the Agency to issue a proposed rule responding to UARG's reconsideration petition that clarifies how existing coal piles will be treated under Subpart Y and adopts a more reasonable mechanism for electronic reporting..

E. Revisions to Test Method for Determining Stack Test Gas Velocity Taking Into Account Velocity Decay Near the Stack Walls

In 2009, EPA proposed revisions to Test Method 2H in 40 C.F.R. Part 60, Appendix A, that would reduce regulatory burdens associated with emissions testing.[54] The proposal would incorporate into Method 2H a procedure in Conditional Test Method 041 the use of which EPA was already routinely approving through source-by-source petitions. The proposal, which would make the method more accurate and require less testing, was universally supported and technically sound.[55] UARG asked EPA to move expeditiously to finalize the revisions in order to eliminate the need for source-by-source petitions. More than seven years later, the proposal has yet to be finalized. UARG urges EPA not to delay any further and finalize the revisions as proposed.

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[52] 74 Fed. Reg. 51,950 (Oct. 8, 2009).

[53] *See* UARG Petition for Reconsideration of Subpart Y Rule (Dec. 7, 2009).

[54] 74 Fed. Reg. 42,819 (Aug. 25, 2009).

[55] *See, e.g.* UARG Comments on Test Method 2H Revisions (Oct. 26, 2009), EPA-HQ-OAR-2008-0697.

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VII. National Ambient Air Quality Standards

A. "Findings of Substantial Inadequacy" of SIPs and "SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction," published at 80 Fed. Reg. 33,840 (June 12, 2015)

In 2015, EPA Administrator Gina McCarthy in one action issued a group of "SIP Calls" mandating that 36 states revise their previously EPA-approved SIPs, because certain provisions of those SIPs addressing emissions from industrial sources during periods of startup, shutdown, or malfunction of applicable process or control equipment ("SSM") are inconsistent with EPA's most recent interpretations of certain CAA provisions. The SIP Calls are not based on any finding of air quality impacts or finding that removing the provisions is necessary to meet other CAA goals. Rather, they are based on the conclusion that there is a "facial inconsistency" of the called SIP provisions' language with EPA's recent interpretations of certain CAA provisions, and that inconsistency renders the previously EPA-approved SIPs "substantially inadequate."

Under the CAA, states have primary responsibility for attaining, maintaining, and enforcing the NAAQS through their SIPs and EPA has only a secondary role that provides no authority to force states to adopt specific control measures. The SIP Calls are inconsistent with that system of cooperative federalism. The SIP Calls also are inconsistent with agencies' inherent responsibility to consider costs and benefits when exercising discretionary authority. UARG is currently a petitioner challenging the SSM SIP Call in the U.S. Court of Appeals for the D.C. Circuit, and the opening briefs that Industry Petitioners (including UARG), State Petitioners, and Texas Petitioners filed are available in the docket for those consolidated cases.[56]

The called SIP provisions are all designed to address the inability of sources to meet otherwise applicable emission control requirements under certain operating conditions, like SSM periods. All of the states subject to the SIP Calls have submitted (or, for revised NAAQS, will submit) demonstrations establishing that their SIP will result in attainment of the NAAQS. Many of the subject states already are achieving some or all of the NAAQS through their existing SIPs. On the other hand, the SIP Calls have imposed on states, and on EPA, the obligation to embark on a years-long and costly process of review and approval/disapproval of revised state rules and potentially development of Federal Implementation Plans. Imposition of such costs, in the absence of quantifiable benefits, also is contrary to the goals of Executive Order 13777.

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[56] *See Walter Coke, Inc. v. EPA*, No. 15-1166 (D.C. Cir. Oct. 31, 2016), ECF Nos. 1643502, 1643571, 1643769.

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In short, the SIP Calls interfere with state discretion and impose significant costs and burdens without any corresponding finding of air quality-related benefit. EPA should convene a proceeding to withdraw the SSM SIP calls by applying a SIP call standard that is consistent with its limited authority under the CAA and obligation to consider the impacts of its exercise of that authority.

B. NAAQS Promulgation and Implementation

NAAQS and their implementation are at the heart of the CAA. EPA sets the NAAQS and must review them at least every five years, revising them as appropriate. Unfortunately, when the NAAQS for a particular pollutant are revised, previous NAAQS for that pollutant seem to linger forever in scattered sections of the Code of Federal Regulations. For example, NAAQS for fine particulate matter ("$PM_{2.5}$") are found in sections 50.7, 50.13, and 50.18 of 40 C.F.R. Part 50. Such scattered codification of NAAQS is at best confusing and at worst misleading. UARG recommends revision of 40 C.F.R. Part 50 to remove NAAQS that have been replaced and to consolidate the current NAAQS for each regulated pollutant in a single section of the C.F.R.

UARG also urges the Agency to consider changes that would simplify the process that it uses to set and revise NAAQS. For example, the present process involves preparation by EPA's career staff of a Policy Assessment. This document is not required by the Act. It could be eliminated, modified to reflect senior management input, or replaced by an Advance Notice of Proposed Rulemaking as was planned in 2006.[57] In addition, to the extent that risk assessment remains a part of the process, UARG urges that the assessment fully capture uncertainty about the estimated number and quality of effects. Preparation of an Integrated Uncertainty Analysis, as the National Academy of Sciences has recommended, would advance this effort.

Once NAAQS have been promulgated, rules established by EPA play a vital role in their implementation. UARG recommends revision of certain aspects of recently-promulgated NAAQS implementation rules, including EPA's March 2015 rule establishing SIP requirements for the 2008 ozone NAAQS[58] and its August 2016 rule establishing SIP requirements for the 2012 $PM_{2.5}$ NAAQS,[59] to eliminate unnecessary and duplicative requirements. Specifically,

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[57] Memorandum from Marcus Peacock, Deputy Adm'r, EPA, to Dr. George Gray, Assistant Adm'r, Office of Research & Development, & William L. Wehrum, Acting Assistant Adm'r, Office of Air & Radiation (Apr. 17, 2007), https://www3.epa.gov/ttn/naaqs/pdfs/memo_process_for_reviewing_naaqs.pdf.

[58] 80 Fed. Reg. 12,264 (Mar. 6, 2015).

[59] 81 Fed. Reg. 58,010 (Aug. 24, 2016).

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UARG urges EPA to revoke the requirement for "anti-backsliding" measures for the 1997 ozone NAAQS,[60] which was replaced in 2008 by a more stringent standard for ozone.[61] Section 172(e) of the CAA requires such measures only when a NAAQS is "relaxed." In addition, UARG recommends that EPA revise its implementation rule for the 2012 $PM_{2.5}$ NAAQS to revoke the less stringent 1997 standard throughout the nation, not just in areas designated attainment.[62] Although UARG recognizes the need for continuity in the NAAQS program and therefore is not recommending that a superseded NAAQS be rendered null immediately upon promulgation of a revised one, UARG recommends that EPA revoke any superseded NAAQS a year after the effective date of area designations for the new or revised NAAQS. The revocation should be effective nationwide. States should not be required to complete an attainment demonstration (or equivalent) for the superseded NAAQS.[63]

Finally, UARG urges EPA to return to its prior approach of relying on air quality monitoring to make initial designations for areas as attainment, nonattainment, or unclassifiable. The SO_2 NAAQS promulgated in 2010 was the first NAAQS for which the Agency chose to rely on modeling predictions—rather than monitoring data—for making initial designations. Modeling is not as accurate as monitoring. EPA's preferred air quality models and required approaches to modeling are conservative by design to ensure that pollutant concentrations in ambient air are not underestimated. EPA acknowledges that its preferred AERMOD model cannot predict pollutant concentrations accurately at a given time and place. Furthermore, EPA continues to revise its AERMOD modeling system, leading to questions concerning the modeling on which designations will be based.[64]

In addition to returning to its prior approach of relying on monitoring for initial designations in the future, EPA should revise nonattainment designations that have already been

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[60] 40 C.F.R. § 51.1105.

[61] *Compare* 40 C.F.R. § 50.10, *with id.* § 50.15.

[62] *See* 81 Fed. Reg. at 58,142.

[63] *See* Comments by UARG and the American Petroleum Institute on Proposed PM NAAQS Implementation Rule at 61-64 (May 29, 2015), EPA-HQ-OAR-2013-0691-0096; *see also* UARG Comments on Proposed Implementation Rule for the 2015 Ozone NAAQS at 5-8 (Feb. 13, 2017), EPA-HQ-OAR-2016-0202-0105.

[64] *See* Memorandum from Richard A. Wayland, Div. Dir., Air Quality Assessment Div., EPA Office of Air Quality Planning & Standards, to Regional Air Dirs., Regions 1-10 (Mar. 8, 2017) (clarification of the version of the AERMOD modeling system to be used for designations in light of recent revisions of the model), https://www3.epa.gov/ttn/scram/guidance/clarification/SO2_DRR_Designation_Modeling_Clarificaiton_Memo-03082017.pdf.

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made based on modeling. Several areas were designated nonattainment based on modeling in 2016,[65] and states have submitted modeling for several other areas for which designations are required by the end of 2017.[66] EPA should use its correction authority under section 110(k)(6) of the Act to replace modeling-based nonattainment designations made in 2016 with unclassifiable designations. Because of the overestimates inherent in modeled air quality, however, attainment designations based on modeling remain valid and should be retained. Furthermore, areas for which designations must be made at the end of 2017 that have not demonstrated attainment through modeling and that do not have adequate monitoring data should be designated unclassifiable; those with adequate monitoring data should be designated according to those data. EPA should also repeal its 2015 Data Requirements Rule for SO_2.[67] That rule places additional burdens on states either to perform modeling or to conduct additional air quality monitoring of SO_2 sources for designations. Although this rule requires the use of either modeling or monitoring, even the monitoring requirement exceeds what is required of states for other criteria air pollutants.[68]

VIII. Air Quality Modeling Issues

On January 17, 2017, EPA promulgated revisions to its Guideline on Air Quality Models, codified at 40 C.F.R. Part 51, Appendix W ("Appendix W").[69] This rule, which specifies models, inputs, and techniques for use in preparing SIPs and PSD permit applications, is not yet effective. Although UARG supports some aspects of the rule revisions, others are expected to make SIP preparation and obtaining permits for new or modified sources more time-consuming and costly. Specifically, UARG is concerned about new modeling requirements for sources seeking permits that emit precursors to ozone or $PM_{2.5}$. Many electric generators fall in this category. The screening tools that EPA suggests—Significant Impact Levels and Modeled Emission Rates for Precursors—are not particularly helpful in their present form.[70] The photochemical grid modeling mandated for sources not helped by these tools is time-consuming

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[65] 81 Fed. Reg. 45,039 (July 12, 2016); 81 Fed. Reg. 89,870 (Dec. 13, 2016).

[66] *See* Fact Sheet: Final Data Requirements Rule for the 2010 1-Hour SO_2 Primary NAAQS (undated), https://www.epa.gov/sites/production/files/2017-02/documents/fact_sheet_-_final_data_requirements_rule.pdf.

[67] 80 Fed. Reg. 51,052 (Aug. 21, 2015).

[68] *See* UARG Comments on the Proposed Data Requirements Rule for the 1-Hour SO_2 NAAQS (July 14, 2014), EPA-HQ-OAR-2013-0711-0075.

[69] 82 Fed. Reg. 5182 (Jan. 17, 2017).

[70] UARG Comments on Draft Guidance on Development of MERPs (Mar. 31, 2017) (attached as Exhibit 2); UARG Comments on Draft Guidance on SILs for Ozone and Fine Particles (Sept. 30, 2016) (attached as Exhibit 3).

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and costly. EPA does not specify a particular model to be used, meaning the selected model must be approved on a case-by-case basis. Formal new requirements for written approval by EPA's (non-statutory) Model Clearinghouse whenever a model not specified in Appendix W is used are likely to further delay the process. Accordingly, the NAAQS Implementation Coalition, of which UARG is a member, filed a petition for reconsideration of these and other aspects of the Appendix W revisions.[71]

IX. Demonstration-of-Compliance Issues

A. Outreach on Current Rulemakings

Measures used to demonstrate compliance with emission standards and other requirements, while critical to the effectiveness of a rule, also can significantly increase the rule's cost, particularly if the rule is unclear or contains errors. EPA often initiates rulemakings with the goal of fixing such problems it has identified in rules, but does so without soliciting input from stakeholders on additional ways the rule could be improved. When UARG participates in such proceedings UARG often includes in comments suggestions for other revisions it believes would make the rule more cost effective without sacrificing environmental benefits. Unfortunately, these comments often are rejected as beyond the scope of the rulemaking because they suggest changes the Agency did not propose. To avoid this problem, before engaging in such rulemakings, EPA should solicit input from stakeholders either informally or formally on ways the rule could be made more cost-effective so that the Agency can address those suggestions in its development of the proposal and/or final rule. While some of these suggestions may not by themselves warrant initiating a rulemaking, once EPA decides to initiate a rulemaking it should make a greater effort to ensure that all potential improvements can be achieved.

For example, EPA already has on its regulatory agenda plans to revise the rules governing compliance demonstrations under the Acid Rain Program, and CSAPR at 40 C.F.R. Part 75. UARG believes there are many opportunities to relieve regulatory burdens under those rules by, for example, updating fuel sampling and analysis requirements to reflect current market and operating conditions and incorporating relief already provided for individual sources by petition. EPA should engage in outreach to affected sources prior to issuing its proposal to maximize the improvements to the rule.

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[71] Petition of the NAAQS Implementation Coalition for Reconsideration of Portions of the Final Rule on Revisions to the Guideline on Air Quality Models (Mar. 20, 2017), EPA-HQ-OAR-2015-0310-0181.

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B. The So-Called "Credible Evidence Rule"

In 1997, EPA promulgated revisions to 40 C.F.R. Parts 51, 52, 60, and 61 removing restrictions on the use of information other than the EPA or state-specified compliance method to establish violations of, or compliance with, emission limitations.[72] Later, EPA revised its model rules for Federal Permit Operating Programs under Title V at 40 C.F.R. Parts 70 and 71 to require identification and consideration of information other than the specified compliance method when certifying compliance with permit terms and conditions.[73] These rules, which have so far avoided judicial review,[74] impose significant regulatory burdens and uncertainty on sources regarding the standard for compliance and responsible officials' obligations when making certifications or compliance under penalty of perjury. They also are inconsistent with Congress' limited authorization to use such information when assessing civil penalties only to determine the duration of a violation that already has been established using the specified compliance method. EPA should engage in rulemaking to repeal or revise these rules to limit the methods for establishing violations and determining compliance to those specified in rules and permits, and to limit use of other information to establishing the duration of a violation or compliance, consistent with Congress' direction in CAA § 113(e).

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UARG appreciates this opportunity to provide input on EPA regulations that may be appropriate for repeal, replacement, or modification. We look forward to the future opportunities for engagement mentioned in the *Federal Register* notice. Please feel free to contact me with any questions.

Sincerely,

/s/ Andrea B. Field
Andrea Field
Counsel for the Utility Air Regulatory Group

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[72] 62 Fed. Reg. 8314 (Feb. 24, 1997).

[73] 62 Fed. Reg. 54,900, 54,946-47 (Oct. 22, 1997); 79 Fed. Reg. 43,661 (Jul. 28, 2014).

[74] Industry groups, including UARG, challenged both rules when they were promulgated, but the U.S. Court of Appeals for the D.C. Circuit refused to review their validity, finding instead that the challenges were not "ripe for review." *Clean Air Implementation Project v. EPA*, 150 F.3d 1200 (D.C. Cir. 1998); *NRDC v. EPA*, 194 F.3d 130 (D.C. Cir. 1999).

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Wehrum, Bill Calendar
Wehrum.Bill@epa.gov
Monday, November 13, 2017 – Wednesday, February 28, 2018
Time zone: (UTC-05:00) Eastern Time (US & Canada)
(Adjusted for Daylight Saving Time)

November 2017

Su	Mo	Tu	We	Th	Fr	Sa
			1	2	3	4
5	6	7	8	9	10	11
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December 2017

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31						

January 2018

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February 2018

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25	26	27	28			

Busy | Tentative | Free
Out of Office | Working Elsewhere | Outside of Working Hours

November 2017

Mon, Nov 13

	Before 8:00 AM	**Free**
	8:00 AM – 3:30 PM	**Free**
	3:30 PM – 4:30 PM	FW: Call: Prep for California Meeting Dial-In: (202)[redacted] Leader Code: [redacted] Participant Code: [redacted] Delahoyde, Magdelana A. EOP/WHO

		WJC-N 5400 + [redacted] Participant Code: [redacted] Wehrum, Bill
	4:15 PM – 5:00 PM	Meet with Lignite Energy Council (Confirmed) WJC-N 5400 Wehrum, Bill
	5:00 PM – 6:00 PM	**Free**
	After 6:00 PM	**Free**

Thu, Dec 7

	Before 8:00 AM	**Free**
	8:00 AM – 8:30 AM	**Free**
	8:30 AM – 9:00 AM	Meet with the Ute Tribe (Confirmed) WJC-N 5400 + Mike Koerber by video Wehrum, Bill
	9:00 AM – 9:30 AM	Management Roundtable WJC-N 5400 + Dial: [redacted] Conference ID: [redacted] (6) [redacted] Participant Code: [redacted] Wehrum, Bill
	9:30 AM – 10:00 AM	Motorpool from EPA WJC-N Courtyard to Auto Alliance Speech Black Chevy Volt, Tag# [redacted] Wehrum, Bill
	10:00 AM – 11:00 AM	Auto Alliance Board Speech (Confirmed) Auto Alliance office – 803 7th Street, NW Suite 300 (Office is located on the corner of 7th Street and H Street NW) Wehrum, Bill
	11:00 AM – 11:05 AM	**Free**
	11:05 AM – 11:30 AM	Motorpool from Auto Alliance Speech to EPA Black Chevy Volt, Tag# [redacted] Wehrum, Bill
	11:30 AM – 12:30 PM	OTAQ Fuels Weekly WJC-N 5400 + Video with AA + [redacted] Participant Code: [redacted] Wehrum, Bill
	12:30 PM – 1:00 PM	HOLD - Management Time
	1:00 PM – 1:15 PM	**Free**
	1:15 PM – 2:00 PM	Limetree Bay Terminals (LBT) Refinery, St. Croix, U.S. Virgin Islands WJC-N 5400 + Video with OAQPS + [redacted] Participant Code: [redacted] Wehrum, Bill
	2:00 PM – 2:30 PM	General with OGC/Ethics Bill's Office, WJC-N Room 5406A Wehrum, Bill

■	2:30 PM – 3:00 PM	Motorpool from EPA WJC-N Courtyard to Hunton Black Chevy Volt, Tag#[redacted] Wehrum, Bill
■	3:00 PM – 4:00 PM	Speech at Hunton with American Electric Power, The Southern Company, Duke Energy, Dominion Energy, and the Utility Air Regulatory Group (Confirmed) Hunton & Williams Offices, 2200 Pennsylvania Avenue NW - 9th Floor Wehrum, Bill
□	**4:00 PM – 4:05 PM**	**Free**
■	4:05 PM – 4:30 PM	Motorpool from Hunton to EEOB Black Chevy Volt, Tag#[redacted] Wehrum, Bill
■	4:30 PM – 5:00 PM	WAVES submitted by Shanita
▨	5:00 PM – 6:00 PM	NADA CAFE-GHG Cordell Hull, EEOB 208 (WAVES link and Call-in info located in Calendar notes) Delahoyde, Magdelana A. EOP/WHO
□	**After 6:00 PM**	**Free**

Fri, Dec 8

□	All Day	Telework: Emily Atkinson
□	**Before 8:00 AM**	**Free**
□	**8:00 AM – 9:45 AM**	**Free**
▨	9:45 AM – 10:15 AM	Briefing: OAR/OECA Update Administrator's Office [redacted]
□	**10:15 AM – 10:20 AM**	**Free**
■	10:20 AM – 10:30 AM	Motorpool from EPA Courtyard to 726 Jackson Place NW Black Chevy Volt, Tag#[redacted] Wehrum, Bill
■	10:30 AM – 12:00 PM	WH Meeting - Climate Diplomacy PCC (Confirmed) White House Conference Center (WHCC), 726 Jackson Place, half a block North of the White House Wehrum, Bill
□	**12:00 PM – 12:05 PM**	**Free**
■	12:05 PM – 12:30 PM	Motorpool from Jackson Place to EPA Black Chevy Volt, Tag#[redacted] Wehrum, Bill
▨	12:30 PM – 1:00 PM	[redacted]
■	1:00 PM – 1:30 PM	Scheduling Meeting WJC-N 5400 + Dial: [redacted] Conference ID: [redacted] Participant Code: [redacted]

Message

From: Elbaum, Kentia [elbaum.kentia@epa.gov]
Sent: 7/22/2019 11:52:40 AM
To: OIG Leadership Committee [Ex. 6 Personal Privacy (PP) @epa.gov]; OIG Deputy Assistant Inspectors General [Ex. 6 Personal Privacy (PP) @epa.gov]; OIG-HQ-OCPA [Ex. 6 Personal Privacy (PP) @epa.gov]; Mears, Gilbert [Mears.Gilbert@epa.gov]; [Ex. 6 Personal Privacy (PP) @epa.gov]
Subject: FW: letter to the Acting Inspector General
Attachments: EPW Report Carper Whitehouse Redefining Air Wehrum 7-2019.pdf; 07.21.19 TC SW to CS Hunton report letter.pdf

Good morning,

Attached please find a letter and report from Senators Carper and Whitehouse regarding allegations surrounding Wehrum and Harlow.

I acknowledged receipt of the letter and report.

Tia

Kentia Elbaum
Public Affairs Specialist
Office of Congressional and Public Affairs - Office of Inspector General
U.S. Environmental and Protection Agency
1301 Constitution Ave. NW, Rm 3102
Washington, DC 20460
202-566-2548
Elbaum.Kentia@epa.gov

From: Freedhoff, Michal (EPW) <Michal_Freedhoff@epw.senate.gov>
Sent: Friday, July 19, 2019 3:37 PM
To: Lagda, Jeffrey <Lagda.Jeffrey@epa.gov>; Elbaum, Kentia <elbaum.kentia@epa.gov>
Cc: Freedhoff, Michal (EPW) <Michal_Freedhoff@epw.senate.gov>; Gaeta, Joe (Whitehouse) <Joe_Gaeta@whitehouse.senate.gov>
Subject: letter to the Acting Inspector General

Hi there

Please see the attached letter and report from Senators Carper and Whitehouse.

Thanks
Michal

Michal Ilana Freedhoff, Ph.D.
Director of Oversight
Committee on Environment and Public Works Democratic Staff

JOHN BARRASSO, WYOMING, CHAIRMAN

JAMES M. INHOFE, OKLAHOMA
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RICHARD M. RUSSELL, MAJORITY STAFF DIRECTOR
MARY FRANCES REPKO, MINORITY STAFF DIRECTOR

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510-6175

July 21, 2019

Charles J. Sheehan
Acting Inspector General
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Acting Inspector General Sheehan:

Enclosed please find a report documenting the extensive influence wielded by the law firm Hunton Andrews Kurth LLP ("Hunton") and EPA during the Trump Administration. As you are aware, Hunton is the former law firm of William Wehrum, who until recently was Assistant Administrator in EPA's Office of Air and Radiation, and David Harlow, currently senior counsel in that same office. We bring this report to your attention because of the pending ethics complaints about Mr. Wehrum and Mr. Harlow you are reviewing. The report raises new and serious concerns about Mr. Wehrum's and Mr. Harlow's compliance with federal ethics requirements. It also raises concerns about the agency's ethics program generally, which merit your attention. We request that you review this report carefully.

More broadly, we urge you in the strongest possible terms not to abandon or decline to pursue work on this matter in the wake of Mr. Wehrum's departure from the agency. These are institutional concerns that are capable of repetition in the future, yet will evade your review should you abdicate your responsibility to conduct and complete an evidence-based investigation. Moreover, the ethical failings and absence of accountability that pervade the Trump Administration should not be aided by an implicit message that one can avoid investigation if one simply resigns before the investigation is complete.

Section 1 of this report demonstrates that multiple Hunton-represented industry groups such as the Utility Air Regulatory Group (UARG) have sought sweeping regulatory changes that would increase air pollution, exacerbate climate change, and reduce the amount of pollution information available to the public. Among the dozens of changes, Hunton and its organizations have asked EPA to weaken greenhouse gas requirements for new and existing coal-fired power plants; to allow the largest polluters to release more toxic air pollution; and to allow upwind power plants to pollute more downwind communities. These Hunton-represented industry groups have also made highly technical and novel arguments that EPA has adopted or is in the process of adopting, such as how to account for certain types of benefits when conducting economic analyses for mercury regulations; how to sideline independent scientists on scientific advisory boards; or even how to redefine what counts as "ambient air" protected by the Clean Air Act in the first place.

While researching the policy outcomes, however, we repeatedly uncovered apparent violations of ethical rules. Some of these violations have been previously described, while others are being revealed for the first time. Section 2 of this report describes those extensive ethical failings. Specifically:

- ***Mr. Wehrum and Mr. Harlow appear to have violated the terms of the Trump Ethics Pledge and Ethics in Government Act regulations by participating in the development of the DTE Memo.*** Although Mr. Wehrum and Mr. Harlow were both recused from working on "any particular matter" in which a recent former client is a party, or in which Hunton "represents a party," Mr. Wehrum and Mr. Harlow appear to have violated this ethical requirement by involving themselves in the

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development of the DTE Memo. In the Memo, EPA (1) analyzed litigation in which DTE, a former client of Mr. Harlow, was represented by Hunton, and in which Mr. Wehrum entered an appearance on behalf of UARG; (2) reversed EPA policy on the eve of the Supreme Court's consideration of this litigation, adopting Hunton's position that the agency should not "second-guess" polluters' own calculations of how much pollution they expect to emit; (3) directly copied language submitted to EPA by Hunton on behalf of the Air Permitting Forum into the DTE Memo; and (4) cited the Hunton-DTE litigation as the basis for that shift in policy. Although EPA previously stated that Mr. Wehrum was not involved in developing the DTE Memo,[1] Mr. Wehrum subsequently acknowledged this was false.[2]

- ***In his recusal statement, Mr. Wehrum failed to disclose at least three former clients that he previously represented in court – the Alliance of Automobile Manufacturers; the Minnesota Trucking Association; and the Minnesota Automobile Dealers Association[3] – then had at least six meetings with one of those undisclosed former clients in apparent violation of Ethics in Government Act regulations and the Trump Ethics Pledge.***[4] Under the terms of his ethics agreement, Mr. Wehrum was supposed to be recused from "any meetings or communications relating to the performance of [his] official duties" with his former clients or employer – the only exception being meetings with at least five parties present where the discussion is limited to matters of general applicability. Mr. Wehrum's failure to disclose his recent former clients frustrates the "screening arrangement" in his recusal statement, which stated that his subordinates would "assist in screening EPA matters" involving the entities he listed to ensure his compliance with ethical rules. None of these meetings appear to have been "open to all interested parties" as the Office of Government Ethics defines that term, and were thus impermissible even if Mr. Wehrum only spoke about generally applicable regulations affecting his former clients' interests.

- ***Mr. Wehrum repeatedly met with other clients he worked with in private practice – actions that appear to violate the intent of the Trump Ethics Pledge and Mr. Wehrum's own ethics agreement. To accomplish this, Mr. Wehrum (and potentially Mr. Harlow) appears to have artificially – and perhaps improperly – limited his list of former clients from which he was recused.*** Although Mr. Wehrum and Mr. Harlow were nominally recused from certain meetings with "UARG," their recusal statements imposed no limits on discussions with *UARG members* (1) who paid hefty UARG "dues" that went almost exclusively to Hunton (and thus to Mr. Wehrum and Mr. Harlow as Hunton partners), or (2) with whom Mr. Wehrum and Mr. Harlow may have developed an attorney-client or other privileged relationship, even absent direct billing. Under D.C. attorney ethics rules it is "well

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[1] https://thehill.com/policy/energy-environment/364015-epa-works-to-ease-air-pollution-permitting-process

[2] Juliet Eilperin, *EPA regulator skirts the line between former clients and current job*, Wash. Post (Feb. 25, 2019).

[3] *See, e.g.*, Mem. of Law in Support of Mot. For Partial Summary Judgment, Doc. 47 at *27, *Minn. Trucking Ass'n et al. v. Stine et al.*, No. 15-cv-2045-JRT-KMM (D. Minn. Sept. 29, 2016) (listing Mr. Wehrum and five other lawyers, including two others from Hunton, as "Attorneys for Plaintiffs Minnesota Trucking Association, Minnesota Automobile Dealers Association, Alliance of Automobile Manufacturers, American Petroleum Institute, and American Fuel & Petrochemical Manufacturers").

[4] Mr. Wehrum had at least six small meetings with his former client the Alliance for Automobile Manufacturers to discuss regulatory policy: 11/27/2017 (with one other entity); 12/27/2017 (alone with board); 2/21/2018 (with lawyers/lobbyists); 4/16/2018 (alone); 5/22/2018 (alone); 5/23/2018 (alone), and 7/16/2018 (with one other entity).

established" that "neither a written agreement nor the payment of fees is necessary to create an attorney-client relationship."[5] In fact, Hunton and UARG have successfully argued in court that Hunton lawyers and UARG members have attorney-client privileged conversations, adding further credence to the notion that Mr. Wehrum and Mr. Harlow should have listed more UARG members as former clients in their recusal statements. A review of Mr. Wehrum's calendars shows that at least 10 different UARG members have been in attendance at nine separate meetings with Mr. Wehrum (American Electric Power; Dominion Energy; Duke Energy; Minnesota Power; Otter Tail Power; Southern Company; the American Coalition for Clean Coal Electricity; the Edison Electric Institute; the National Mining Association; and the National Rural Electric Cooperative Association). On December 7, 2017, the same day EPA issued the DTE Memo, Mr. Wehrum gave a closed-door briefing on Clean Air Act regulatory developments at his former employer Hunton. This presentation occurred during a two-day set of meetings at Hunton that appears to have been a pre-planned gathering of UARG's membership. Such a gathering raises the prospect that the event was really a meeting before a single entity, UARG, which Mr. Wehrum was prohibited from meeting with alone – not a meeting with five parties. In any event, the meeting was also not "open to all interested parties" as required by the Trump Ethics Pledge, because Hunton only invited its own clients to this closed-door meeting. In addition to numerous meetings with UARG members, Mr. Wehrum also held two private meetings with his former client General Electric (which is also a member of the Air Permitting Forum).

Thank you very much for your attention to this matter. We look forward to your prompt response. Should you have any questions, please contact Michal Freedhoff (michal_freedhoff@epw.senate.gov) of Senator Carper's Environment and Public Works Committee staff, or Joe Gaeta (joe_gaeta@whitehouse.senate.gov) of Senator Whitehouse's staff.

Sincerely yours,

Tom Carper
Ranking Member
Committee on Environment and Public Works

Sheldon Whitehouse
Ranking Member
Subcommittee on Clean Air and Nuclear Safety

cc: David Cozad, Acting Designated Agency Ethics Official and Acting Deputy General Counsel, Office of General Counsel, Environmental Protection Agency

[5] *In re Lieber*, 442 A.2d 153, 156 (D.C. 1982).

July 2019

Redefining Air:

Industry's Pipeline to Power at EPA's Office of Air and Radiation

Thomas R. Carper, Ranking Member of the U.S. Senate Environment and Public Works Committee

Sheldon Whitehouse, Ranking Member of the U.S. Senate Clean Air and Nuclear Safety Subcommittee

Released via FOIA EPA-2019-008216

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EXECUTIVE SUMMARY

This report describes the efforts, outcomes, and potential ethical concerns associated with several industry organizations represented by Hunton Andrews Kurth LLP (formerly Hunton & Williams, hereafter "Hunton"). Hunton is the law firm that Bill Wehrum, the top air pollution regulator at the Environmental Protection Agency (EPA), and his deputy, David Harlow, worked at prior to their tenures at EPA. While at Hunton, Wehrum served as co-chairman of the firm's environmental practice and led the administrative law group.[1] As partners at the law firm, both Wehrum and Harlow advocated before EPA and the courts on behalf of some of the biggest polluters.

These Hunton-represented industry groups are similar to the recently dissolved Utility Air Regulatory Group (UARG), a "secretive utility industry coalition"[2] that has long-represented the interests of coal-fired power plants before air pollution regulators, and in the courts. Like UARG, these industry organizations superficially appear to be organizations with unique names, and officers such as "Executive Directors" and "Managers." However, these amorphous industry "groups," "coalitions," "forums," and "alliances" appear to have no independent existence apart from Hunton, and their officers are almost all Hunton lawyers. They appear to exist largely for the purpose of coordinating payments to Hunton for legal services, and to provide a well-funded, expert-led effort to influence EPA and the courts without revealing the identities of their members.

On June 26, 2019, EPA Administrator Andrew Wheeler announced that Wehrum would be leaving his position at EPA, thanking him for the "tremendous progress he has made" repealing climate regulations and "in so many other regulatory initiatives."[3]

This report demonstrates that Wehrum's "tremendous progress" was largely to the benefit of Hunton-represented industry groups, which have had remarkable success under his tenure achieving their policy objectives to roll back air pollution protections. And while Wehrum left the agency under the scrutiny of congressional oversight, after less than two years on the job, Harlow, his senior counsel, remains.

Staying behind as well are the Hunton-driven rollbacks that Wehrum and Harlow undertook, which will continue to have consequences for everyone who breathes air. These include major efforts to weaken or undermine landmark climate and air toxics regulations, such as the Clean Power Plan (CPP) and the Mercury and Air Toxics Standards (MATS) rule, at the expense of human health. For example, the Trump EPA proposed to repeal the Clean Power Plan despite the fact that, by the Trump EPA's own admission, doing so could prematurely kill 1,400 people per year.[4] Although the final rule stayed

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[1] Q&A With Hunton & Williams' Bill Wehrum, LAW360, May 6, 2013, https://www.huntonak.com/images/content/2/4/v2/2407/Law360_Bill_Wehrum_QA.pdf

[2] Zack Colman, *Industry group tied to EPA air chief dissolves*, POLITICO, May 10, 2019.

[3] Statement of Administrator Andrew Wheeler regarding the departure of Assistant Administrator Bill Wehrum, June 26, 2019 (press release).

[4] Lisa Friedman, *Cost of New E.P.A. Coal Rules: Up to 1,400 More Deaths a Year*, N.Y. TIMES, Aug. 21, 2018.

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largely the same in substance, the economic analyses were changed to no longer show those harms.[5] As another example, Wehrum withdrew the "Once In, Always In" policy for toxic air pollution, and on June 25, 2019 the Trump EPA issued a proposed rule to codify the shift, even while acknowledging that it would allow 3,912 facilities nationwide to substantially increase their toxic air pollution.[6] Independent analyses indicate that those sources could more than double their toxic air pollution under this new approach.[7]

But these higher-profile rollbacks are not the only Hunton-advocated policies being carried out by the Trump EPA. This investigation also identified numerous technical, often arcane, policy shifts sought by Hunton-represented industry groups that carry major air pollution implications. These policy shifts, and agency actions to implement them, illustrate the close relationship between Hunton and former Hunton employees who now direct this country's air pollution policy at EPA. Such shifts include the adoption of a novel legal interpretation of New Source Review regulations that was used to abandon EPA's legal posture in an enforcement action against a Hunton client, DTE Energy; a change to the meaning of "conflict of interest" that allowed EPA to purge academic researchers from several of its scientific advisory panels and replace them with industry-funded consultants; a redefinition of "ambient air" that would exclude more open air from being subject to the Clean Air Act; and even an argument that the Clean Air Act's looser requirements for "International border areas" should apply everywhere in the country, regardless of proximity to any international border.

This report also explores significant questions about the ongoing relationship between Wehrum, Harlow, and the member companies of the various Hunton-represented industry groups. Such questions include whether Wehrum and Harlow have been forthright about their past legal work on behalf of these entities, and whether they have adhered to the ethical requirements of public service. This investigation identifies circumstances in which Wehrum and Harlow may have involved themselves in litigation and other matters to benefit Hunton and former clients; failed to report the existence of former clients from which they should have been recused; and impermissibly met with former clients, including former clients that were not properly disclosed to agency ethics officials.

There has been good deal of reporting on the dissolution of UARG, which "has participated in every major EPA rulemaking affecting the electric generating industry" since the group was formed in 1977.[8] UARG repeatedly advocated in those rulemakings for shifts in public policy that would increase air pollution, exacerbate climate change, and limit public access to information about pollution in their communities.

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[5] https://www.epa.gov/sites/production/files/2019-06/documents/utilities_ria_final_cpp_repeal_and_ace_2019-06.pdf

[6] Proposed Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act at 95 (pre-publication version).

[7] *See* ENVTL. DEF. FUND, PRUITT'S NEW AIR TOXICS LOOPHOLE at 2 (Aug. 2018) (estimating that eligible facilities in the Houston-Galveston area could increase their toxic air pollution by 146% to 152% under the new approach).

[8] Defendant Duke Energy Corp.'s Reply, *United States et al. v. Duke Energy Corp.*, 2003 WL 25509066 (M.D.N.C. Feb. 13, 2003) (citing Declaration of Norman W. Fitchorn).

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For example, while at Hunton, one of Harlow's clients was DTE Energy, a UARG member. DTE sought Hunton's assistance in an EPA enforcement case alleging that one of the utility's coal-fired power plants had emitted pollution in violation of the Clean Air Act's New Source Review (NSR) program. In that case, Wehrum personally filed a brief as a lawyer for UARG in support of DTE's position.[9] Despite Wehrum's private practice advocacy, DTE Energy had not been successful in its efforts to resolve this NSR matter. The utility had already lost twice before the U.S. Court of Appeals for the 6th Circuit, and faces millions of dollars in penalties.

On December 7, 2017, shortly after Harlow and Wehrum left Hunton for EPA, the agency published a memorandum (known as the "DTE Memo"). The DTE Memo reversed the agency's position in Hunton's DTE case.[10] Furthermore, the release of the DTE Memo was timed so that DTE's Hunton lawyers could file it with the U.S. Supreme Court before the Court decided the very next day whether it would hear DTE's appeal.[11] These actions – along with other evidence suggesting that Wehrum and Harlow participated in the development of the DTE Memo, despite ethical rules barring their involvement in matters involving their particular clients (UARG and DTE Energy, respectively) – led Senator Sheldon Whitehouse (D-RI), along with Senate Environment and Public Works Committee Ranking Member Tom Carper (D-DE) and House Energy and Commerce Chairman Frank Pallone, Jr. (D-NJ) to ask the Acting Inspector General of the EPA on February 25, 2019 to undertake an investigation.[12] On May 10, 2019, following additional supplemental filings with the Acting Inspector General,[13] along with other disclosures[14] and congressional investigation,[15] UARG's "policy committee" announced that they would "disband" the organization.

UARG is not the only Hunton-represented industry group comprised of polluting interests with business before the EPA. On May 6, 2019, the offices of Senators Carper and Whitehouse discovered that language included by EPA in the DTE Memo was copied verbatim from a document that Hunton

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[9] Brief Amici Curiae of UARG et al. in Support of Defendants-Appellees, at *2, *United States v. DTE Energy Co. & Detroit Edison Co.*, 2012 WL 1656078 (May 8, 2012) (listing Wehrum as "Counsel for UARG").

[10] Memorandum from EPA Admin'r Scott Pruitt to Reg'l Administrators, *New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected Actual Applicability Test in Determining Major Modification Applicability*, at 8 (Dec. 7, 2017).

[11] Letter from Senator Whitehouse, Senator Carper, Representative Pallone to Charles J. Sheehan, Acting Inspector General, U.S. EPA, at 7–8 & Exhs. M–N (emails from EPA political appointee Mandy Gunasekara stating that the memorandum "needs to go out before" the Supreme Court considers whether to hear the DTE enforcement case), https://www.whitehouse.senate.gov/download/doj-ig-memo-letter.

[12] https://www.whitehouse.senate.gov/news/release/democrats-call-for-investigation-of-top-epa-officials-role-in-reversing-enforcement-position. An ethics watchdog group, Citizens for Responsibility and Ethics in Washington (CREW), later filed a supplemental complaint with the Inspector General. https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2019/05/28205410/William-Wehrum-Complaint-29-MAY-2019.pdf.

[13] https://www.whitehouse.senate.gov/download/wehrum-oig-supplemental-letter

[14] https://www.epw.senate.gov/public/index.cfm/press-releases-democratic?ID=E598EA19-BB86-4737-ABE8-BE97F356D11E

[15] https://energycommerce.house.gov/newsroom/press-releases/ec-leaders-launch-investigation-of-secretive-front-group-uarg-and-its-ties

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had submitted to EPA on behalf of the Air Permitting Forum,[16] a similar Hunton-represented industry group with little existence independent from the law firm.

The full list of Hunton organizations examined in this report includes:

- The **Utility Air Regulatory Group**, itself a former client of both Wehrum and Harlow, which until its recent demise was comprised of multiple trade organizations and coal-fired power plant operators, including at least three more former Wehrum clients (Dominion, Duke Energy, and Salt River Project) and at least two more former Harlow clients (DTE Energy and LG&E & KU Energy);

- The **Air Permitting Forum**, which nominally advocates on Clean Air Act permitting matters, and whose members include one former client shared by Wehrum and Harlow (Chevron), as well as at least three other former Wehrum clients (ExxonMobil, Georgia-Pacific, and General Electric), and six additional companies that are not former Wehrum or Harlow clients (Fiat Chrysler, Ford, General Motors, Toyota, Shell, and International Paper);

- The **Auto Industry Forum**, a "sub-coalition" of the Air Permitting Forum that represents several automakers on issues related to stationary source emissions, and whose members include at least Fiat Chrysler, Ford, General Motors, and Toyota;

- The **NAAQS Implementation Coalition**, which advocates for policy changes that would increase opportunities for political interference with, or otherwise weaken, air quality standards, and whose members include UARG (and thus UARG's members) and at least three other former Wehrum clients (the American Forest & Paper Association, the American Petroleum Institute, and the Brick Industry Association); and

- The **CCS Alliance**, which advocates on issues related to carbon capture and storage matters, and whose membership includes at least two former UARG members (the National Mining Association (NMA) and the National Rural Electric Cooperative Association (NRECA)), as well as Berkshire Hathaway Energy, NRG Energy, PacifiCorp, and Zurich North America.

This report provides a comprehensive examination of Hunton court filings, public comments, and regulatory petitions made on behalf of these five organizations in order to determine the extent to which they have influenced policy within the Trump EPA air office. Although the examination covers submissions to EPA and the courts extending back decades, this report focuses primarily on submissions made during the Trump Administration, including submissions made in response to EPA's April 2017 request for the identification of "regulations that may be appropriate for repeal, replacement, or modification."[17]

[16] https://www.epw.senate.gov/public/index.cfm/press-releases-democratic?ID=E598EA19-BB86-4737-ABE8-BE97F356D11E

[17] 82 Fed. Reg. 17793 (Apr. 13, 2017).

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The analysis shows that since the beginning of the Trump Administration, these organizations have been highly successful in obtaining policy outcomes that benefit their corporate clients at the expense of everyone who breathes air (Finding #1). They also raise more questions about whether Wehrum and Harlow have been forthright in their ethical obligations to put the public trust above the interests of their friends and former clients, and to avoid even the appearance of impropriety (Finding #2).

In sum, this investigation indicates that private companies no longer need to pay for Hunton lawyers to effectuate their goals, because those very same lawyers are now representing their interests at the highest levels within EPA, at the taxpayers' expense. Summaries of the key findings are below.

SUMMARY OF FINDING #1: With Wehrum and Harlow at EPA, Hunton-represented industry groups are getting the policy results they seek.

Hunton-represented industry groups have sought sweeping regulatory changes that would increase air pollution, exacerbate climate change, and reduce the amount of pollution information available to the public. Among the dozens of changes, Hunton and its organizations have asked EPA to weaken greenhouse gas requirements for new and existing coal-fired power plants; to allow the largest polluters to release more toxic air pollution; and to allow upwind power plants to pollute more downwind communities. These Hunton-represented industry groups have also made highly technical and novel arguments that EPA has adopted or is in the process of adopting, such as how to account for certain types of benefits when conducting economic analyses for mercury regulations, how to sideline independent scientists on scientific advisory boards, or even how to redefine what counts as "ambient air" protected by the Clean Air Act in the first place. Specifically:

- Although **UARG** has taken dozens of industry-friendly positions on the Clean Air Act, early in the Trump Administration it emphasized 17 rules, sets of rules, or programs it recommended be withdrawn, revisited, or severely weakened. Of those, the Trump EPA has already taken actions responsive to eight of UARG's most significant requests to weaken air pollution rules, including the reversal adopted in the DTE Memo.[18]

- The **Air Permitting Forum** (an umbrella group that includes the **Auto Industry Forum**) prioritized 19 changes to permitting requirements, emission standards, or the National Ambient Air Quality Standards (NAAQS). Of those priorities, the Trump EPA has already formally adopted eight rollbacks – including using verbatim text submitted by the Forum in the DTE Memo – and has stated that it is actively considering another two of the Forum's priorities.[19]

[18] The only UARG priority that the Trump EPA appears to have proposed rejecting is to remove the subcategory "stationary combustion turbines" from the Clean Air Act's hazardous air pollutant (HAP) program. That is because the D.C. Circuit ruled 12 years ago that EPA has no authority to remove a subcategory from HAP regulation. However, the Trump EPA has proposed that no additional health-based standards should be required for the subcategory.

[19] The only Forum priority that the Trump EPA appears to have rejected outright was withdrawal of an EPA rule regarding how the agency would treat disagreements among federal courts regarding the Clean Air Act – a rule

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- The **NAAQS Implementation Coalition** requested dozens of changes to how the NAAQS are developed and implemented. The Coalition's most notable successes have been to undermine the science-based NAAQS development process, which by statute is led by the independent Clean Air Scientific Advisory Committee (CASAC). The Trump EPA has adopted the Coalition's recommendations to change CASAC's membership – including through the appointment and elevation of Committee members who have scientific views that are well outside the mainstream – and changed the definition of "conflict of interest" to allow for the removal of independent members from academia, while adding industry-funded members. The full extent of Coalition's successes may become more evident as the Trump EPA reviews the NAAQS for ground-level ozone (smog) and particulate matter (soot), to be proposed in March 2020.

- Although the **CCS Alliance** nominally promotes carbon capture and storage (CCS) technology, its submissions to EPA's air office have largely been to advocate that EPA should *not* use the existence of partial CCS technology as the basis for any air pollution standards. The Trump EPA has proposed to no longer use partial CCS technology to set greenhouse gas emission limitations for new power plants, echoing the Alliance's positions.

SUMMARY OF FINDING #2: Former Hunton lawyers Wehrum and Harlow appear to have violated ethical requirements in their rush to serve former clients tied to Hunton-represented industry groups.

Wehrum and Harlow's continued engagement with their former clients and Hunton-represented industry groups (and the members thereof) raises numerous ethical questions for EPA's Designated Ethics Official, EPA's Inspector General, and the U.S. Office of Government Ethics. Specifically, the "Trump Ethics Pledge" (Executive Order 13770) prohibits Wehrum and Harlow, "for a period of 2 years from the date of [their] appointment[s]," from participating in any meeting, any communications, or "any particular matter involving specific parties that is directly and substantially related to [their] former employer [Hunton] or former clients, including regulations . . . ."[20] A limited exception to the Trump Ethics Pledge permits them to participate in "communications and meetings" with Hunton or their former clients, but only if the event is both (1) on a matter of general applicability, and (2) "open to all interested parties," a phrase interpreted to mean "*five or more* stakeholders" representing a diversity of viewpoints, "even if *one* of the stakeholders is a former employer or former client."[21]

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unanimously upheld by courts as lawful against a legal challenge brought by Wehrum himself in 2016 when he was in private practice.

[20] E.O. 13770 § 1, ¶ 6 ("Trump Ethics Pledge").

[21] Memorandum from Robert I. Cusick, Dir. of U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, DO-09-011, at 1–2 (Mar. 26, 2009) (explaining the meaning of the phrase "open to all interested parties") (emphasis added); Legal Advisory from David J. Apol, General Counsel of U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, LA-17-02, at 1 (Feb. 6, 2017) (emphasis added) ("With respect to [President Trump's] Executive

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As of July 2, 2019, neither Wehrum nor Harlow had received a waiver from the Trump Ethics Pledge.[22] In addition, the Office of Government Ethics' impartiality regulations and Wehrum's pre-confirmation ethics agreement make his recusal from such meetings mandatory, unless he had received prior written authorization from an agency ethics official.[23] As of September 29, 2018, Wehrum had never received prior authorization from an agency ethics official to participate in a matter otherwise prohibited by the Office of Government Ethics regulations.[24]

This report demonstrates that:

a. ***Wehrum and Harlow appear to have violated the terms of the Trump Ethics Pledge and Ethics in Government Act regulations by participating in the development of the DTE Memo.*** Although Wehrum and Harlow were both recused from working on "any particular matter" in which a recent former client is a party, or in which Hunton "represents a party," Wehrum and Harlow appear to have violated this ethical requirement by involving themselves in the development of the DTE Memo, in which EPA (1) analyzed litigation in which DTE, a former Harlow client, was represented by Hunton, and in which Wehrum entered an appearance on behalf of UARG; (2) reversed EPA policy on the eve of the Supreme Court's consideration of this litigation to adopt the position Hunton advocated on behalf of its clients that the agency should not "second-guess" polluters' own calculations of how much pollution they expect to emit; (3) directly copied language submitted to EPA by Hunton on behalf of the Air Permitting Forum into the DTE Memo; and (4) cited the Hunton-DTE litigation as the basis for that shift in policy. Although EPA previously stated that Wehrum was not involved in developing the DTE Memo,[25] Wehrum subsequently acknowledged this was false.[26]

b. ***In his recusal statement, Wehrum failed to disclose at least three former clients that he previously represented in court – the Alliance of Automobile Manufacturers; the Minnesota Trucking Association; and the Minnesota Automobile Dealers Association***[27] – in addition to two confidential clients he is contractually prohibited from

Order 13770, ethics officials and employees may continue to rely on OGE's prior guidance regarding [President Obama's] Executive Order 13490 to the extent that such guidance addresses language common to both orders").

[22] U.S. Office of Gov't Ethics, *USOGE | Agency Ethics Pledge Waivers (EO 13770)* (last visited July 2, 2019).

[23] *See* Letter from William L. Wehrum to Kevin S. Minoli, Designated Agency Ethics Official, U.S. EPA, at 1 (Aug. 28, 2017) (citing 5 C.F.R. § 2635.502(d)).

[24] Letter from Kevin S. Minoli, Designated EPA Ethics Official, to Sen. Sheldon Whitehouse, at 1 (Sept. 29, 2018) ("To date, Mr. Wehrum has not received any waivers or authorizations issued pursuant to Executive Order 13770, 18 U.S.C. § 207(b)(1), or 5 C.F.R. § 2635.502(d).").

[25] https://thehill.com/policy/energy-environment/364015-epa-works-to-ease-air-pollution-permitting-process

[26] Juliet Eilperin, *EPA regulator skirts the line between former clients and current job*, Wash. Post (Feb. 25, 2019).

[27] *See, e.g.*, Mem. of Law in Support of Mot. For Partial Summary Judgment, Doc. 47 at *27, *Minn. Trucking Ass'n et al. v. Stine et al.*, No. 15-cv-2045-JRT-KMM (D. Minn. Sept. 29, 2016) (listing Wehrum and five other lawyers, including two others from Hunton, as "Attorneys for Plaintiffs Minnesota Trucking Association, Minnesota

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disclosing. Wehrum's failure to disclose his recent former clients frustrates the "screening arrangement" in his recusal statement, which stated that his subordinates would "assist in screening EPA matters" involving the entities he listed to ensure his compliance with ethical rules. Furthermore, although the recusal statements for both Wehrum and Harlow disclosed "confidential" clients, only Harlow's statement acknowledges his personal obligation "not to participate in specific party matters for the duration of my ethics obligation," even for clients "who are not listed."[28]

c. ***Wehrum has had at least six meetings with one of his undisclosed former clients, the Alliance of Automobile Manufacturers, in apparent violation of Ethics in Government Act regulations and the Trump Ethics Pledge.***[29] None of these meetings appear to have been "open to all interested parties" as the Office of Government Ethics defines that term, and were thus impermissible even if Wehrum only spoke about generally applicable regulations affecting his former client's interests. All members of the Hunton-represented industry group the Auto Industry Forum are also members of the Alliance of Automobile Manufacturers.

d. ***Wehrum and possibly Harlow appear to have artificially – and perhaps improperly – limited their list of former clients from which they are recused.*** Although Wehrum and Harlow were nominally recused from certain meetings with "UARG," their recusal statements imposed no limits on discussions with *UARG members* (1) who paid hefty UARG "dues" that went almost exclusively to Hunton (and thus to Wehrum and Harlow as Hunton partners), or (2) with whom Wehrum and Harlow may have developed an attorney-client or other privileged relationship, even absent direct billing. Under D.C. attorney ethics rules it is "well established" that "neither a written agreement nor the payment of fees is necessary to create an attorney-client relationship."[30] Additionally, Hunton and UARG have successfully argued in court that Hunton lawyers and UARG members have attorney-client privileged conversations, adding further credence to the notion that Wehrum and Harlow should have listed more UARG members as former clients in their recusal statements.

e. ***Wehrum repeatedly met with clients he worked with in private practice – actions that appear to violate the intent of the Trump Ethics Pledge and Wehrum's own ethics agreement.*** A review of Wehrum's calendars shows that at least 10 different UARG members have been in attendance at nine separate meetings with Wehrum (American Electric Power; Dominion Energy; Duke Energy; Minnesota Power; Otter Tail Power; Southern Company;

Automobile Dealers Association, Alliance of Automobile Manufacturers, American Petroleum Institute, and American Fuel & Petrochemical Manufacturers").

[28] *Compare* Harlow recusal at 2 nn.1–2 ("For my former clients who are not listed, I understand that I am personally obliged not to participate in specific party matters for the duration of my ethics obligations."), *with* Wehrum recusal at 2 n.1 (simply acknowledging the existence of two "confidential clients").

[29] Wehrum has had at least six small meetings with his former client the Alliance for Automobile Manufacturers to discuss regulatory policy: 11/27/2017 (with one other entity); 12/27/2017 (alone with board); 2/21/2018 (with lawyers/lobbyists); 4/16/2018 (alone); 5/22/2018 (alone); 5/23/2018 (alone), and 7/16/2018 (with one other entity).

[30] *In re Lieber*, 442 A.2d 153, 156 (D.C. 1982).

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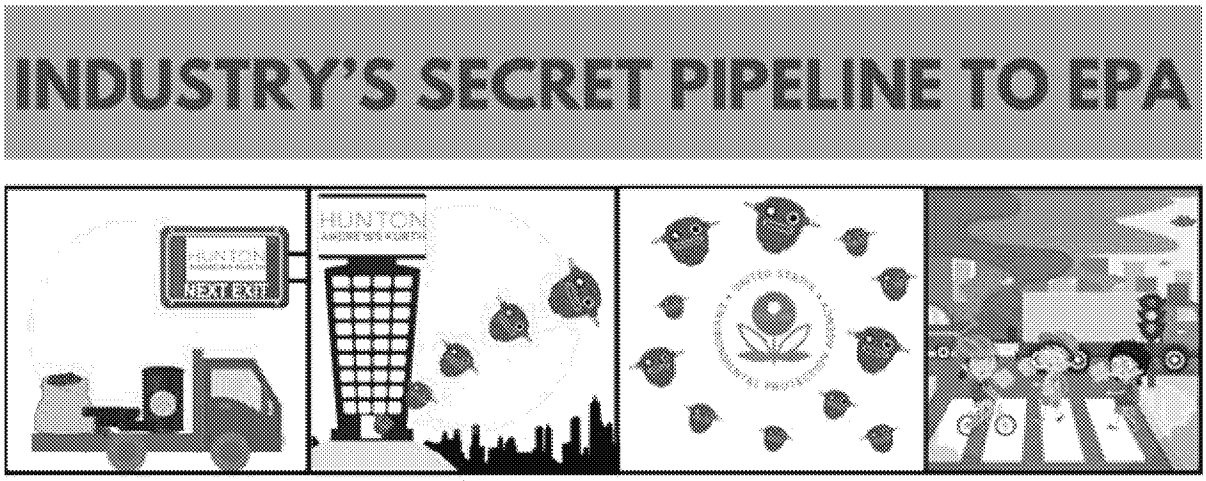
the American Coalition for Clean Coal Electricity; the Edison Electric Institute; the National Mining Association; and the National Rural Electric Cooperative Association). On December 7, 2017, the same day EPA issued the DTE Memo, Wehrum gave a closed-door briefing on Clean Air Act regulatory developments at his former employer Hunton. This presentation occurred during a two-day set of meetings at Hunton that appears to have been a pre-planned gathering of UARG's membership. Such a gathering raises the prospect that the event was really a meeting with a single entity, UARG, which Wehrum was prohibited from meeting with alone – not a meeting with five parties. In any event, the meeting was also not "open to all interested parties" as required by the Trump Ethics Pledge, because Hunton only invited its own clients to this closed-door meeting. Wehrum also held two private meetings with his former client General Electric (which is also a member of the Air Permitting Forum). Under the terms of his ethics agreement, Wehrum is supposed to be recused from "any meetings or communications relating to the performance of [his] official duties" with his former clients or employer – the only exception being for meetings with at least five parties present where the discussion is limited to matters of general applicability. The purpose of these meetings is unknown; one of these meetings was solely with General Electric, while the other was with five members of the Gas Turbine Association, which at the time of the meeting was chaired by a General Electric manager.



Auto, oil & gas, lumber, & coal industries hire law firm Hunton Andrews Kurth LLP to help them achieve their policy objectives to roll back air pollution protections.

Hunton Andrews Kurth LLP creates groups like Utility Air Regulatory Group, Air Permitting Forum, Auto Industry Forum, NAAQS Implementation Coalition & CCS Alliance. The companies who pay for these groups are not disclosed.

These groups lobby EPA. The public doesn't know which companies are behind the effort.

EPA rolls back air regulations. Polluters profit. Public health suffers.

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SECTION #1: With Wehrum and Harlow at EPA, Hunton-represented industry groups are getting the policy results they seeking.

Introduction

This report describes a comprehensive examination of Hunton court filings, public comments, and regulatory petitions made on behalf of amorphous "coalitions," "forums," "groups," and "alliances," that are secretive about their membership and have little existence outside the Hunton law firm. In fact, the Hunton-represented industry groups described in this report appear to exist solely for the purposes of coordinating payments to Hunton for legal services. They are not incorporated anywhere, hold no legal status, and are not required to publicly disclose their members. Their "staff" are attorneys at Hunton, where Wehrum and Harlow worked before assuming their roles at EPA. The organizations exist only on paper, and among the benefits they impart on their "members" is the assumption of anonymity and the ability to coordinate a well-funded, expert-led effort to influence EPA under the public's radar.

Hunton-represented industry groups are achieving remarkable success with their policy objectives, on everything from major efforts to roll back landmark climate and toxic air pollution regulations, to more technical changes that allow for more air pollution such as by narrowing the definition of "ambient air" or expanding the Clean Air Act's "International border areas" to include states without international borders.

Most of these Hunton-represented industry groups filed comments in response to EPA's April 2017 request for the identification of "regulations that may be appropriate for repeal, replacement, or modification."[31] One of the groups (UARG) sought 17 rollbacks, and the Trump EPA air office has acted on the eight most significant ones. Another group, the Air Permitting Forum, sought 13 changes to weaken Clean Air Act permitting programs, and the Trump EPA air office has acted upon or has stated it is actively considering eight of the requests. Still another Hunton-represented industry group formed to weaken the National Ambient Air Quality Standards (NAAQS) program has seen the Trump EPA begin to implement its suggestions for doing so, including by removing government-funded academics from science advisory panels under the guise of "conflict of interest," while adding industry-funded consultants who have long questioned the health effects of pollution.

Appendices to this report contain more detailed information, including quotes and citations, to where the Trump EPA appears to be granting the requests of these Hunton-represented industry groups. Research revealed at least five such organizations represented by Hunton that have advocated for policy changes from the EPA air office:

- Utility Air Regulatory Group (UARG)
- Air Permitting Forum ("the Forum")
- Auto Industry Forum (AIF)

[31] 82 Fed. Reg. 17793 (Apr. 13, 2017).

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- CCS Alliance ("the Alliance")
- NAAQS Implementation Coalition ("the Coalition")

In some cases, these organizations are also members of each other. For example, UARG is a "member" of the NAAQS Implementation Coalition, and the Auto Industry Forum is a "sub-coalition" of the Air Permitting Forum. This makes it particularly difficult to determine who is a member of each group. In all cases, however, the public-facing representatives of these organizations are lawyers at Hunton.

Below are descriptions of each Hunton-represented industry group, along with a summary of some of the long-desired policy goals the groups are achieving from the Trump EPA's air office. This report includes detailed appendices cataloguing these and other positions taken by the Hunton-represented industry groups that the Trump EPA's air office has subsequently adopted.

a. The Utility Air Regulatory Group (UARG)

One of Wehrum's and Harlow's mutual clients was the recently-disbanded Utility Air Regulatory Group (UARG), which advocates against pollution limits for fossil fuel-fired power plants and their related interests (*e.g.*, coal mining). In court filings, UARG's Hunton lawyers have stated that, "since its inception in 1977, UARG has participated in every major EPA rulemaking affecting the electric generating industry."[32] UARG has alternatively described itself as an "informal consortia" of power plant operators and "national associations";[33] "an ad hoc, unincorporated association" of electricity generators and "industry groups";[34] and as "a not-for-profit association" of individual [electric] generating companies and national trade associations."[35]

In 1988, UARG counted 64 individual electric utility companies among its members, as well as three related trade associations.[36] By 2017, UARG's membership consisted of 25 power plant companies, five coal-related trade associations, and the federally owned Tennessee Valley Authority.[37]

Together, Hunton and UARG have been among the most prolific industry-funded participants in EPA rulemakings and litigation under the Clean Air Act (CAA). In 2017, Mr. Wehrum accepted an award for Hunton's representation of UARG and others fighting public health protections at EPA, stating that those fights are "very important issues to our clients, and we are doing everything we can

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[32] Defendant Duke Energy Corp.'s Reply, *United States et al. v. Duke Energy Corp.*, 2003 WL 25509066 (M.D.N.C. Feb. 13, 2003) (citing Declaration of Norman W. Fitchorn).

[33] Hunton & Williams comments of UARG et al., Docket Id. No. 102-RQ-14-116, at 1 (Aug. 25, 1983).

[34] Brief for Intervenor-Petitioners UARG et al., Case Nos. 14-1112 & 14-1151 at v (D.C. Cir.) (filed Dec. 30, 2014).

[35] *See* Comments of UARG, Docket Id. ID No. EPA-HQ-OAR-2017-0355-24421 (Aug. 31, 2018).

[36] *See Maine v. Thomas*, 690 F. Supp. 1106, 1107 n.2 (D. Me. 1988) (describing those entities all as "members of the Utility Air Regulatory Group").

[37] Leaked UARG Policy Committee document

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to represent them successfully in these issues."[38] Wehrum's nomination to lead the Trump EPA air office was announced less than nine months later.

While Hunton may attempt to imply that "UARG" is an organization with meaningful independence from Hunton, the facts indicate otherwise:

- Documents indicate that although UARG counts many corporations and trade associations among its "members," the organization itself has little existence outside the walls of Hunton's firm. Indeed Hunton itself "founded" UARG in the late 1970s,[39] and has served as counsel to UARG and its members ever since.

- An internal budget proposal presented to the "UARG Policy Committee" in June 2017 sought nearly $2 million in "dues" from UARG members, to cover work during the period "June 23 to early September 2017."[40] Although couched as a request for "technical consultant *and* legal support," only 2.3% of the proposed budget ($45,000 out of $1,955,000) would have supported technical services. The remaining 97.7% went to Hunton for legal services in 11 subject areas.

- Hunton appeared to be in control of day-to-day management and growth of UARG itself. For example, Hunton was the sole entity paid for UARG's "planning/general coordination," with $100,000 in legal fees proposed to go to Hunton in exchange for "continuation of efforts to recruit new members" for UARG.

The following is a list of all UARG's members as of June 2017, shortly before Wehrum and Harlow left for EPA.[41] The five Wehrum/Harlow clients from which they are formally recused are also noted below:[42]

- American Electric Power
- Ameren
- Consumers Energy
- **Dominion (Wehrum recused)**
- **DTE Energy Co. (Harlow recused)**
- **Duke Energy Corp. (Wehrum recused)**
- Dynegy Inc.
- Eversource Energy/Pub Service of N.H.
- FirstEnergy Corp.
- Kansas City Power & Light Co.

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[38] Stan Parker, *Environmental Group Of The Year: Hunton & Williams*, LAW360, Jan. 17, 2017 (9:59 PM EST).

[39] *United States v. Illinois Power,* Civil Action No. 99-CV-833-MJR (S.D. Ill. April 24, 2003) (J. Proud).

[40] Leaked UARG Policy Committee document at 1.

[41] *See id.* at 6.

[42] *See* Wehrum recusal at 2 (listing former clients); Harlow recusal at 2 (listing former clients).

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- **LG&E & KU Energy LLC (Harlow recused)**
- Luminant
- Minnesota Power Co./ALLETE
- NiSource Inc.
- Oglethorpe Power Corp.
- Ohio Valley Electric Corp.
- Otter Tail Power Co.
- Pinnacle West/Arizona Public Service
- **Salt River Project (Wehrum recused)**
- South Carolina Elec & Gas Co. (SCANA)
- Southern Company Services
- Tri-State Generation & Transmission
- Tucson Electric Co.
- Wabash Valley Power Association
- WeEnergies
- American Coalition for Clean Coal Electricity
- American Public Power Association
- EEI-J/E [Edison Electric Institute]
- National Rural Electric Cooperative Association (NRECA)
- National Mining Association (NMA)
- Tennessee Valley Authority (TVA)

UARG's 2018 budgeting document, prepared for a meeting less than three months before Wehrum was nominated, had projected that the group would require an overall budget of between $8.2 and $8.5 million. The precise amount, UARG wrote, would depend on whether "the new Administration is ready and able in 2018 to undertake a substantial number of initiatives to reform the unreasonable Clean Air Act programs of the previous Administration...."[43] Wehrum has stated that he does not remember this two-day UARG meeting, at which his former client voted on whether to pay Hunton millions of dollars in legal fees, but others have confirmed he attended.[44]

UARG has taken dozens of industry-friendly positions on the Clean Air Act, the most salient of which can be found in Appendix 1 to this report alongside the status of corresponding Trump EPA actions.

[43] *See* Leaked UARG Policy Committee document at 3 (projecting an $8.2 million budget request, or potentially "3-4% higher than that" depending on the Trump EPA's ambitions).

[44] Zack Colman, *Industry group tied to EPA air chief dissolves,* POLITICO, May 10, 2019.

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In May 2017, UARG submitted a prioritized set of 17 rules, sets of rules, or programs it suggested should be withdrawn, revisited, or changed in ways that would severely weaken public health protections.[45] Of those 17 rollbacks, the Trump EPA has taken concrete steps to effectuate the eight most significant matters:

1. UARG asked EPA to repeal the Clean Power Plan's greenhouse gas (GHG) emission guidelines for certain existing power plants, and to replace them with weaker requirements and significant room for states to create further loopholes. The Trump EPA issued a final rule doing so in June 2019. The Trump EPA's own analysis of the proposal projected that it could prematurely kill 1,400 people a year by 2030.[46] Although the final rule stayed largely the same in substance, the economic analyses were changed to no longer show those harms.[47]

2. UARG asked EPA to repeal or revise GHG limits for new power plants. The Trump EPA has proposed to do so, and to finalize the rule in December 2019.

3. UARG asked EPA to weaken the framework interstate pollution rules. On August 31 and October 19, 2018, the Trump EPA issued memoranda and guidance documents that would allow for more interstate air pollution under those framework rules.[48]

4. UARG asked EPA to make changes to the New Source Review (NSR) permitting program that would allow older sources to continue polluting without having to install additional controls. The Trump EPA has proposed rules and issued guidance documents to weaken NSR in at least five different ways, starting December 7, 2017 with the "DTE Memo," which announced that the agency would no longer "second guess" the projections of UARG members and other large polluters regarding whether upgrades would "significantly increase" emissions and thus require pollution controls. Wehrum and Harlow's involvement in developing the DTE Memo raises substantial ethical concerns, as discussed in Section 2 of this report. The Trump EPA has announced plans to propose multiple changes to the NSR program in the summer of 2019.

5. UARG asked EPA to weaken the rules restricting regional haze in national parks and wilderness areas. On December 20, 2018 and April 4, 2019, the Trump EPA issued guidance documents to that effect,[49] and also announced in a letter to Hunton that it would propose a rule to accomplish other related UARG-sought changes.

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[45] Hunton comments for UARG, Docket Id. No. EPA-HQ-OA-2017-0190-40140 (May 12, 2017).

[46] Lisa Friedman, *Cost of New E.P.A. Coal Rules: Up to 1,400 More Deaths a Year*, N.Y. TIMES, Aug. 21, 2018.

[47] https://www.epa.gov/sites/production/files/2019-06/documents/utilities_ria_final_cpp_repeal_and_ace_2019-06.pdf

[48] *See* Stuart Parker, *EPA Guidance Grants States 'Flexibilities' To Avoid Interstate Air Mandates*, INSIDEEPA, Nov. 1, 2018.

[49] *See, e.g.*, Stuart Parker, *EPA Expands Air Data Waivers for 'Exceptional' Events, Sparking Criticism*, INSIDEEPA (Apr. 11, 2019) (noting that the expanded waivers could be used in "selecting data to show compliance with EPA's rule limiting regional haze).

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6. UARG asked EPA to repeal a rule that, if repealed, would allow states to create loopholes where polluters can emit unlimited quantities of air pollution during certain operational phases, such as when the facility is "malfunctioning." The Trump EPA has proposed to partially repeal that rule, and has told courts that it is considering whether to allow additional loopholes.

7. UARG asked EPA to reconsider the GHG emission guidelines for municipal solid waste landfills – presumably to establish regulatory precedents that could limit similar EPA regulations of existing coal-fired power plants. The Trump EPA announced that it is reconsidering the landfill rule and, separately, has proposed to postpone some of the rule's implementation deadlines from six months to two years.

8. UARG asked EPA to reduce the electronic reporting requirements for emissions of hazardous air pollution under the Mercury and Air Toxics Standards (MATS) rule. The Trump EPA has granted power plants a two-year reprieve from these requirements, and has also proposed to reverse the economic and legal underpinning of the entire MATS rule.

EPA appears to have outright rejected only one UARG request from this prioritized wish list: a request to remove the "stationary combustion turbine" subcategory from regulation under the Clean Air Act's hazardous air pollution program. EPA has proposed to reject this request because a D.C. Circuit case expressly holds that EPA has no legal ability to remove subcategories (rather than categories) from regulation under the hazardous air pollution program.[50] However, the Agency proposed to determine that no additional health-based controls on the subcategory were necessary.

b. The Air Permitting Forum ("the Forum") and its sub-coalition, the Auto Industry Forum (AIF)

Another opaque "coalition" nominally housed at Hunton is the Air Permitting Forum ("the Forum"). In public comments, the Forum has described itself as "a coalition of manufacturing companies focused on stationary source implementation issues under the Clean Air Act"[51] who "are subject to numerous CAA regulatory requirements . . . ."[52] The Forum is closely associated with the Auto Industry Forum (AIF), which describes itself as a "sub-coalition" within the Forum that is focused on stationary source regulations affecting the automobile manufacturing industry.[53] Because AIF is a sub-entity of the larger "Forum," this investigation ascribes the Forum's policy positions to all of its members, including those within the smaller AIF entity.

[50] 84 Fed. Reg. 15046, 15068 (Apr. 12, 2019).

[51] Forum comments on Title V rule, Docket Id. No. EPA-HQ-OAR-2016-0194-0031, at 1 (Oct. 24, 2016).

[52] Forum comments on CPP repeal, Docket Id. No. EPA-HQ-OAR-2017-0355-19903, at 1 (Apr. 26, 2018),

[53] Forum comment on stratospheric ozone, Docket Id. No. EPA-HQ-OAR-2003-0167-0166 at 1 (March 7, 2012).

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The Forum originally existed outside of Hunton, but the organization's two longtime lawyers were hired by Hunton in June 2016.[54] Since then, Wehrum and Harlow's former law firm has represented the Forum on numerous matters before EPA and the courts, including in litigation filed jointly with Wehrum himself against EPA.[55]

Like UARG, the Forum does not have any apparent physical address, or even a public website. In the headers for the Forum's and AIF's public comments, the organization has listed individuals serving in various roles for the groups, such as an "Executive Director," "Director," "Counsel," and "Manager" – but all of these individuals are lawyers employed by the Hunton law firm, and their contact information is their Hunton email address.[56]

Unlike UARG, however, neither the Forum nor its sub-coalition AIF are listed as a former client of Wehrum or Harlow. Accordingly, it appears that neither Wehrum nor Harlow have recused themselves from meetings with, or working on particular matters related to, the Forum or its representatives.

Evidence suggests that the Forum is comprised of at least some former Wehrum and Harlow clients. In May 2015, 18 individuals associated with the Forum met with EPA staff about Clean Air Act rulemakings. As required,[57] EPA staff docketed summaries of those meetings, including a list of attendees representing the Forum.[58] In addition to three lawyers (all of whom would later join Hunton), the Forum's representatives included employees from four automakers, three oil and gas companies, two pulp and paper companies, and General Electric. Forum members from whom Wehrum or Harlow are recused are noted below:

- Fiat Chrysler
- Ford
- General Motors
- Toyota
- **Chevron (Wehrum & Harlow recused)**
- **ExxonMobil (Wehrum recused)**
- Shell
- **Georgia-Pacific (Wehrum recused)**
- International Paper
- **General Electric (Wehrum recused)**

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[54] https://www.huntonak.com/en/news/chuck-knauss-and-shannon-broome-join-global-environmental.html

[55] *See* Proof Petitioners' Opening Brief, *Nat'l Envtl. Dev. Assn's Clean Air Project v. EPA*, Case No. 16-1344 (D.C. Cir. Aug. 30, 2017) (brief filed by Wehrum on behalf of the American Petroleum Institute, alongside other Hunton lawyers on behalf of the Air Permitting Forum).

[56] *See, e.g.*, Forum comments on CPP repeal, Docket Id. No. EPA-HQ-OAR-2017-0355-19903, at 1 (Apr. 26, 2018).

[57] *See Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977).

[58] *See* U.S. EPA, "Summary of EPA Stakeholder Meeting – Air Permitting Forum; May 19, 2015"; U.S. EPA "Summary of Meeting with the Air Permitting Forum on May 20, 2015."

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The Hunton-represented Forum has been highly successful in getting EPA to adopt its policy positions on rollbacks – so much so that language written by Hunton lawyers for the Forum was copied verbatim into the DTE Memo, without attribution, as part of EPA's justification for rolling back New Source Review permitting requirements. Specifically, Hunton's submittal to EPA on behalf of the Forum stated that:

> "While historically EPA has recognized that a source must exercise judgment to exclude increases for which the project is not the 'predominant cause,' more recent EPA actions reflect the view that all emission increases are presumed to be caused by the change."[59]

Despite the fact that this statement was erroneous,[60] nearly identical language appeared without explanation in EPA's DTE Memo disavowing the federal government's position in litigation involving Hunton, UARG, and a UARG member:

> "Because increased emissions may be caused by multiple factors, the EPA has recognized that the source must exercise judgment to exclude increases for which the project is not the 'predominant cause."[61]

The only other instance in which this particular legal argument was made – albeit not with the same words – was also by Hunton. Hunton made this argument in briefs defending UARG member DTE Energy from the EPA enforcement action that was the impetus for the agency's DTE Memo.[62, 63]

EPA's use of language supplied by the Forum in the DTE Memo is only the tip of the iceberg. Like UARG, the Forum has achieved remarkable success in convincing EPA to change its position in ways that mirror the Forum's advocacy. The May 2017 Forum document that EPA plagiarized included a wish list of 19 desired rollbacks of Clean Air Act permitting requirements and emission limits, and of the National Ambient Air Quality Standards.

As of July 2019, the Trump EPA has adopted six of the Forum's air permitting and emission standard rollbacks in final rules, orders, and/or final guidance documents, or a combination – including the substance of the DTE Memo described above:

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[59] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 12 (May 15, 2017).

[60] https://energycommerce.house.gov/newsroom/press-releases/pallone-whitehouse-carper-raise-new-questions-about-wehrum-s-involvement-in

[61] DTE Memo at 7.

[62] https://www.whitehouse.senate.gov/news/release/whitehouse-carper-pallone-raise-new-questions-about-wehrum

[63] This is not the first time Bill Wehrum appears to have copy-pasted text verbatim from documents provided by his former clients. In 2004, while Wehrum was serving as chief counsel in the Bush Administration's Office of Air and Radiation, EPA proposed mercury emissions rules that *also used verbatim text from his former law firm* – in that case, the firm Latham & Watkins. *See* Eric Pianin, *Proposed Mercury Rules Bear Industry Mark*, WASH. POST, (Jan. 31, 2004).

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1. With respect to air toxics, the Forum asked the EPA to withdraw its "once in, always in" policy that requires major sources of toxic air pollution to continue meeting strong emission limits. In a January 25, 2018 memorandum from Wehrum, the Trump EPA withdrew the policy, and on June 25, 2019 proposed a rule that would enshrine the looser toxic air pollution limits in regulation.[64] The Forum and UARG joined litigation helping the Trump EPA defend the issuance of what they call, "the Wehrum Memo," in court.[65] If the withdrawal of the "once in, always in" policy is finalized, the Trump EPA projects that 3,912 facilities nationwide – nearly half of all major air toxic polluters – could substantially increase their toxic air pollution.[66] Independent analyses indicate that those sources could more than double their toxic air pollution under the new approach.[67] The Trump EPA has acknowledged that it conducted no health or environmental analysis before Wehrum withdrew the policy in 2018.[68]

2. With respect to New Source Review, the Forum asked EPA to "reduce, if not eliminate, federal second-guessing" of state permitting programs to ensure compliance with legal requirements. The Trump EPA has issued a memorandum calling for "General Deference" to states and tribes implementing those programs.[69]

3. With respect to New Source Review, the Forum also asked EPA to "clarify its position" regarding deference to polluters' projections of their own emissions, and included language inaccurately characterizing the types of pollution that EPA has allowed sources to exclude from their calculations. The Trump EPA issued the DTE Memo "to provide greater clarity" on that issue, and adopted verbatim without citation the Forum's novel legal argument, which itself mirrored Hunton's position on behalf of a UARG member in the DTE litigation. As discussed in Section 2, Wehrum and Harlow's involvement in developing the DTE Memo raises serious ethical concerns.

4. With respect to New Source Review, the Forum also asked EPA to expand the scope of "netting," which allows polluters to upgrade old equipment – and prolong the life of their facility – without triggering new pollution control requirements. In guidance, the Trump EPA changed its interpretation of its rules to allow for that exact expansion of project netting – now called "project emissions accounting" – and in March 2019 it sent a proposal to OMB

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[64] https://www.epa.gov/sites/production/files/2019-06/documents/frn_mm2a_proposal_and_reg_text_6_25_19.pdf

[65] *See generally* Intervenor-Respondents Air Permitting Form, et al. Final Response to Petitioners' Opening Brief, *Calif. Communities Against Toxics v. U.S. Envtl. Protection Agency*, 2019 WL 858013 (D.C. Cir.).

[66] Proposed Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act at 95 (pre-publication version).

[67] ENVTL. DEF. FUND, PRUITT'S NEW AIR TOXICS LOOPHOLE at 2 (Aug. 2018) (estimating that eligible facilities in the Houston-Galveston area could increase their toxic air pollution by 146% to 152% under the new approach).

[68] Testimony of Scott Pruitt, Senate Comm. on Env't and Publ. Works, Jan. 30, 2018, https://www.c-span.org/video/?440282-1/epa-administrator-pruitt-testifies-senate-oversight-hearing&live&start=1832

[69] Memorandum from Andrew R. Wheeler, *Principles and Best Practics for Oversight of Federal Environmental Programs Implemented by States and Tribes* at 3 (Oct. 30, 2018).

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that would enshrine the change in EPA regulations.[70] EPA expects to publish the proposal sometime in July 2019.[71]

5. With respect to New Source Review, the Forum also asked EPA to lift the agency's stay of a 2009 rule finalized in the last week of the George W. Bush Administration, which would have allowed polluters to artificially divide the significant emissions from construction projects into smaller pieces, and thereby claim that no individual piece significantly increases emissions. The Trump EPA decided it would lift the Obama Administration EPA's stay of this "aggregation" rule, allowing the Bush Administration rule to come into effect.[72]

6. With respect to the Clean Air Act's core operating permit program, the Forum's "highest priority" was to limit the public's ability to challenge certain illegal permit conditions before EPA – what the Forum derisively referred to as "a second bite at the apple." The Trump EPA rejected a Sierra Club petition on that precise basis, stating the group was, "in essence, asking for a 'second bite at the apple' . . . ."[73]

The Trump EPA has also stated that it is actively considering two more of the Forum's permitting rollbacks:

7. With respect to New Source Review, the Forum asked EPA to expand the "debottlenecking" rule, which would allow major polluters to ignore emissions increases that upgrades cause at other parts of the plant. In October 2017, the Trump EPA listed changes to the debottlenecking rule as one of the "important areas" it would assemble a task force to review.[74]

8. With respect to New Source Review, the Forum also asked EPA to redefine the word "routine," so that even changes that "occur only once or twice during the life of a plant" are considered routine and thus exempt from triggering additional pollution control requirements. In April 2018, the Trump EPA said it was "evaluating the need to clarify the interpretation and appropriate application" of this exception to New Source Review.[75]

In addition to permitting rollbacks, the Forum also sought a number of other changes to the way EPA establishes and implements the National Ambient Air Quality Standards (NAAQS). The full scope of the Forum's success in influencing the Trump EPA regarding the NAAQS will become clear as the agency undertakes a major scientific review of the NAAQS for particulate matter (soot) and ground-

[70] Memorandum from Scott Pruitt, Admin'r, to Reg'l Admin'rs, *Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program* (Mar. 13, 2018).

[71] https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2060-AT89

[72] 83 Fed. Reg. 57324, 57324 (Nov. 15, 2018).

[73] *In re PacificCorp Energy Hunter Power Plant*, Order on Petition No. VIII-2016-4 at 17 (Oct. 16, 2017).

[74] U.S. EPA, FINAL REPORT ON REVIEW OF AGENCY ACTIONS THAT POTENTIALLY BURDEN THE SAFE, EFFICIENT DEVELOPMENT OF DOMESTIC ENERGY RESOURCES UNDER EXECUTIVE ORDER 13783 at 2 (Oct. 25, 2017).

[75] Anna Marie Wood, U.S. EPA, *NAAQS and Other Implementation Updates* at slide 33 (Apr. 5, 2018).

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level ozone (smog), but early signs indicate substantial influence. Most notably, the Trump EPA appears determined to undermine the scientific reviews underpinning the NAAQS. The seven-member Clean Air Scientific Advisory Committee (CASAC) is charged by law with providing independent advice on the public health and environmental science of air pollution. Whereas CASAC was previously "a committee of nationally and internationally recognized researchers at the leading edge of their fields,"[76] the Trump EPA has replaced all but one of the academic research scientists, and appointed as chair a fossil fuel consultant, Tony Cox, who disputes the well-established health effects of particulate matter (PM).[77,78] The Trump EPA then disbanded a 20-person panel of experts who advise CASAC specifically on PM science, leaving CASAC – according to the Trump appointees' own admission – unable to conduct a "meaningful independent scientific review" of the literature.[79] The Trump EPA further recommended that individual CASAC members should be allowed to share their own personal views of the science with EPA political officials, even when those views "fall outside the committee consensus."[80] Combined, these changes to undermine in-depth scientific review and to elevate fringe views of CASAC members, could provide cover for EPA political appointees to differ wildly from mainstream public health science when setting the NAAQS.

During the time Wehrum was at the helm of the Trump EPA air office, the agency sought to adopt several Forum-proposed rollbacks concerning the NAAQS, such as:

9. The Forum asked EPA to review how it evaluates the health benefits that come from reducing PM pollution, even if the reductions are in places already meeting the NAAQS. Five months later, in an October 2017 proposal concerning the Clean Power Plan, the Trump EPA floated the possibility that any benefits from PM reductions below the NAAQS levels could be treated as "zero" benefit.[81] In May 2019, Wehrum publicly questioned[82] the public health benefits of PM reductions caused by the MATS rule in areas achieving the NAAQS. In June 2019, rather than rely on the agency's independent science advisory boards, the Trump EPA "invite[d] the

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[76] Letter from former members of CASAC Particulate Matter Review Panel to Tony Cox, CASAC Chair, at 2 (Dec. 10, 2018).

[77] Stuart Parker, *CASAC Research Scientist Attacks Panel Chairman's NAAQS Review Shift*, INSIDEEPA (Mar. 26, 2019).

[78] *See*, U.S. EPA, *Health and Environmental Effects of Particulate Matter (PM)*, https://www.epa.gov/pm-pollution/health-and-environmental-effects-particulate-matter-pm (last visited July 2, 2019).

[79] *See* Letter from Tony Cox, Chair of CASAC, to Andrew Wheeler, EPA Admin'r, at 2 (Apr. 10, 2019) (stating that "CASAC recommends that the EPA reappoint the previous CASAC PM panel (or appoint a panel with similar expertise)," among other recommendations, in order to review an integrated scientific assessment that will "enable independent scientific review" by CASAC).

[80] Memorandum from Scott Pruitt to Asst. Admin'rs, *Back-to-Basics Process for Reviewing National Ambient Air Quality Standards*, at 10 (May 9, 2018).

[81] 82 Fed. Reg. 48035, 48044 (presenting an "alternative approach" to calculate premature death from particulate matter in which "Forgone $PM_{2.5}$ co-benefits fall to zero in areas whose model-predicted air quality is at or below the annual average $PM_{2.5}$ NAAQS").

[82] Lisa Friedman, *E.P.A. Plans to Get Thousands of Pollution Deaths Off the Books by Changing Its Math*, N.Y. TIMES, May 20, 2019.

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public to nominate scientific experts" who could review a forthcoming reexamination of how PM benefits are calculated.[83]

10. The Forum asked EPA to reexamine how it treats "foreign sources of emissions" for purposes of achieving the NAAQS.[84] The Trump EPA now states that the Clean Air Act's weaker "International border area" provision is no longer restricted to areas on the international border, and instead applies to any emissions that can be traced back to foreign countries.[85]

Indeed, this investigation could find only one change sought by the Forum that the Trump EPA has expressly rejected: Repealing an EPA "regional consistency" rule that four Hunton lawyers – including Bill Wehrum himself – were challenging in court. EPA defended the rule against Hunton's challenge, and the D.C. Circuit unanimously rejected Hunton's arguments on June 8, 2018, seven months after Wehrum began his current tenure at EPA.[86]

c. The NAAQS Implementation Coalition ("the Coalition")

The NAAQS Implementation Coalition ("the Coalition") appears to have been established at Hunton in 2011, which is also when it submitted its first public comments to EPA (in that case, asking the agency to weaken the way it models violations of air quality standards).[87]

Like the other Hunton-represented industry groups, the Coalition has no public website, no apparent physical address, and no employees other than its Hunton "counsel."

In recent years, the Coalition has been similarly opaque about its membership and funding, instead merely describing itself as being "comprised of trade associations, companies, and other entities who confront difficulties in permitting and operating facilities" pursuant to EPA's National Ambient Air Quality Standards (NAAQS), particularly for smog-forming ozone.[88] However, the Coalition's first-ever public comment – filed in 2011 by a former managing partner of Hunton's Washington, D.C. office – lists the following organizations as some of the members:[89]

- American Chemistry Council
- **American Forest & Paper Association (Wehrum recused)**

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[83] *See* 84 Fed. Reg. 27632 (June 13, 2019).

[84] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 25 (May 15, 2017).

[85] 83 Fed. Reg. at 63010 (Dec. 6, 2018) ("a demonstration prepared under CAA section 179B [the Clean Air Act's international border areas provision] could consider emissions emanating from . . . intercontinental sources and is not restricted to areas adjoining international border areas . . . .").

[86] *Nat'l Envtl. Dev. Assn's Clean Air Project v. EPA*, No. 16-1344 (D.C. Cir. June 8, 2018).

[87] Coalition comment on SO2 guidance, Docket Id. No. EPA-HQ-OAR-2010-1059-0057 (Dec. 2, 2011).

[88] https://www.uschamber.com/sites/default/files/2.13.17-_coalition_comments_to_epa_on_proposed_nonattaniment_area_classifications_and_sip_requirements_for_2015_ozone_naaqs.pdf

[89] Coalition comment on SO2 guidance, Docket Id. No. EPA-HQ-OAR-2010-1059-0057, at 2 n.1 (Dec. 2, 2011),

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- **American Petroleum Institute (Wehrum recused)**
- American Wood Council
- **Brick Industry Association (Wehrum recused)**
- Corn Refiners Association
- National Oilseed Processors Association
- Rubber Manufacturers Association
- **Utility Air Regulatory Group (Wehrum and Harlow recused)**

In May 2017, the Coalition filed detailed comments with EPA asking for 21 major changes to how EPA reviews and implements the NAAQS, which form the core of the Clean Air Act. The Trump EPA has not yet had the opportunity to review air quality standards for the two most significant NAAQS pollutants, particulate matter and smog-forming ozone. However, the Trump EPA is currently undertaking reviews of those air quality standards, and has announced its intention to propose standards for both pollutants in March 2020.[90] The Trump EPA also recently disbanded a 20-person panel of experts on particulate matter.[91] The main Clean Air Science Advisory Committee that will advise on public health risks now has only one academic research scientist, and is led by an industry-backed consultant who disputes[92] the well-established health effects of particulate matter.[93]

The full scope of the Coalition's success in influencing the Trump EPA will become clear as those standards develop, but early signs indicate substantial influence. Thus far, the Trump EPA has adopted at least five of the Coalition's recommended reforms for NAAQS review and implementation:

1. Similar to the Forum, the Coalition asked EPA to expand the Clean Air Act's "International border areas" provisions to reduce air quality protections in states without any international borders. The Trump EPA now states that the weaker "International border area" provision is no longer restricted to areas on the international border.[94]

2. The Coalition asked EPA to change the meaning of "conflict of interest" to remove public health scientists who receive EPA research grants from the agency's science advisory boards, even while adding industry-funded scientists. Five months later, on October 31, 2017, the

[90] https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2060-AU40 (ozone); https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2060-AS50 (particulate matter).

[91] Lisa Friedman, *E.P.A. to Disband a Key Scientific Review Panel on Air Pollution*, N.Y. TIMES, Oct. 11, 2018.

[92] Stuart Parker, *CASAC Research Scientist Attacks Panel Chairman's NAAQS Review Shift*, INSIDEEPA (Mar. 26, 2019).

[93] *See*, U.S. EPA, *Health and Environmental Effects of Particulate Matter (PM)*, https://www.epa.gov/pm-pollution/health-and-environmental-effects-particulate-matter-pm (last visited July 2, 2019).

[94] 83 Fed. Reg. at 63010 (Dec. 6, 2018) ("a demonstration prepared under CAA section 179B [the Clean Air Act's international border areas provision] could consider emissions emanating from . . . intercontinental sources and is not restricted to areas adjoining international border areas . . . .").

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Trump EPA changed its conflict of interest rules to exclude any researchers who receive EPA grants to study pollution.[95]

3. The Coalition asked EPA to narrow the meaning of "ambient air," which would reduce the amount of outdoor air protected by the Clean Air Act in the first instance. The Trump EPA publicly circulated draft guidance that would redefine "ambient air" to exempt more outdoor air from pollution protections.[96] Other Hunton-represented industry groups, such as the Forum, submitted comments to EPA supporting this redefinition.

4. The Coalition characterized the main NAAQS science committee as "imbalanced," with members who live in similar parts of the country, and suggested that the members "should be given rotating terms." In October 2017, the Trump EPA called for membership in its scientific committees to "be balanced" with "geographic diversity," and stated that "membership should be rotated regularly."[97]

5. The Coalition criticized efforts of the main NAAQS science committee to develop "consensus" around widely accepted science, stating that members with "minority views" should be allowed to report those to EPA political appointees as alternative takes on the science. In May 2018, the Trump EPA stated that although the committee should "seek to find consensus," individual committee members should be allowed "to share their own individual opinions when they fall outside committee consensus."[98] When coupled with the Trump EPA's replacement of impartial research scientists with industry-backed consultants, this change could allow politics to interfere with the science-based NAAQS-setting process.

d. The CCS Alliance ("the Alliance")

The Alliance describes itself as "a coalition of entities, spanning a number of economic sectors, that share a common interest in removing the impediments to investment in and development of carbon capture and storage ("CCS"), as well as mitigating the potential risks associated with the deployment of this technology."[99]

The Alliance has a website (ccsalliance.net), but the site is currently inactive for "scheduled maintenance."[100] However, the Internet Archive shows what the website looked like before it went

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[95] Memorandum from Scott Pruitt, *Strengthening and Improving Membership on EPA Federal Advisory Committees*, at 3 (Oct. 31, 2017).

[96] U.S. EPA, DRAFT REVISED POLICY ON EXCLUSIONS FROM "AMBIENT AIR" (Nov. 2018).

[97] Memorandum from Scott Pruitt, *Strengthening and Improving Membership on EPA Federal Advisory Committees*, at 2 (Oct. 31, 2017).

[98] Memorandum from Scott Pruitt to Asst. Admin'rs, *Back-to-Basics Process for Reviewing National Ambient Air Quality Standards*, at 10 (May 9, 2018).

[99] Comments of the CCS Alliance, Docket Id. No. EPA-HQ-OW-2008-0390-0178, at 1 (Dec. 22, 2008).

[100] www.ccsalliance.net

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inactive sometime in late 2016 or early 2017.[101] That website bore the "Hunton & Williams" logo along the top. In addition, "Hunton & Williams" is incorporated into the CCS Alliance logo. The Alliance lists the D.C. office of Hunton & Williams on the front page, along with Hunton's telephone number. For entities seeking to "join the CCS Alliance," the website provided the contact information for Hunton, as well as for a Hunton law partner (Frederick R. Eames), and the Gmail address of an energy lobbyist who does not appear to work at Hunton.[102] Hunton appears to have been paid approximately $860,000 by the Alliance over seven years (2009–2015) to lobby Congress on various pieces of climate change legislation.[103] Hunton terminated its lobbying engagement with the Alliance in early 2016.[104]

In some cases, the Alliance produced white papers that were then cited by other Hunton organizations. For example, UARG cited an Alliance "study" to oppose the use of CCS technology in Clean Air Act rulemakings.[105]

The Alliance – which has called coal "indispensable" to meeting electricity demands – is comprised of entities that would likely lose out financially if EPA required the use of CCS technology to capture and store carbon emissions. In comments submitted to EPA in 2008,[106] the Alliance listed the following as its members:

- Berkshire Hathaway Energy[107]
- MidAmerican Energy Holdings, a Berkshire subsidiary
- National Mining Association (former UARG member)
- National Rural Electric Cooperative Association (former UARG member)
- NRG Energy
- PacifiCorp
- Zurich North America

With respect to EPA rulemakings, the Alliance appears to favor the use of CCS technology – except to the extent it would have an adverse effect on the burning of coal for electricity. For example, in 2008 the Alliance argued that CCS technology is "the only tool now on the horizon" that could address "in a major way and within a mid-term timeframe" the "very large quantities of CO_2 emissions" from fossil fuel power plants.[108] In that rulemaking, the Alliance was urging EPA to authorize the geologic sequestration of CO2 under the Safe Drinking Water Act. But when it came to actually requiring even

[101] https://web.archive.org/web/20150405023737/http://www.ccsalliance.net/

[102] https://web.archive.org/web/20150405023929/http://www.ccsalliance.net/join/

[103] *See* PROPUBLICA, *Lobbying for CCS Alliance by HUNTON & WILLIAMS LLP* (last visited July 2, 2019).

[104] *Id.*

[105] *See* UARG comment, Docket Id. No. EPA-HQ-OAR-2008-0318-1550, at 117 n.29 (Nov. 28, 2008),

[106] Alliance comments, Docket Id. No. EPA-HQ-OW-2008-0390-0178, at 1 n.2 (Dec. 22, 2008).

[107] Comments of Berkshire Hathaway Energy, Docket Id. No. EPA-HQ-OAR-2013-0495-10052, at 2 (May 9, 2014).

[108] Alliance comments, Docket Id. No. EPA-HQ-OW-2008-0390-0178, at 2 (Dec. 22, 2008).

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the *partial* use of CCS technology, the Alliance balked, repeatedly arguing that it was not "adequately demonstrated" for even brand new coal plants.

The Alliance's views on partial CCS appear to now be echoed by the Trump EPA air office:

1. In May 2011, the Alliance argued that partial CCS for new coal-fired power plants "is not adequately demonstrated" because it does "not exist in sufficient geographic dispersion." In December 2018, the Trump EPA proposed to revise that Obama EPA standard, with the "primary reason" for its proposed rollback being "the high costs and limited geographic availability of CCS." In proposing the standard, Wehrum stated in a press release that the rollback "reflects our approach of defining new, clean coal standards by data and the latest technological information, not wishful thinking."

2. The Alliance criticized the landmark Boundary Dam power plant, which uses CCS, claiming its first year of operation "offers very little evidence of reliability or efficiency" for regulatory purposes. The Trump EPA's proposed rollback of the standard cited "multiple issues" at the Boundary Dam power plant, and solicited comment on whether the facility's "first year operational problems cast doubt" on the standard.

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SECTION #2: While at the Trump EPA, former Hunton lawyers Wehrum and Harlow appear to have violated ethical requirements in their rush to serve former clients and Hunton-represented industry groups

Before becoming EPA's top air pollution regulator on November 20, 2017, Bill Wehrum was a lawyer at the law firm Hunton Andrews Kurth LLP (at the time, Hunton & Williams LLP). Wehrum served as co-chairman of Hunton's environmental practice and led the administrative law group,[109] advocating before EPA and the courts on behalf of some of the biggest polluters in America. One of Wehrum's colleagues at Hunton, a partner named David Harlow, joined EPA as "senior counsel" in the air pollution office on October 1, 2017.[110]

This investigation leads to several ethics-related conclusions:[111]

(a) Wehrum and Harlow appear to have worked improperly to benefit Hunton and a UARG member in an ongoing EPA enforcement action;

(b) Wehrum failed to disclose the existence of at least three former clients in his recusal statement;

(c) Wehrum met at least six times with an undisclosed former client;

(d) Wehrum and Harlow listed only "UARG" as their client, but not its constituent members with whom they likely also developed attorney-client relationships pursuant to D.C.'s attorney ethics rules;

(e) Wehrum met at least nine times with UARG members, almost always in situations that would not comply with ethical rules for former clients, including one meeting at Hunton's office on the same day EPA released the DTE Memo; and

(f) Wehrum held at least two additional apparently improper meetings with a former client, General Electric, which is also a member of a Hunton-represented industry group.

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[109] Q&A With Hunton & Williams' Bill Wehrum, LAW360, May 6, 2013, https://www.huntonak.com/images/content/2/4/v2/2407/Law360_Bill_Wehrum_QA.pdf

[110] Kevin Bogardus, *Chemicals official cleared to weigh in on industry litigation*, E&E NEWS (Mar. 1, 2018).

[111] This report was unable to as comprehensively evaluate David Harlow's ethical conduct while at EPA because of a lack of public records regarding his schedules and communications while at EPA, as compared to William Wehrum.

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Introduction

As political appointees at EPA, both Wehrum and Harlow signed "Recusal Statements" drafted with the guidance of agency ethics officials and designed to identify and address conflicts of interests. Although Harlow signed his recusal statement within the requisite 3-month timeframe[112] – and indeed addressed it to Wehrum as his supervisor – Wehrum's own recusal statement was signed after a substantial delay of 10 months and demands from public officials, notably Senator Whitehouse, that he do so.[113] In connection with his nomination to lead the Trump EPA air office, Wehrum further committed to recuse himself from participating personally and substantially in any particular matter involving Hunton or his former clients without obtaining written pre-approval – regardless of whether a reasonable person would question his impartiality.[114]

The recusal statements outline various ethics obligations for Wehrum and Harlow, particularly under the so-called "Trump Ethics Pledge."[115] Similar to the Ethics in Government Act regulations,[116] which also apply to Wehrum and Harlow, the Ethics Pledge prohibits them from participating "for a period of 2 years from the date of [their] appointment[s]" "in any particular matter involving specific parties that is directly and substantially related to [their] former employer or former clients, including regulations . . . ."[117]

Both Wehrum and Harlow understood that this two-year ban applies to interactions with Hunton, their former employer, and with their former clients. To that effect, each included a list of former clients in his recusal statement – 37 for Wehrum, seven for Harlow. In addition, Wehrum and Harlow noted that they have confidential clients (two for Wehrum, one for Harlow) they are contractually prohibited from disclosing.[118] It is unknown whether ethics officials are aware of the identities of those clients, or if Wehrum or Harlow have met with those clients.

Each recusal statement outlines what the so-called Trump Ethics Pledge covers, as Wehrum and Harlow were advised by EPA's ethics officials:

> [F]or the purposes of this pledge obligation, the term "particular matters involving specific parties" is broadened to include any meetings or other communication relating to the performance of my official duties, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested

[112] 5 C.F.R. § 2634.802(b).

[113] *See* Sean Reilly, *Under pressure, Wehrum details recusal obligations*, GREENWIRE, Sept. 18, 2018

[114] *See* Letter from William L. Wehrum to Kevin S. Minoli, Designated Agency Ethics Official, U.S. EPA, at 1 (Aug. 28, 2017).

[115] E.O. 13770, Ethics Commitments by Executive Branch Appointees (Jan. 28, 2017) ("Trump Ethics Pledge").

[116] 5 C.F.R. pt. 2635.

[117] *Id.* § 1, ¶ 6.

[118] Wehrum Recusal at 2 n.1; Harlow Recusal at 2 n.2.

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> parties. I am further advised that the term "open to all interested parties" means five or more parties.[119]

Wehrum purportedly delayed signing his recusal statement over confusion regarding these terms. Wehrum asserted that the delay was due to having received, "three different interpretations" about what it meant to be recused from a "particular matter involving specific parties," telling the New York Times, "[W]hat I don't want to do is sign a recusal letter and then have the rules change again."[120] It is unknown what "three different interpretations" Wehrum received, who they came from, and whether in the 10-month interim before signing, Wehrum followed the requirements as they were ultimately outlined in his recusal statement.

Strangely, Wehrum's recusal statement contains a glaring omission when compared with other EPA recusal statements signed both before and after his own. For example, the recusal statements of Andrew Wheeler (signed May 24, 2018),[121] of Peter Wright[122] and Anne Idsal[123] (both signed July 24, 2018), and of David Dunlap[124] (signed Dec. 19, 2019) all state that "open to all interested parties" means at least five parties who "represent a diversity of interests" rather than "one shared perspective" or "the same united perspective." The recusal statement that Wehrum signed September 17, 2018 omitted that critical language.

a. Wehrum and Harlow appear to have violated the terms of the Trump Ethics Pledge and Ethics in Government Act regulations by participating in the development of the DTE Memo.

While at Hunton, David Harlow represented DTE Energy, a UARG member. DTE sought Hunton's assistance in an EPA enforcement case alleging that one of the utility's coal-fired power plants had emitted pollution in violation of the Clean Air Act's New Source Review (NSR) program. In that case, Wehrum personally filed a brief as a lawyer for UARG in support of DTE's position.[125] DTE Energy lost twice before the U.S. Court of Appeals for the 6th Circuit, and faces millions of dollars in penalties. In May 2017, Hunton lawyers lobbied EPA to reform the Clean Air Act's NSR program, stating that the DTE Energy litigation specifically "highlight[ed] the uncertainty these [NSR]

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[119] Wehrum Recusal at 2; Harlow Recusal at 2.

[120] Eric Lipton, *As Trump Dismantles Clean Air Rules, an Industry Lawyer Delivers for Ex-Clients*, N.Y. TIMES (Aug. 19, 2018).

[121] Wheeler Recusal at 2 (May 24, 2018)

[122] Wright Recusal at 1 (July 24, 2018)

[123] Idsal Recusal at 2 (July 24, 2018)

[124] Dunlap Recusal at 2 (Dec. 29, 2018)

[125] Brief Amici Curiae of UARG et al. in Support of Defendants-Appellees, at *2, *United States v. DTE Energy Co. & Detroit Edison Co.*, 2012 WL 1656078 (May 8, 2012) (listing Wehrum as "Counsel for UARG").

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regulations have created," and justified reform.[126] In July 2017, DTE filed a petition for certiorari with the U.S. Supreme Court, asking the Court to reverse the judgment against it.

Then, in December 2017, shortly after Harlow and Wehrum left Hunton for EPA, the agency published a memorandum (known as the "DTE Memo"). The DTE Memo reversed the agency's position in Hunton's DTE case, stating (like Hunton had) that the DTE case was evidence of "uncertainty regarding the applicability of NSR permitting requirements": When determining whether a major polluter expected to significantly increase its emissions as a result of a major project, the agency would no longer "'second guess[]' the owner or operator's emissions projections,"[127] as EPA had done in the DTE litigation. The memorandum was issued December 7, 2017, intentionally timed to give DTE's Hunton lawyers time to file it with the U.S. Supreme Court as the Court was considering DTE's petition for certiorari the very next day.[128] That same day, at the request of one of DTE's lawyers in the litigation, Wehrum gave a speech at Hunton before UARG (of which DTE is a member).

Evidence subsequently emerged through the Freedom of Information Act (FOIA) that Wehrum and Harlow appear to have participated in the development of the DTE Memo, despite ethical rules barring their participation in matters involving their particular clients, or in matters where their former employer Hunton represented a client. This evidence, along with other materials, led Senator Sheldon Whitehouse (D-RI), along with Senate Environment and Public Works Committee Ranking Member Tom Carper (D-DE) and House Energy and Commerce Chairman Frank Pallone, Jr. (D-NJ), to ask the Acting Inspector General of the Environmental Protection Agency (EPA) on February 25, 2019 to undertake an investigation of Wehrum's and Harlow's role in helping to reverse EPA's position in the DTE enforcement action to benefit DTE Energy and Hunton.[129]

On March 20, 2019, Senator Whitehouse, Ranking Member Carper, and Chairman Pallone informed the Acting Inspector General in a supplemental letter that, in the DTE Memo, EPA adopted without discussion a novel interpretation of NSR regulations that had previously been enunciated only by Hunton's lawyers in the underlying DTE litigation.[130] On May 6, 2019, the offices of Senators Carper

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[126] Hunton comments for UARG, Docket Id. No. EPA-HQ-OA-2017-0190-40140, at 17 n.37 (May 12, 2017) (citing litigation against DTE Energy in the U.S. Court of Appeals for the Sixth Circuit).

[127] Memorandum from EPA Admin'r Scott Pruitt to Reg'l Administrators, *New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected Actual Applicability Test in Determining Major Modification Applicability*, at 8 (Dec. 7, 2017).

[128] Letter from Senator Whitehouse, Senator Carper, Representative Pallone to Charles J. Sheehan, Acting Inspector General, U.S. EPA, at 7–8 & Exhs. M–N (emails from EPA political appointee Mandy Gunasekara stating that the memorandum "needs to go out before" the Supreme Court considers whether to hear the DTE enforcement case). The May 2019 complaint by CREW also discusses circumstances demonstrating that EPA's memorandum was essentially a litigation memorandum crafted to support Hunton's aims and timed for maximum effect on the DTE litigation.

[129] https://www.whitehouse.senate.gov/news/release/democrats-call-for-investigation-of-top-epa-officials-role-in-reversing-enforcement-position.

[130] https://www.whitehouse.senate.gov/download/wehrum-oig-supplemental-letter

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and Whitehouse identified language in the DTE Memo, this time copied verbatim from a document that Hunton had submitted to EPA on behalf of the Air Permitting Forum, a similar Hunton-represented industry group with no existence outside the law firm.[131]

Any involvement by Wehrum or Harlow in the DTE Memo would seem to fit squarely within the prohibition on involvement in particular matters with specific parties who are former clients or represented by former employers: DTE Energy, a former client of Harlow, was a specific party represented by the former employer of both Wehrum and Harlow, facing millions of dollars in penalties and damages in a specific enforcement matter in which Wehrum had personally made an appearance while in private practice.

Although EPA originally stated that Wehrum had no involvement in reviewing the DTE Memo, he subsequently admitted to *The Washington Post* that this was not true, and additional reporting from other sources indicates that the discussion with Wehrum "cover[ed] topics such as the memo's potential impact on future EPA enforcement activities and the need to issue it before the Supreme Court conference on the DTE case."[132]

Indeed, documents obtained under FOIA corroborate those reports by revealing that EPA political appointees were intent on issuing the DTE Memo on a timeframe where it could impact the DTE litigation. For example, one EPA political appointee wrote: "I thought we may have more time, but know now that the cert hearing [Supreme Court's conference to consider which appeals to hear] is planned for Wednesday. This memo needs to go out before."[133] The DTE Memo was posted on EPA's web page sometime during the evening of December 7, 2017,[134] the same day that Wehrum had spoken to a private meeting of UARG members at his old Hunton office. The next morning, DTE's Hunton lawyers – not EPA or the Department of Justice lawyers opposing them in the case – informed the Supreme Court about the DTE Memo.[135]

Wehrum's participation appears to have been both personal and substantial. As the ethics watchdog Citizens for Responsibility and Ethics in Washington (CREW) explained in a complaint it filed with EPA's Acting Inspector General: "OGE's regulations explain that participation 'may be substantial even though it is not determinative of the outcome of a particular matter.'" [136] Moreover, the efforts by Wehrum's deputy to redact "potentially offending language" from a draft of the DTE Memo being reviewed by Wehrum "did not negate his participation" in the DTE Memo's development, "for both

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[131] https://www.epw.senate.gov/public/index.cfm/press-releases-democratic?ID=E598EA19-BB86-4737-ABE8-BE97F356D11E

[132] Juliet Eilperin, *EPA regulator skirts the line between former clients and current job*, Wash. Post (Feb. 25, 2019).

[133] *See* Letter from Sen. Whitehouse, Sen. Carper and Rep. Pallone, to Charles J. Sheehan, Acting Inspector General at 7 & n.19 (Feb. 21, 2019). Gunasekara's email misstates the day of the conference; it was actually scheduled for Friday (December 8), not Wednesday, of that week.

[134] *Id.* at 8.

[135] *Id.* at 101 (Exhibit P).

[136] Letter from Noah Bookbinder to Charles Sheehan at 3–4, 10–13, May 29, 2019 (citing 5 C.F.R. § 2635.401(b)(4)).

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his Ethics Pledge and his ethics agreement establish the duty to recuse from a 'particular matter involving specific parties' and not merely parts of the matter."[137]

Federal ethics regulations prohibit officials from taking certain actions where there is and appearance of a lack of impartiality.[138] Accordingly, Wehrum and Harlow should have consulted with ethics officials, which it appears that Wehrum did not do. Specifically, federal ethics regulations require employees to recuse from participation in "a particular matter involving specific parties" that is "likely to have a direct and predictable effect on the financial interest of . . . a person with whom he has a covered relationship," or a person who "represents a party to such a matter."[139] Employees are advised to seek assistance from ethics officials and supervisors in determining "whether a relationship would cause a reasonable person to question his impartiality . . . ."[140] In addition, even if a matter is not "specifically described" in this ethics rule, an employee concerned that circumstances "would raise a question regarding his impartiality should use the [pre-authorization] process to determine whether he should or should not participate in a particular matter."[141] According to EPA's ethics officials, Wehrum had not received any such waivers as of September 29, 2018.[142]

b. In his recusal statement, Wehrum failed to disclose at least three former clients that he previously represented in court – the Alliance of Automobile Manufacturers; the Minnesota Trucking Association; and the Minnesota Automobile Dealers Association.

If an agency's designated ethics official is not made aware of potential conflicts by a political appointee, the recusal statement approved by the official may be both incomplete and inadequate. Wehrum's recusal statement does not list at least three recent former clients he represented in litigation: the Alliance of Automobile Manufacturers; the Minnesota Trucking Association; and the Minnesota Automobile Dealers Association.

In 2015, a number of entities challenged a Minnesota law related to biofuels. In 2016, Wehrum filed a brief in the case along with five other lawyers – including two from Hunton – where they were listed as "Attorneys for Plaintiffs Minnesota Trucking Association, Minnesota Automobile Dealers Association, Alliance of Automobile Manufacturers, American Petroleum Institute, and American Fuel & Petrochemical Manufacturers."[143]

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[137] *Id.*

[138] *See generally* 5 C.F.R. § 2635.502.

[139] *Id.* § 2635.502(a).

[140] *Id.* § 2635.502(a)(1).

[141] *Id.* § 2635.502(a)(2).

[142] Letter from Kevin S. Minoli, Designated EPA Ethics Official, to Sen. Sheldon Whitehouse, at 1 (Sept. 29, 2016) ("To date, Mr. Wehrum has not received any waivers or authorizations issued pursuant to Executive Order 13770, 18 U.S.C. § 207(b)(1), or 5 C.F.R. § 2635.502(d).").

[143] *See, e.g.*, Mem. of Law in Support of Mot. For Partial Summary Judgment, Doc. 47 at *27, *Minn. Trucking Ass'n et al. v. Stine et al.*, No. 15-cv-2045-JRT-KMM (D. Minn. Sept. 29, 2016) (listing Wehrum and five other lawyers, including two others from Hunton, as "Attorneys for Plaintiffs Minnesota Trucking Association, Minnesota

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Wehrum's recusal statement includes the latter two plaintiffs (American Petroleum Institute and the American Fuel & Petrochemical Manufacturers), but not the other three. Accordingly, there was no way for the EPA air office employees identified in Wehrum's recusal statement to properly screen him from participating in meetings with those clients. As described below, Wehrum has in fact met with one of those undisclosed former clients in a manner that appears to violate the Ethics Pledge and the Ethics in Government Act regulations.

In addition to Wehrum's undisclosed clients, both Wehrum's and Harlow's recusal statements acknowledge that they each have "confidential" clients whose identities they contractually cannot disclose. However, only Harlow's recusal statement further acknowledges that, with respect to "clients who are not listed," he has a personal obligation "not to participate in specific party matters for the duration of my ethics obligation."[144] Wehrum's recusal statement includes no such acknowledgment.

c. Wehrum had at least six meetings with one of his undisclosed clients, the Alliance of Automobile Manufacturers, in violation of the Trump Ethics Pledge and potentially in violation of Ethics in Government Act regulations.

Wehrum had at least six meetings with one of his undisclosed clients, the Alliance of Automobile Manufacturers, including giving a speech before its board. This appears to violate Ethics in Government Act regulations and the Trump Ethics Pledge. Wehrum did not receive an ethics waiver for any of these meetings, and because none of them were "open to all interested parties," they thus appear to have been impermissible even if Wehrum only spoke about generally applicable regulations affecting his former client's interests.

Specifically, according to records obtained via FOIA and the EPA website, Wehrum met with his undisclosed client the Alliance for Automobile Manufacturers on:

- **Nov. 27, 2017,** with one other entity, to discuss fuel economy and greenhouse gas standards;
- **Dec. 27, 2017,** "to meet some of the Auto Alliance Board members";
- **Feb. 21, 2018**, with some of his former client's (current) lawyers and lobbyists, to discuss fuel economy and greenhouse gas testing;
- **Apr. 16, 2018**, to discuss an unknown topic alone with his former client;

Automobile Dealers Association, Alliance of Automobile Manufacturers, American Petroleum Institute, and American Fuel & Petrochemical Manufacturers").

[144] *Compare* Harlow recusal at 2 nn.1–2 ("For my former clients who are not listed, I understand that I am personally obliged not to participate in specific party matters for the duration of my ethics obligations."), *with* Wehrum recusal at 2 n.1 (acknowledging the existence of two "confidential clients" without offering the same assurances).

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- **May 22, 2018**, to discuss an unknown topic alone with his former client;
- **May 23, 2018**, to discuss fuel economy standards alone with his former client; and
- **July 16, 2018**, with one other entity, to discuss a model year 2020 fuel economy testing extension related to fuel without ethanol.

Because all of these meeting were either solely with his former client and its representatives, or with just one other entity, they were not "open to all interested parties" and thus violated the Trump Ethics Pledge. The Pledge prohibits Wehrum and Harlow from having any meetings or communications relating to the performance of their official duties with Hunton or their former clients, or from "participating in any particular matter involving" Hunton or their former clients.[145]

Depending on the subject matter discussed at these meetings, which is unknown, the meetings may also have violated Ethics in Government Act regulations.

d. Wehrum and possibly Harlow appear to have artificially – and perhaps improperly – limited their list of former clients from which they are recused.

As noted above, UARG was not incorporated, appears to hold no legal status, and was founded by Hunton. The organization appears to have existed only on paper as part of a coordinated effort by its members to influence EPA through legal services provided by Hunton.

As lawyers admitted to practice in the District of Columbia, Wehrum and Harlow are subject to attorney ethics rules that define who constitutes their clients. Under those rules, "It is well established that neither a written agreement nor the payment of fees is necessary to create an attorney-client relationship."[146] But emails obtained under FOIA reveal that when Wehrum developed his list of former clients, he merely asked Hunton for "a list of all clients to whom I *billed time* for the past 24 months," and then used that Hunton-provided list as the basis for his recusal obligations.[147]

By limiting his recusal list to only those "clients to whom [he] billed time," Wehrum's recusal statement may not include all entities with which he formed an attorney-client relationship. Particularly given Wehrum's management role as co-chairman of Hunton's environmental practice and leader of its administrative law group, he may have provided legal services to numerous additional "clients" who he did not bill directly.

Though Wehrum and Harlow recused themselves from certain meetings with representatives of "UARG," their recusal statements impose no limits on their involvement with the individual corporate members of UARG. Accordingly, the list of former clients from which they should be recused may

[145] Wehrum recusal at 2; Harlow recusal at 2.

[146] *In re Lieber*, 442 A.2d 153, 156 (D.C. 1982).

[147] *See* Maxine Joselow, *Air chief worried about conflicts of interest — emails*, E&E NEWS (Feb. 12, 2019) (emphasis added).

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be significantly under-inclusive, particularly since UARG is not incorporated and does not appear to have any other legal status.

This investigation determined that UARG and Hunton have repeatedly argued in court – successfully – that there is "an attorney-client privilege between *UARG members* and UARG's counsel, Hunton & Williams."[148] Their primary argument has been that Hunton and UARG enjoy an attorney-client relationship, and that information shared with UARG members as part of that relationship should be similarly protected from discovery under the "common interest" privilege. But in making those arguments, Hunton and UARG have repeatedly revealed that UARG was a mechanism for individual UARG-member entities to obtain legal advice useful in their day-to-day operations.

UARG has argued, for example, that it "was formed to advance the common legal interests of its members,"[149] that Hunton "provid[ed] legal services to UARG *and its members*,"[150] and that this work exposed Hunton to "confidential information from UARG *and its members*," who are constantly anticipating litigation" under the Clean Air Act.[151]

Similarly, Hunton has argued that a document it shared with UARG members "clearly falls within the attorney-client privilege" because it was about a court case with "ramifications for every *utility company* in the industry," and the document was akin to "advising [] clients about the prospects with respect to *their own potential liability*."[152] UARG, as an abstract group, has no Clean Air Act liability itself – only its individual, dues-paying members do.

An ethics opinion of the D.C. Bar states that although it is permissible for "individual subscribers" to pay a fee to an intermediary entity that entitles the subscriber to contact a law firm regarding legal matters, "the firm's client in each instance would be the subscriber and not [the intermediary]."[153]

Hunton has similarly argued that its work for UARG was not merely providing "general information and legal advice," but that UARG essentially operated as a vehicle for the UARG members to seek and receive legal advice about specific issues of concern to them.[154] In one enforcement case, for example, Hunton lawyers described various documents as containing conversations in which "UARG members" and Hunton lawyers "'agreed' to pursue certain legal strategies"; others describing

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[148] *See United States v. Duke Energy*, 2003 WL 25509097 (M.D.N.C. July 7, 2003) (emphasis added) (listing cases in which Hunton and UARG have successfully made that argument to withhold Hunton-UARG documents from discovery).

[149] UARG Opposition to Motion to Compel UARG to Comply with a Subpoena, *United States v. Duke Energy*, 1:02-mc-00480, at *2 (D.D.C.) (filed Dec. 18, 2002).

[150] *Id.* at *28 (emphasis added).

[151] *Id.* at *3 (emphases added)

[152] Def. Duke Energy Corp.'s Reply, *United States et al. v. Duke Energy Corp.*, 2003 WL 25509066 (M.D.N.C. Feb. 13, 2003) (emphasis added) (citing *Diaz v. Delchamps, Inc.*, 1997 WL 680602 (E.D. La. Oct. 31, 1997).

[153] D.C. Bar, *Ethics Opinion 225, Prepaid Legal Services* (Jan. 1992).

[154] *See, e.g.*, Def. Duke Energy's Reply in Support of its Mot. for Reconsideration, *United States v. Duke Energy*, 2003 WL 25509088 (M.D.N.C. June 6, 2003) (quoting excerpts from an internal UARG documents).

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"confidential and privileged discussions" with counsel present in which "UARG members" raised various "problems that arise"; and still other communications in which "UARG members" requested legal advice from Hunton via the UARG organization, and Hunton lawyers "respond[ed] to that request" with written legal opinions.[155]

At least three federal courts have protected UARG documents from discovery in enforcement matters involving UARG members.[156] In a 2003 enforcement case involving Ohio Edison, a subsidiary of former UARG member FirstEnergy, a federal court considered whether certain documents in Ohio Edison's possession were created by Hunton "in response to a request of legal advice from UARG *or any of its members*."[157] The court explained that there "is no dispute that Hunton & Williams is legal counsel to UARG and may be consulted *by UARG members* for legal advice on issues which are common to some or all of the members," including on "issues relating to *whether UARG members are in compliance with federal environmental regulations* and whether those regulations apply to *specific projects being considered by the members* . . . "[158] The court concluded that Hunton "clearly generated these memoranda in response to an ongoing relationship involving the rendition of legal advice *at the request of UARG's members*," and that those communications "would at least arguably reveal client confidences, including the types of subjects about which *the UARG members sought legal advice*."[159] The court upheld Hunton and UARG's claims of privilege.

Hunton has maintained a similar position as late as 2012,[160] as Hunton and continued to characterize its UARG work as "providing legal services to UARG *and its members*," and should thus be considered attorney-client privileged from discovery in Clean Air Act enforcement matters against UARG members – in that case, Duke Energy.[161]

Substantial public evidence indicates that UARG members paid their hefty dues in part to receive individualized legal advice and communications from Hunton attorneys, possibly including Wehrum and Harlow. For example, media obtained a copy of the most recent UARG "membership agreement" for the Tennessee Valley Authority (TVA).[162] That 2015 agreement[163] states that Hunton

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[155] *Id.*

[156] *Id.* n.1 (listing *United States v. Ohio Edison Co., et al.,* Case No. C2-99-1181 (S.D. Ohio Jan. 6, 2003) (denying motion to compel UARG documents) (J. Kemp); *United States v. Illinois Power,* Civil Action No. 99-CV-833-MJR (S.D. Ill. April 24, 2003) (J. Proud) (denying motion to compel UARG documents); and *United States v. Illinois Power,* Civil Action No. 99-CV-833-MJR (S.D. Ill. May 19, 2003) (J. Reagan denying Government's motion for reconsideration)).

[157] *See* Opinion and Order, *United States v. Ohio Edison Co.*, No. C2–99–1181 at *3–4 (S.D.Ohio Jan. 6, 2003) (J. Kemp).

[158] *Id.* at *3–4 (emphasis added).

[159] *Id.* at *7 (emphasis added).

[160] *See United States v. Duke Energy Corp.*, No. 1-cv-1262, 2012 WL 1565228, at *12 (M.D.N.C. Apr. 30, 2012).

[161] Defendant Duke Energy's Reply to the United States Opposition to Duke Energy's Cross-Motion for Protective Order Regarding UARG, 2003 WL 25509066 (M.D.N.C. Feb. 12, 2003).

[162] *See* Sean Reilly, *TVA defends its role in trade group*, E&E News, May 7, 2019.

[163] TVA-UARG contract, Mar. 10, 2015 (emphasis added).

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"serves as counsel to UARG *and its members*" on CAA matters, that Hunton would "provide necessary legal advice to UARG *and its members, including TVA*," and that the information exchanged "among UARG members and its counsel . . . are developed in anticipation of litigation [i.e., attorney work product] and/or constitute attorney-client communications for the purpose of obtaining advice from UARG counsel."[164] The agreement further contemplates that, "as a member of UARG," TVA "may have communications" with Hunton that are "privileged and confidential."[165]

And even in 2017, mere months before Wehrum left Hunton to join EPA, some of UARG's designated "legal" costs went to Hunton to pay for "communications with UARG members"[166] and "responding to members' questions"[167] – questions and communications that Hunton would argue in court are subject to attorney-client privilege.

Further evidence indicates that Hunton and individual UARG members even discussed the matter of payment. An internal UARG document proposes that Hunton would be paid for "[c]ommunications *with individual UARG members* concerning their membership plans for 2018 and the likely level of members' dues for 2018."[168] Although the Hunton may not have "billed time" directly to UARG members, when UARG members then paid those "dues" discussed with Hunton, 97.7% of the total "dues" went to Hunton for legal services.

In the UARG membership agreement documents, the collection of fees from UARG's member entities, and in court filings, Hunton has maintained that both UARG and its individual members create various privileged relationships with the law firm, including in some cases an attorney-client privilege. Under these circumstances, Wehrum's and Harlow's former clients included not only UARG, which has no apparent legal status, but also its individual members. By omitting the full list of UARG members from their list of former clients, Wehrum and Harlow appear to be frustrating – or violating – their ethical obligations.

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[164] *Id.* at 1.

[165] *Id.* at 3.

[166] *See, e.g.*, Leaked UARG Policy Committee document at 13 (request to pay Hunton for "communications with UARG members" regarding potential EPA changes to greenhouse gas rules for new and existing coal-fired power plants).

[167] *See, e.g.*, *id.* at 20 (request to pay Hunton for "responding to members' questions" regarding regional haze requirements).

1. [168] Leaked UARG Policy Committee document at 26 ("PLANNING/GENEAL COORDINATION").

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e. Wehrum has repeatedly met with clients he would worked with in private practice – actions that appear to have violated the intent of the Trump Ethics Pledge and Wehrum's own ethics agreement.

Shortly after Bill Wehrum assumed control of the EPA air office, his former law partner, Makram B. Jaber, emailed to invite him "to speak to our group regarding air regulations and regulatory outlook."[169] Nominally, the presentation to "our group" would be on "behalf" of five entities – UARG, plus four UARG members: American Electric Power, Southern Company, Duke Energy, and Dominion Energy. Of those five, Wehrum's recusal statement (which he only agreed to sign ten months later) makes clear that he was recused from individual meetings or communications relating to his EPA work with three of them: UARG, Duke Energy, and Dominion Energy.[170] Wehrum eventually gave that invitation-only briefing on December 7, 2017, less than three weeks after assuming his new role at EPA.

The fact that Hunton partner Makram B. Jaber stated that the meeting was on behalf of five entities is notable. Although Wehrum and Harlow are forbidden by the Trump Ethics Pledge – and by their recusal statements incorporating the Pledge – from meeting in private with any *single* former employer or client, there is a limited exception for events "open to all interested parties," a phrase that means "*five or more* stakeholders," representing a diversity of viewpoints "even if *one* of the stakeholders is a former employer or former client."[171]

With respect to the December 7, 2017 meeting at Hunton, circumstantial evidence indicates that Jaber's characterization of the entities attending may have been a pretense for Wehrum to maintain that the meeting was "open to all interested parties" because there were *exactly five* entities invited, and thus he could argue that his recusal obligations did not apply. Indeed, when confronted about this meeting, Wehrum appeared to believe that it was immaterial that the event would be hosted at and by Hunton, his former employer, and believed it immaterial that the event was being held on behalf of his former clients UARG and four companies that were *also UARG members* – including two, Duke Energy and Dominion, that were former Wehrum clients in their own right. Indeed, Wehrum has stated that it would have been permissible for him to discuss EPA matters behind closed doors with *just his former clients present* – provided there were at least five former clients.[172]

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[169] Email from Jaber Makram to Bill Wehrum, "Invitation to speak," Nov. 21, 2017 (6:21 AM). Mr. Jaber was subsequently named co-leader of Hunton's environmental team.

[170] Wehrum recusal at 2.

[171] Memorandum from Robert I. Cusick, Dir. of U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, DO-09-011, at 1–2 (Mar. 26, 2009) (explaining the meaning of the phrase "open to all interested parties"); Legal Advisory from David J. Apol, General Counsel of U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, LA-17-02, at 1 (Feb. 6, 2017) ("With respect to [President Trump's] Executive Order 13770, ethics officials and employees may continue to rely on OGE's prior guidance regarding [President Obama's] Executive Order 13490 to the extent that such guidance addresses language common to both orders").

[172] Juliet Eilperin, *EPA regulator skirts the line between former clients and current job*, WASH. POST, Feb. 25 ("[Wehrum] said he has concluded that his meetings comply as long as five entities participate. And, he said, it does not matter how many of those entities are former clients.").

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Such an argument represents an absurd interpretation of these ethics rules. The "open to all interested parties exception" applies to events that "do not raise concerns about special access."[173] A closed-door meeting at Wehrum's former employer, where the only invitees are Wehrum's former clients and those represented by Wehrum's former employer, is perhaps a paradigmatic example of a case of "special access."

Second, evidence does not substantiate that five stakeholders were actually present. Rather, evidence suggests this December "meeting" was a pre-planned meeting of UARG, in which case under Wehrum's view of "UARG" as his single client, all members present should have been treated as "UARG" – not a collection of independent companies. Internal UARG documents obtained by Politico reference a planned "December 2017 UARG Policy Committee meeting," at which UARG would recommend and vote upon a 2018 budget.[174] That document was itself prepared in advance of a two-day UARG Policy Committee meeting in June 2017, and the meeting that Makram Jaber invited Wehrum to speak at also spanned two days – December 7 and 8.[175] Notably, this double-counting of UARG members as distinct from "UARG" conflicts with Wehrum and Harlow's treatment of UARG members for purposes of defining their former clients: The UARG members are treated as distinct from UARG for purposes of determining whether a meeting is "open to all interested parties," but the companies are indistinguishably lumped together as "UARG" for purposes of escaping individual designation as former clients (see Section 2.d of this report). Wehrum and Harlow cannot have it both ways: Either UARG is a collection of companies, in which case they should have been recused from meeting with them all, or UARG is a single group, in which case this was a meeting with a single client that violated the Trump Ethics Pledge.

Regardless, Wehrum stated that he did not consult with agency ethics personnel about the propriety of the meeting,[176] *despite his schedule showing that he met with ethics officials from 2:00–2:30pm that day, immediately before leaving EPA for Hunton at 2:30pm.*
Wehrum's briefing, obtained via FOIA, was titled, "Clean Air Act: Update on Stationary Source Regulations."[177] Among other issues, Wehrum discussed with his former clients and law partners:

- EPA's proposal to repeal the Clean Power Plan, and his intention to seek information from the public about a replacement that accords with legal interpretations advocated by Hunton;[178]
- EPA's ongoing review of greenhouse gas standards for new coal-fired power plants;[179]

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[173] Memorandum from Robert I. Cusick, Dir. of U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, DO-09-011 (Mar. 26, 2009).

[174] Leaked UARG Policy Committee document at 4.

[175] Email from Jaber Makram to Bill Wehrum, "Invitation to speak," Nov. 21, 2017 (6:21 AM).

[176] Juliet Eilperin, *EPA regulator skirts the line between former clients and current job*, Wash. Post (Feb. 25, 2019).

[177] Wehrum presentation at Hunton at slide 1.

[178] *See id.* at slide 4.

[179] *Id.*

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- Legal challenges to the Mercury and Air Toxics Standards (MATS) Rule, including the ongoing *Murray Energy v. EPA* case being litigated by Hunton;[180]

- EPA's ongoing work to determine which areas of the country are meeting the 2015 National Ambient Air Quality Standards (NAAQS) for ozone;[181]

- EPA's progress reviewing state regional haze plans, and state haze plans currently subject to ongoing litigation[182] – at least some of which was litigation by Hunton attorneys on behalf of UARG;[183]

- Various "Permitting Actions Underway" with implications for major sources of air pollution such as power plants.[184]

Immediately afterwards, Wehrum did a "Q&A" session with his former clients and other participants.[185] There is no public record of what questions Wehrum's former clients and law partners asked him, nor what his answers were.

In addition to the December 7, 2017 meeting at UARG's office, a review of Wehrum's calendar information shows that he has continued to meet in an official capacity with UARG members, including in at least eight meetings open to fewer than five entities. For those meetings held as of September 29, 2018, Wehrum had not received any waiver from EPA's ethics officials.[186] It is unknown whether he obtained waivers before any of the subsequent meetings.

In all, at least 10 different UARG members who arguably should have been included on Wehrum's list of recused former clients were able to gain private access to him when he served at EPA: American Electric Power; Dominion Energy; Duke Energy; Minnesota Power; Otter Tail Power; Southern Company; the American Coalition for Clean Coal Electricity; the Edison Electric Institute; the National Mining Association; and the National Rural Electric Cooperative Association.

A review of Wehrum's November 2017 through May 2019 calendar information – culled from FOIA productions and EPA's website – indicates the following meetings:

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[180] *Id.* at slide 5.

[181] *Id.* at slide 6.

[182] *Id.* at slides 12–13 (noting states with ongoing litigation).

[183] *See, e.g., Texas et. al v. EPA*, 829 F.3d 405 (5th Cir. 2016) (Hunton attorneys Norman W. Fichthorn and Aaron M. Flynn representing UARG).

[184] Wehrum presentation at Hunton at slide 15.

[185] *Id.* at slide 16 ("Q&A"); Makram Jaber, "Event Information Form" at 1 (showing there would be time for "Q&A" moderated by Andrea Field, a Hunton partner).

[186] Letter from Kevin S. Minoli, Designated EPA Ethics Official, to Sen. Sheldon Whitehouse, at 1 (Sept. 29, 2016) ("To date, Mr. Wehrum has not received any waivers or authorizations issued pursuant to Executive Order 13770, 18 U.S.C. § 207(b)(1), or 5 C.F.R. § 2635.502(d).").

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- **Dec. 7, 2017:** Wehrum met at the offices of his former employer Hunton, for a private speech before his former client "UARG," as well as four UARG members: American Electric Power, Duke Energy, Dominion, and Southern Company.

- **Jan. 10, 2018:** Wehrum met alone with UARG member the American Coalition for Clean Coal Electricity.

- **Jan. 12, 2018:** Wehrum met alone with UARG member the National Mining Association and its attorneys to discuss the Clean Power Plan, New Source Review, and Ozone Transport – all regulations that UARG proposed weakening.

- **Jan. 24, 2018:** Wehrum met with UARG member the Edison Electric Institute (EEI) to discuss the Mercury and Air Toxics Standards. In attendance on behalf of EEI was John McManus, an American Electric Power employee who chaired UARG's "Policy and Steering Audit" Committee in 2017, as well as representatives from UARG members Duke (from which Wehrum is recused), Ameren, FirstEnergy, and Southern Company. Also in attendance was a representative from Berkshire Hathaway Energy, a member of Hunton's CCS Alliance.

- **March 30, 2018:** Wehrum met alone with UARG member the National Rural Electric Cooperative Association.

- **May 30, 2018:** Wehrum met alone with UARG member the Edison Electric Institute to discuss the Clean Power Plan, Mercury and Air Toxics Standards, Regional Haze, and other matters.

- **July 9, 2018:** Wehrum met alone with UARG member the American Coalition for Clean Coal Electricity.

- **Nov. 28, 2018:** Wehrum met with the "Lignite Energy Council," including representatives from UARG members Otter Tail Power Co. and Minnesota Power.

- **Dec. 11, 2018:** Wehrum met alone with UARG member the National Rural Electric Cooperative Association.

The Trump EPA has not released any information about Harlow's schedule, and this investigation was thus unable to determine whether he met with any former clients or UARG members.

In addition, Wehrum also appears to have held meetings in apparent violation of ethical rules with former clients who he acknowledged the existence of and agreed not to meet with.

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Specifically, as Senator Whitehouse noted[187] in letters to President Trump and Andrew Wheeler, Wehrum held two closed-door meetings with his former client General Electric (which is also a member of the Air Permitting Forum) in early 2018 that were not "open to all interested parties," thus violating the prohibition on participating in "any meetings or communications relating to the performance of [his] official duties," even regarding matters of general applicability.

The first meeting, on January 23, 2018, had only one additional entity present (Boeing), and thus did not satisfy the exception for being "open to all interested parties." The second meeting, on January 26, 2018 was with General Electric alone. The purpose of these small meetings with his former client is unknown. Depending on the subject matter discussed at these meetings, which is unknown, the meetings may also have violated Ethics in Government Act regulations.

Wehrum had additional meetings with General Electric representatives that appear to have included representatives of more than five other entities, on November 27, 2017 (with various members of the Association of Home Appliance Manufacturers) and on April 10, 2018 (with various members of the Gas Turbine Association).

[187] https://www.whitehouse.senate.gov/news/release/whitehouse-calls-out-wehrum-for-flaunting-trump-ethics-pledge

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APPENDICES

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APPENDIX 1: Utility Air Regulatory Group

Topic	Sub-topic	UARG's position	Trump EPA's position
Air Toxics	**MATS 2016 Supplemental Finding that it is "appropriate and necessary" to regulate mercury and other toxic air pollution from power plants under CAA section 112.**	**2011: Harlow** writes nearly 300 pages of comments opposing the MATS proposal, including that "Regulation of [power plants] Under § 112(n)(1)(A) Is Neither 'Appropriate' Nor 'Necessary'" **2016:** Argued the Obama EPA should not have found that it is "appropriate and necessary" to regulate toxic air pollution from power plants under CAA section 112.[188] "UARG" asked its members to pay money to finance Hunton's legal challenge to this Obama EPA finding.[189]	**2017:** At a closed-door session held for UARG's benefit, Wehrum discussed MATS legal challenges, including the case Hunton itself was litigating against EPA.[190] **2019:** Wehrum signed proposal to reverse the Obama EPA finding, concluding instead that "it is not appropriate and necessary" to regulate toxic air pollution from power plants under CAA section 112.[191]
Air Toxics	**MATS 2016 Supplemental Finding's treatment of co-benefits**	**2016:** While at Hunton, Wehrum stated that, "[If] you look at the benefits generated by the hazardous air pollutant reductions [the MATS] rule would achieve, the costs vastly outweigh the benefits. So from our perspective, it's a regulation that made no sense and wasn't justified."[192] UARG argued in court that, when determining whether it is "appropriate and necessary" to regulate toxic air pollution from power plants under CAA section 112, the Obama EPA should not have considered co-benefits of reducing particulate matter (PM) because PM is "addressed under . . . the § 109 NAAQS program."[193] Wrote that reductions in co-benefits constitute the "overwhelming majority" of the MATS rule benefits.[194]	**2019:** Wehrum signed proposal to "reconsider" Obama EPA finding in part on the basis that co-pollutants are "already addressed" by the NAAQS program.[195] Focused in proposal on the fact that "these projected [PM] co-benefits comprised the overwhelming majority (approximately 99.9 percent" of the monetized benefits of MATS . . . ."[196]

[188] UARG brief challenging the 2016 MATS Supplemental Finding.
[189] Leaked UARG Policy Committee document at p. 19.
[190] Wehrum presentation at Hunton at 5.
[191] 84 Fed. Reg. 2670, 2674 (Feb. 7, 2019).
[192] Juan Carlos Rodriguez, *Environmental Group Of The Year: Hunton & Williams*, LAW360, Jan. 5, 2016 (5:57 PM EST).
[193] UARG brief challenging the 2016 MATS Supplemental Finding at 47.
[194] UARG brief challenging the 2016 MATS Supplemental Finding at 21.
[195] 84 Fed. Reg. at 2677.
[196] 84 Fed. Reg. at 2676.

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Topic	Sub-topic	UARG's position	Trump EPA's position
Air Toxics	**MATS Residual Risk & Technology Review to determine whether to require additional health- or environmental-based controls on power plants**	**2011:** "HAP emissions from coal-fired EGUs pose insignificant risks to human health and ecological resources," and on that basis should be de-listed.[197] **2017:** UARG seeks dues from its members to pay Hunton to "Coordinate with EPRI regarding eventual residual risk and technology review (RTR) of MATS rule," which could have imposed additional controls on power plants beyond the MATS rule's MACT standards.[198] In the past, UARG had used EPRI analyses in August 2011 to argue that coal-fired power plants do not pose a legally significant cancer risk, and would not hurt the environment.[199]	**2019 (Wehrum's signed proposal):** "Considering all of the health risk information and [relevant] factors . . . Including the uncertainties . . . the EPA proposes that the risks are acceptable" for HAP emissions from coal- and oil-fired power plants.[200] No additional health- or environmental-based controls should be required: "we are proposing that the current MATS requirements provide an ample margin of safety to protect public health," and "it is not necessary to set a more stringent standard to prevent . . . an adverse environmental effect."[201]

[197] UARG comments at 18. Although this comment urged that power plants be entirely removed from regulation under CAA section 112, the scientific arguments advanced are similar to those in a residual risk and technology review.
[198] Leaked UARG Policy Committee document at p. 19.
[199] UARG comments at 5-14.
[200] 84 Fed. Reg. at 2700.
[201] 84 Fed. Reg. at 2700.

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Topic	Sub-topic	UARG's position	Trump EPA's position
Air Toxics	**Withdrawal of "Once In, Always In" (OIAI) policy requiring major sources to continue meeting stringent limits**	**2007:** "EPA's 'once-in-always-in' policy adds a temporal condition to source classification that is not found in the CAA or in EPA's § 112 regulations."[202] Withdrawal of the OIAI policy would be "consistent with language [sic] and structure of the CAA and should be adopted."[203] Withdrawal of the OIAI policy "must be addressed by rulemaking, not by issuance of a guidance memorandum."[204] **2019:** UARG – joined by APG, AIF and NEDACAP (four Hunton lawyers total) – intervene in lawsuit defending Wehrum's withdrawal of the OIAI policy.[205] Made same 3-part argument that EPA does: (1) "The Wehrum Memo is not subject to judicial review at this time," and (2) alternatively, "The Wehrum Memo implements the CAA's plain language," but (3) asked for "remand should the Court find statutory ambiguity."[206]	**2018 (Wehrum memo):** "Congress placed no temporal limitations on the determination of whether a source emits or has the [potential to emit air toxics] in sufficient quantity to qualify as a source. To the extent the OIAI policy imposed such a temporal limitation . . ., EPA had no authority to do so under the plain language of the statute."[207] "Nothing in the structure of the CAA counsels against the plain language reading" advanced by Wehrum.[208] **2019:** EPA files brief arguing that, (1) "The 2018 Guidance is neither a legislative rule nor final agency action," and thus cannot be directly challenged, (2) alternatively, "EPA's plain language reading of the statute should be upheld," but if it's not clear from the plain text then (3) "EPA must be given the first opportunity to consider how best to resolve that ambiguity."[209] **June 2019:** EPA proposes rule to codify the Wehrum memo. "We are proposing to make clear in this rulemaking [such sources] will not be subject to the CAA section 112 requirements applicable to the source as a major source . . . ."[210]

[202] UARG comment on OIAI proposal at 2.
[203] *Id.* at 3.
[204] *Id.* at 1.
[205] California Communities Against Toxics v. EPA, 18-1085 (D.C. Cir.) (briefs for Hunton-aligned groups filed in January 2019 in Feb. 2019).
[206] UARG OIAI brief, 2019 WL 858013.
[207] Wehrum OIAI memo at 3.
[208] *Id.* at 4.
[209] EPA OIAI brief, 2019 WL 858006.
[210] https://www.epa.gov/sites/production/files/2019-06/documents/frn_mm2a_proposal_and_reg_text_6_25_19.pdf

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Topic	Sub-topic	UARG's position	Trump EPA's position
Climate	**GHG NSPS for new power plants; decision to base the "best system of emission reduction" (BSER) for power plants in part on what can be achieved using partial carbon capture and storage (CCS) technology**	**2012 (Wehrum):** "There is no doubt that CCS [carbon capture and storage] cannot possibly be considered to be the BSER [best system of emission reduction] at the present time . . . ."[211] **2014:** "CCS has not been shown to meet the CAA's criteria for determining whether technology has been adequately demonstrated."[212] **2015:** "[O]perational experience to date at Boundary Dam does not support finding that CCS is adequately demonstrated or that it is the BSER for coal-fired EGUs."[213] **2017:** UARG files briefs in lawsuit challenging the Obama EPA rule. UARG sought dues from its members for "preparation of a possible replacement" of the Obama EPA rule.[214] **2019:** "UARG supports EPA's proposed finding that neither 'full' nor 'partial' CCS constitutes the BSER for new coal-fired EGUs."[215]	**2017:** "EPA . . . is reviewing the [2015 Rule] and, if appropriate, will as soon as practicable and consistent with law, initiate reconsideration proceedings to suspend, revise or rescind the rule."[216] **2018:** "EPA is proposing to revise its [2015] analysis and determine that CCS is not adequately demonstrated . . . ."[217] "[T]he EPA proposes to revise to the BSER . . . . The primary reason for this proposed revision is the high costs and limited geographic availability of CCS."[218] "While the carbon capture technology at the Boundary Dam is currently operating, that project experienced multiple issues with [the CCS technology] during its first year of operation . . . . EPA solicits comment on whether Boundary Dam's first-year operational problems cast doubt on the technical feasibility of fully integrated CCS."[219] ***Wehrum*:** "Today's actions reflect our approach of defining new, clean coal standards by data and the latest technological information, not wishful thinking."[220]

[211] Comments of Bill Wehrum et al. for UARG, Docket Id. No. EPA-HQ-OAR-2011-0660-9995, at 77 (June 25, 2012).
[212] UARG Comments, Docket Id. No. EPA-HQ-OAR-2013-0495-9666, at 41–42 (May 9, 2014).
[213] UARG petition for reconsideration, Docket Id. No. EPA-HQ-OAR-2013-0495-11894, at 5 (Dec. 22, 2015).
[214] Leaked UARG Policy Committee document at 13.
[215] UARG comments, Docket Id. No. EPA-HQ-OAR-2013-0495-12621, at 14 (Mar. 18, 2019).
[216] 82 Fed. Reg. 16330 (Apr. 4, 2017).
[217] 83 Fed. Reg. at 65441 (Dec. 20, 2018).
[218] *Id.* at 65426.
[219] *Id.* at 65444.
[220] https://www.epa.gov/newsreleases/epa-proposes-111b-revisions-advance-clean-energy-technology

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Topic	Sub-topic	UARG's position	Trump EPA's position
Climate	**Clean Power Plan; determination of the "best system of emission reduction" (BSER) for reducing GHGs from power plants**	**2014:** "A standard of performance under section 111 must be achievable for individual sources based on measures the source's owner can integrate into the design or production process of the source itself."[221] "[T]he plain text of section 111 of the CAA establishes a program that is focused on reducing the rate of emissions . . . through the application of systems that can be integrated into the design or operation of the source itself."[222] "Likewise, the CAA's other similar programs . . . are limited to measures incorporated into the design or production processes of individual sources."[223] **2017:** "Any replacement or revision to the Clean Power Plan under CAA § 11(d) must . . . be based on a 'best system of emission reduction' that can be applied at the individual [sources] subject to the rule . . . "[224]	**2017:** "[T]he Agency proposes to return to a reading of CAA section 111(a)(1) (and its constituent term, 'best system of emission reduction') as being limited to emission reduction measures that can be *applied to or at* an individual stationary source. That is, such measures must be based on a physical or operational change to a building, structure, facility, or installation at that source, rather than measures that the source's owner or operator *can implement on behalf of* the source at another location."[225] This "source-specific approach" includes measures "integrated into its design or operation."[226] **2019:** The word "system" is "limited to lower-emitting processes, practices, designs, and add-on controls that are applied at the level of the individual facility."[227]

[221] UARG CPP comments, Docket Id. No. EPA-HQ-OAR-2013-0602-22768, at 17 (Dec. 1, 2014).
[222] *Id.* at 28.
[223] *Id.* at 36.
[224] UARG comments, Docket Id. No. EPA-HQ-OA-2017-0190-40140, at 5 (May 12, 2017).
[225] 82 Fed. Reg. 48035, 48309 (Oct. 16, 2017).
[226] *See* 82 Fed. Reg. at 48037.
[227] Repeal of Clean Power Plan at 99 (July 19, 2019) (pre-publication).

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Topic	Sub-topic	UARG's position	Trump EPA's position
Climate / permitting	**Clean Power Plan; exemption from New Source Review (NSR) permitting requirements**	**2007:** "UARG members strongly support EPA's proposal to adopt an hourly emissions increase test as a threshold requirement for what is a 'modification' under the NSR program . . . ."[228] **2014:** "EPA's failure to account for the potential cost of NSR—and NSR uncertainty" in the Clean Power Plan is unlawful.[229] **2018:** "Adopting a maximum hourly emission rate increase threshold test for major modifications will promote the safe, reliable, and efficient operation of [power plants]. * * * UARG supports the proposed scope of EPA's revisions to the NSR applicability test . . . ."[230]	**2017:** "We are interested in actions that be taken to harmonize and streamline the NSR applicability and/or the NSR permitting process with a potential new rule. * * * What rule or policy changes or flexibilities can EPA provide as part of the NSR program that would enable [power plants] to . . . not trigger major NSR permitting while maintaining environmental protections? * * * What other approaches would minimize the impact of the NSR program on the implementation of [greenhouse gas standards for power plants]?"[231] **2018:** "EPA is proposing to amend the NSR regulations to include an hourly emissions increase test for [power plants]."[232] "EPA has historically not considered the costs of complying with other CAA programs, like NSR, when determining BSER for a source category under section 111. * * * However, due to the nature of the electric utility industry and the types of candidate control measures being considered in this proposal, it may be appropriate to consider NSR compliance costs in this instance."[233]

[228] UARG NSR comments, Docket Id. No. EPA-HQ-OAR-2005-0163-0319, at 3 (Aug. 8, 2007).
[229] UARG CPP comments, Docket Id. No. EPA-HQ-OAR-2013-0602-22768, at 177 (Dec. 1, 2014).
[230] UARG ACE comments, Docket Id. No. EPA-HQ-OAR-2017-0355-24421, at 99 (Oct. 31, 2018).
[231] 82 Fed. Reg. 61507, 61519 (Dec. 28, 2019) (ANPR).
[232] 83 Fed. Reg. 44746, 44780 (Aug. 31, 2018) (proposal).
[233] *Id.* at 44777.

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Topic	Sub-topic	UARG's position	Trump EPA's position
Climate	**Emission guidelines for methane from existing landfills, and EPA's authority to revise such guidelines**	**2015:** Opposes updates to landfill emission guidelines because EPA "lacks authority under the CAA to revise the emission guidelines to make them more stringent."[234]	**2017:** Pruitt delays effective date of the rules, but this is struck down in court. **2018:** EPA asks court to hold litigation challenging the landfill rule "in indefinite abeyance" while the agency reconsiders the rule.[235]
NAAQS	**Primary (health-based) SO2 NAAQS, and Trump EPA's decision not to strengthen it**	"UARG supports EPA's proposal to retain the primary SO_2 NAAQS without change."[236] "[T]he current NAAQS is more protective than was recognized when it was adopted. This means that the margin of safety is greater than was previously considered adequate."[237]	"[T]he Administrator has concluded that the current primary SO_2 standard is requisite to protect public health, with an adequate margin of safety, from effects of SO_X in ambient air and should be retained, without revision."[238] **Wehrum:** "[W]e have concluded that the existing standard continues to provide adequate health protection to our most vulnerable populations."[239]
NAAQS	**Primary (health-based) NO2 NAAQS, and Trump EPA's decision not to strengthen it**	"UARG supports the proposal to retain the primary NO_2 NAAQS . . . ."[240] "In fact, the present standards are even more protective than the Administrator recognizes."[241]	"EPA is retaining the current primary NO_2 standards, without revision."[242]

[234] UARG Comments, Docket Id. No. EPA-HQ-OAR-2014-0451-0198, at 1 (Oct. 26, 2015).
[235] Joint Motion to Govern Further Proceedings, *Nat'l Waste & Recycling Ass'n v. EPA*, No. 16-1372 (D.C. Cir. Apr. 3, 2018).
[236] UARG Comments, Docket Id. No. EPA-HQ-OAR-2013-0566-0207, at 2 (Aug. 9, 2018).
[237] UARG Comments, Docket Id. No. EPA-HQ-OAR-2013-0566-0207 at 10 (Aug. 9, 2018).
[238] 84 Fed. Reg. 9866, 9867 (Mar. 18, 2019).
[239] https://www.epa.gov/newsreleases/epa-retains-national-ambient-air-quality-standards-sulfur-dioxide
[240] UARG Comment, Docket. ID No. EPA-HQ-OAR-2013-0146-0150, at 1 (Sept. 25, 2017).
[241] *Id.* at 10.
[242] 83 Fed. Reg. 17226, 17227 (Apr. 18, 2018)

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Topic	Sub-topic	UARG's position	Trump EPA's position
NAAQS	**Review of ozone NAAQS, sidelining of independent science**	**May 2011**: "Recent research on morbidity effects" of ozone exposure "is inconsistent and unremarkable,"[243] and "recent research on mortality effects is inconsistent and inconclusive."[244] **Dec. 2011:** "EPA staff continues in [the draft Integrated Science Assessment] to present new research in a manner that suggests that the new science changes what was known previously about the effects of ozone exposure on public health. . . . This biased approach is highly inappropriate, contrary to the purpose of the NAAQS review process," and illegal.[245] **Aug. 2012:** "Unfortunately, EPA staff takes the same . . . biased approach" in the Third Draft ISA, again "present[ing] the recent research in a manner that suggested that the new science changes what was known" in 2008.[246] **Oct. 2012:** EPA's draft Health Risk and Exposure Assessment (HREA) for ozone pollution is "overly complex and inaccessible . . . 533 pages long and well over one-inch thick when printed double-sided."[247]	**April 2018:** Wehrum publicly advocates a faster NAAQS review process by "reducing some scientific advisory input and accepting data that is 'close enough' to justify a review rather than 'perfect,' . . . ."[248] **Oct. 2018:** EPA eliminates plans for an Ozone Review Panel, which would have provided expert scientific advice for purposes of considering whether to update the NAAQS.[249]

[243] UARG comment on draft Integrated Science Assessment, Docket Id. No. EPA-HQ-ORD-2011-0050-0009, at 6 (May 5, 2011).
[244] *Id.* at 21.
[245] UARG comment on Second External Review of the draft ISA, Docket Id. No. EPA-HQ-ORD-2011-0050-0031, at 6, (Dec. 30, 2011).
[246] UARG Comment on Third External Review of the draft ISA, Docket Id. No. EPA-HQ-ORD-2011-0050-0046, at 3 (Aug. 20, 2012).
[247] UARG comment, Docket Id. No. EPA-HQ-OAR-2008-0699-0096, at 8 (Oct. 12, 2012).
[248] *EPA Air Chief Plans To Speed NAAQS Reviews Using 'Close Enough' Data*, INSIDEEPA (Apr. 19, 2018).
[249] *See* Dino Grandoni & Juliet Eilperin, *EPA scraps pair of air pollution science panels*, WASH. POST (Oct. 13, 2018).

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Topic	Sub-topic	UARG's position	Trump EPA's position
NAAQS	**Startup, Shutdown, and Malfunction (SSM) Rule**[250]	**2013:** "UARG members have a significant, direct interest in EPA's proposal and the CAA interpretations on which it is based. * * * UARG disagrees that EPA has demonstrated that the identified SIP provisions are 'substantially inadequate.' * * * UARG also disagrees with many of the CAA interpretations that EPA suggests justify the proposed result."[251] **2016**: "EPA has not met its burden to justify a SIP call."[252] **2017:** "EPA should convene a proceeding to withdraw the SSM SIP calls by applying a SIP call standard that is consistent with its limited authority under the CAA and obligation to consider the impacts of its exercise of that authority."[253]	**Oct. 2018:** "Region 6 has received concurrence from the relevant office in EPA's Office of Air and Radiation to convene a proceeding for reconsideration of the Texas SIP call, the outcome of which may potentially entail Region 6 proposing an action inconsistent with EPA's interpretation in the 2015 SSM SIP Action when acting pursuant to the reconsideration of the Texas SIP call. * * * EPA will conduct notice-and-comment proceedings as part of that reconsideration process if the Agency proposes to change the Texas SIP call."[254] **Apr. 2019:** "[EPA Region 6] is considering an alternative interpretation regarding affirmative defense provisions in [SIPs] . . . that departs from the EPA's 2015 policy on this subject. * * * EPA Region 6 proposes to withdraw the 2015 determination that the Texas SIP is substantially inadequate . . . ."[255] **June 2019:** "[EPA] Region 4 is considering changing the finding . . . that certain SIP provisions in the North Carolina SIP are substantially inadequate to meet CAA requirements."[256]
NSR	**DTE "second-guessing"**	**2012:** "[T]he causation standard is whether the 'change' was the 'predominant cause' of the increase."[257]	**2017:** "Because increased emissions may be caused by multiple factors . . . the source must exercise judgment to exclude increases for which the project is not the 'predominant cause.'"[258]

[250] https://eelp.law.harvard.edu/2017/09/power-plant-startup-shutdown-and-malfunction-rule/
[251] UARG comments, Docket Id. No. EPA-HQ-OAR-2012-0322-0556, at 4 (May 13, 2013).
[252] Brief of UARG and other industry petitioners, *Walter Coke, Inc. v. EPA*, No. 15-1166, at 23 (D.C. Cir. Oct. 31, 2016).
[253] UARG comments, Docket Id. No. EPA-HQ-OA-2017-0190-40140, at 25 (May 12, 2017).
[254] Letter from Anne Idsall, Reg'l Admin'r, to Jon Niermann and Janis Hudson, at 2 (Oct. 16, 2018).
[255] 84 Fed. Reg. 17986, 17987 (Apr. 29, 2019).
[256] 84 Fed. Reg. 26031, 26036 (June 5, 2019).
[257] UARG brief at 20 (Feb. 27, 2015); UARG brief at 15 & n.8 (May 1, 2012).
[258] Memorandum from EPA Admin'r Scott Pruitt to Reg'l Administrators, *New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected Actual Applicability Test in Determining Major Modification Applicability*, at 7 (Dec. 7, 2017)..

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Topic	Sub-topic	UARG's position	Trump EPA's position
NSR	**Source aggregation**	**June 2010:** "[T]he final Aggregation Rule is a step in the right direction and should not be revoked."[259]	**Nov. 2018:** "On April 15, 2010, the EPA proposed to revoke the 2009 NSR Aggregation Action. After a review of the public comments . . . the EPA has now decided not to revoke the 2009 Aggregation Action."[260]
Interstate pollution	**Rejection of "section 126" petitions from downwind states**	**July 2018:** "UARG and UARG members have a strong, direct interest in supporting EPA's proposed denial of the section 126 petitions at issue in this proceeding."[261] "[E]ach of the petitions is insufficient to support a section 126(b) finding."[262] "Although the Administrator could, in his discretion, choose to undertake a separate analysis . . . section 126(b) does not obligate or direct the Administrator to conduct such an analysis."[263]	**Oct. 2018:** "Delaware's petition provides insufficient evidence of a requisite air quality problem with respect to the 2008 ozone NAAQS within the state."[264] "The EPA has no obligation to prepare an analysis to supplement a petition that fails, on its face, to include an initial technical demonstration. Such a petition, or a petition that fails to identify the specific finding requested, can be denied as insufficient." [265]
Interstate pollution	**CSAPR close-out**	**2018:** "EPA reasonably and properly concluded" that it would evaluate downwind conditions based on projected air quality in 2023, rather than a sooner date.[266]	**2018:** "EPA is finalizing a determination that 2023 is an appropriate future analytic year to evaluate remaining good neighbor obligations."[267]

[259] UARG Aggregation Rule comments, Docket Id. No. EPA-HQ-OAR-2003-0064-0157, at 2 (June 16, 2010).
[260] 83 Fed. Reg. 57324, 57324 (Nov. 15, 2018).
[261] UARG 126 comments, Docket Id. No. EPA-HQ-OAR-2018-0295-0077, at 3 (July 23, 2018).
[262] *Id.* at 11.
[263] *Id.* at 7.
[264] 83 Fed. Reg. 50444, 50456 (Oct. 5, 2018).
[265] 83 Fed. Reg. 50444, 50452 (Oct. 5, 2018).
[266] *See* UARG CSAPR Close-Out comments, Docket Id. No. EPA-HQ-OAR-2018-0225-0319, at 8 (Aug. 31, 2018).
[267] 83 Fed. Reg. 65878 (Dec. 21, 2018).

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Topic	Sub-topic	UARG's position	Trump EPA's position
Visibility	**Changes to weaken the Regional Haze Rule**	**Mar. 2017:** "UARG requests that EPA reconsider provisions of the [Regional Haze] Rule," including "Revisions to the 'reasonably attributable visibility impairment'. . . ."[268] **May 2017:** "EPA should reconsider and modify . . . provisions concerning the 'uniform rate of progress' and provisions addressing states' consultation processes . . . with federal land management agencies."[269] **June 2017:** UARG sought additional money from its members to pay Hunton for "[p]articipation as necessary . . . proceedings regarding implementation of the regional haze rules," and "[m]onitoring and reporting on EPA activities and guidance concerning regional haze requirements . . . ."[270]	**Jan. 2018**: "We intend to commence a notice-and-comment rulemaking in which we will address portions of the [Regional Haze] rule, including but not limited to the Reasonably Attributable Visibility Impairment provisions, the provisions regarding Federal Land Manager consultation and any other elements of the rule we may identify for additional consideration," which "will provide UARG and the public an opportunity to comment on the issues . . . ."[271] **Dec. 2018:** "This guidance document includes EPA's final recommendations on . . . methods for accounting for total international impacts to adjust the uniform rate of progress . . ."[272]
NAAQS	**Manipulating data from days with bad air quality, even *without* an "exceptional event" like wildfires or volcanoes**[273]	**2016:** "UARG recommends that EPA consider making the [Exceptional Events] Rule applicable to more circumstances than the Agency has proposed."[274]	**2019:** "[This] document identifies other determinations, actions, and analyses that are not covered by the scope of the Exceptional Events Rule, but for which the exclusion, selection, or adjustment of monitoring data may be appropriate and allowable under other sections of the Clean Air Act . . . and EPA rules or guidance."[275]

[268] UARG petition for reconsideration, Docket Id. No. EPA-HQ-OAR-2015-0531-0642, at 1 (Mar. 13, 2017).
[269] UARG comments, Docket Id. No. EPA-HQ-OA-2017-0190-40140, at 11–12 (May 12, 2017).
[270] Leaked UARG Policy Committee document at 20.
[271] Letter from Scott Pruitt, Admin'r, to Hunton counsel for UARG, Jan. 17, 2018.
[272] Memorandum from Richard Wayland to Reg'l Air Division Dirs., *Technical Guidance on Tracking Visibility Progress for the Second Implementation Period of the Regional Haze Program*, at 1 (Dec. 20, 2018).
[273] *See EPA Expands Air Data Waivers For 'Exceptional' Events, Sparking Criticism*, INSIDEEPA, Apr. 11, 2019.
[274] UARG comments, Docket Id. No. EPA-HQ-OAR-2013-0572-0161, at 1 (Feb. 3, 2016).
[275] U.S. EPA, Additional Methods, Determinations, and Analyses to Modify Air Quality Data Beyond Exceptional Events, EPA-457/B-19-002, at 1 (Apr. 2019).

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APPENDIX 2: The Air Permitting Forum and its sub-coalition, the Auto Industry Forum

Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
Climate	**Hydro-fluorocarbons (HFCs); opposition to rules restricting refrigerant substitutes, and extension of compliance deadline**	***Filed with Auto Industry Forum*** Jan. 2017: "[E]xpanding the rule to include chemicals that have a high global warming potential, but no or limited impact on stratospheric ozone, is inconsistent with the intent of section 608 of the CAA."[276] "That Congress did not provide any explicit grant of authority for EPA to establish a regulatory program for substitutes indicates that no such authority exists . . . ."[277] Nov. 2018: "Like the Agency, the Forum believes the 2016 interpretation led to EPA exceeding its authority in extending . . . requirements to substitutes."[278] "The Forum recommends a twelve month extension [of the compliance date] . . . * * * EPA should issue a separate final rule that specifically extends the compliance date."[279]	Aug. 2017: "The EPA is planning to issue a proposed rule to revisit aspects of the 2016 rule's extension of . . . refrigerant management requirements to non-exempt substitutes. We are also aware of your concerns regarding the feasibility of meeting the January 1, 2018, compliance dates and will consider options for relief if we receive adequate information from you to substantiate the basis for such relief."[280] Oct. 2018: "Based on feedback from some in the regulated community, the Agency reviewed the 2016 Rule, focusing in particular on whether the Agency had statutory authority to extend the full set of . . . regulations to non-exempt substitute refrigerants, such as HFCs and HFOs. * * * [T]he Agency is now proposing to withdraw the recent extension of the appliance maintenance and leak repair provisions . . . ."[281] "EPA is proposing to take final action to extend the compliance date . . . . EPA anticipates the extension would be between six to twelve months . . . . If needed, EPA intends to take final action on the proposed extension of the compliance date separate from, and before, taking action on other proposals in this document."[282]

[276] APF HFC petition for reconsideration, Docket Id. No. EPA-HQ-OAR-2017-0629-0006, at 1 (Jan. 17, 2017).
[277] *Id.* at 4.
[278] APF HFC rollback comments, Docket Id. No. EPA-HQ-OAR-2017-0629-0295, at 4 (Oct. 1, 2018).
[279] *Id.* at 12.
[280] Letters from Scott Pruitt, EPA Admin'r, to Hunton counsel for the Air Permitting Forum, Aug. 10, 2017.
[281] 83 Fed. Reg. 49332, 49333 (Oct. 1, 2018).
[282] *Id.* at 49341.

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Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
NAAQS	Narrowing the meaning of "ambient air"	***Filed with Auto Industry Forum*** **2019:** "The Draft Revised Policy would appropriately recognize that modern measures, such as surveillance technology, should be on the same footing as fences or physical barriers in determining ambient air exclusions"[283]	**2018:** "[S]takeholders have argued that the application of the ambient air policy is overly restrictive and that . . . the restrictive language from the 1980 letter that solely focuses on the use of a 'fence or other physical barriers' to preclude public access should be updated to provide for consideration of additional types of measures that are effective in deterring or precluding access to the land by the general public . . . . "[284] "The EPA's [draft] revised ambient air policy replaces 'a fence or other physical barriers' with 'measures, which may include physical barriers, that are effective in deterring or precluding access to the land by the general public.'"[285]

[283] APF ambient air comments at 5 (Jan. 11, 2019), https://insideepa.com/sites/insideepa.com/files/documents/2019/feb/epa2019_0278b.pdf
[284] U.S. EPA, DRAFT REVISED POLICY ON EXCLUSIONS FROM "AMBIENT AIR" at 2 (Nov. 2018), https://www.epa.gov/sites/production/files/2018-11/documents/draft_ambient_air_guidance_110818.pdf
[285] *Id.* at 5.

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Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
NAAQS	**Co-benefits**	**May 2017:** "EPA's reliance on $PM_{2.5}$ co-benefits in issuing regulations has had a profound effect in not only justifying EPA regulations but in supporting the overall value of the government's regulatory enterprise. * * * [O]ver 99 percent of the projected benefits from [the Mercury and Air Toxics Standards (MATS) rule] are based on reductions in $PM_{2.5}$ exposures projected to occur in areas where the $PM_{2.5}$ levels are already below the $PM_{2.5}$ NAAQS. "The Forum recommends that EPA undertake a review of the use of co-benefits including co-benefits that derived from reductions in exposures that are well below the levels deemed safe by EPA [*i.e.*, the NAAQS]."[286]	**Oct. 2017:** Under one approach to estimating the health consequences of repealing the "Forgone $PM_{2.5}$ co-benefits fall to zero in areas whose model-predicted air quality is at or below the annual average $PM_{2.5}$ NAAQS of 12 [micrograms per cubic meter of air]."[287] **May 2019:** "A longstanding and important question is how much benefit is derived by further reducing ambient levels [of pollution] below the national standards. We are considering changes to how such benefits are calculated."[288] **May 2019 (Wehrum):** "How in the world can you get $30 or $40 billion of benefit to public health [from the MATS rule] when most of that is attributable to reductions in areas that already meet a health-based standard . . . . That doesn't make any sense."[289] **June 2019:** "EPA invites the public to nominate scientific experts to be considered as peer reviewers for the EPA-drafted report titled, 'Potential Approaches for Characterizing the Estimated Benefits of Reducing PM2.5 at Low Concentrations.'"[290]
NSR	**Reduce EPA oversight of state programs**	**May 2017:** "EPA . . . has repeatedly second-guessed the purpose, content, and timing of state permit decisions. * * * The Forum . . . recommends that EPA respect decisions made by its state partners as Congress originally intended and reduce, if not eliminate, federal second-guessing."[291]	**Oct. 2018:** Wheeler issues memorandum, "Principles and Best Practices for Oversight of Federal Environmental Programs."[292] Among other things, the memo calls for, "General Deference to States and Tribes Implementing Federally Delegated Programs."[293]

[286] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 29 (May 15, 2017)
[287] 82 Fed. Reg. at 48044 (Oct. 16, 2017).
[288] https://insideepa.com/daily-news/epa-said-cut-pm-benefits-final-ace-rule-reduce-premature-deaths
[289] Lisa Friedman, *E.P.A. Plans to Get Thousands of Pollution Deaths Off the Books by Changing Its Math*, N.Y. TIMES, May 20, 2019.
[290] https://insideepa.com/sites/insideepa.com/files/documents/2019/jun/epa2019_1027a.pdf
[291] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 7 (May 15, 2017)
[292] https://www.acwa-us.org/wp-content/uploads/2018/11/State-Oversight-Memo.pdf
[293] *Id.* at 3.

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Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
NSR	**Weaken or eliminate the independent EPA enforcement office**	**May 2017:** "Implement structural changes within the Agency for how enforcement is initiated and managed . . . . [T]he essence of a successful reorganization will be that those involved in enforcement are more connected to the standards they enforce, and those that set the standards are more connected to the enforcement of the standards they established."[294]	InsideEPA: Trump EPA Weighs Shuttering Enforcement Office By Prospects Unclear[295] *"A source familiar with the plan says Trump EPA officials intend to 'disassemble the enforcement office. They are going to take it, break it up and move it back into the program offices.'"*
NSR	**Demand-growth exclusion; DTE "second-guessing"**	**May 2017:** "The Forum recommends that EPA clarify its position on the Demand Growth Exclusion/causation requirement . . . ."[296] "While historically EPA has recognized that a source must exercise judgment to exclude increases for which the project is not the 'predominant cause,' more recent EPA actions reflect the view that all emission increases are presumed to be caused by the change."[297]	**Dec. 2017:** "We believe this memorandum is necessary to provide greater clarity for sources and states implementing the NSR regulations."[298] "Because increased emissions may be caused by multiple factors, the EPA has recognized that the source must exercise judgment to exclude increases for which the project is not the 'predominant cause.'"[299]

[294] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 9 (May 15, 2017)
[295] https://insideepa.com/daily-news/trump-epa-weighs-shuttering-enforcement-office-prospects-unclear
[296] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 13 (May 15, 2017).
[297] *Id.* at 12.
[298] Memorandum from EPA Admin'r Scott Pruitt to Reg'l Administrators, "New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected Actual Applicability Test in Determining Major Modification Applicability," at 2 (Dec. 7, 2017), *available at* https://www.epa.gov/sites/production/files/2017-12/documents/nsr_policy_memo.12.7.17.pdf.
[299] Memorandum from EPA Admin'r Scott Pruitt to Reg'l Administrators, "New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected Actual Applicability Test in Determining Major Modification Applicability," at 7 (Dec. 7, 2017), *available at* https://www.epa.gov/sites/production/files/2017-12/documents/nsr_policy_memo.12.7.17.pdf.

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Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
NSR	**Expansion of "netting" to allow old sources to avoid CAA controls when they upgrade equipment**	**May 2017:** "EPA should clearly state that emission decreases are allowed in determining project emissions changes without triggering full netting of all contemporaneous projects."[300]	**Mar. 2018:** "Based on reconsideration of some previous conclusions and an examination of the regulations as a whole, the EPA now interprets [certain NSR rules] as providing that any emissions *decreases* that may result from a given proposed project are to be considered when calculating at Step 1 whether the proposed project will result in a significant emissions increase."[301] **Mar. 2019 (InsideEPA):** "EPA has sent for [OMB] review its proposal to revise Clean Air Act new source review (NSR) permit 'project emissions accounting,' or 'netting,' one of several piecemeal NSR reforms that critics say will make it easier for companies to avoid strict air permits."[302]
NSR	**Aggregation; reinstatement of rule finalized in last week of George W. Bush Administration but never made effective by the Obama Administration**	**May 2017:** "Aggregating projects that independent, for the purposes of determining NSR applicability, increases the likelihood of triggering the cumbersome NSR process beyond what was originally intended. * * * EPA guidance has expanded the 'aggregation' criteria well beyond what is needed . . . . Had it not been put on hold, the 2009 final rule would have brought needed clarity and simplified administration of the program. EPA should remove the stay of the final [2009] rule . . . ."	**Nov. 2018:** "The Environmental Protection Agency (EPA) is concluding the reconsideration of an earlier action that the EPA published on January 15, 2009, titled 'Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation and Project Netting.' The 2009 action . . .clarified implementation of the [NSR] permitting program under the [CAA] with respect to treating related physical or operational changes as a single 'modification' for the purpose of determining NSR applicability at a stationary source. . . . [T]he EPA has now decided to not revoke the 2009 NSR Aggregation Action."
NSR	**Debottlenecking**	**May 2017:** EPA should "issue a rule to clearly state that only emission increases related to units actually being modified should be analyzed," rather than considering "upstream and downstream units (referred to as debottlenecked units) [that] have previously obtained [NSR] permits . . . ."[303]	**Oct. 2017:** Pruitt report noted that commenters recommended "reviewing the debottlenecking rule and re-proposing it to address NSR requirements for modifying sources," and that he would be convening an "NSR Reform Task Force" to "address these important areas and achieve meaningful NSR Reform . . . ."[304]

[300] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 14 (May 15, 2017)
[301] Memorandum from Scott Pruitt, Admin'r, to Reg'l Admin'rs, *Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program* (Mar. 13, 2018), at 6, https://www.epa.gov/sites/production/files/2018-03/documents/pea_nsr_memo_03-13-2018.pdf
[302] https://insideepa.com/daily-feed/epa-sends-nsr-air-permit-%E2%80%98netting%E2%80%99-proposal-omb-review
[303] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 16 (May 15, 2017).
[304] https://www.epa.gov/sites/production/files/2017-10/documents/eo-13783-final-report-10-25-2017.pdf

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Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
NSR	**Expansion of "routine maintenance" exception**	**May 2017:** "EPA continues to inappropriately interpret [the routine maintenance, repair, and replacement (RMRR)] exclusion narrowly. * * * EPA should clarify that replacements and repairs that are routine in the industry, even if they may occur only once or twice during the life of a plant . . . are considered 'routine' within the meaning of the RMRR exclusion."[305]	**Apr. 2018:** "EPA believes there is uncertainty regarding the interpretation of the Routine Maintenance, Repair and Replacement (RMRR) provisions in the New Source Review Program. * * * EPA is evaluating the need to clarify the interpretation and appropriate application of the RMRR provision . . . ."[306]
NSR	**Significant Emissions Rate (SER) for greenhouse gases**	**May 2017:** "In October 2016, EPA proposed a rule to establish a significant emission rate [SER] for GHGs of 75,000 tons per year (tpy) of carbon dioxide equivalent . . . . The Forum submitted comments on the proposed rule recommending that EPA finalize a SER value much higher than 75,000 tpy . . . ."[307]	The Obama Administration proposed a rule establishing an SER of 75,000 tons per year of CO2-equivalent emissions.[308] As of April 2019, the Trump Administration has not taken action on that proposal.[309]
NSR	**Control technology determination process; "presumptive BACT"**	**May 2017:** "[T]he Forum recommends that EPA undertake administrative changes to the NSR program to reduce uncertainty, by adopting approaches like 'presumptive BACT' and giving states the flexibility to make expeditious permitting decisions without second-guessing by EPA."[310] **Dec. 2017:** Reporting indicates that "industry officials are stepping up their push" for "presumptive BACT guidance."[311]	Unknown

[305] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 18 (May 15, 2017).
[306] Presentation by Anna Marie Wood, Dir. Air Quality Policy Div., *NAAQS and Other Implementation Updates* (Apr. 5, 2018), slide 33, https://insideepa.com/sites/insideepa.com/files/documents/2018/apr/epa2018_0631.pdf.
[307] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 18 (May 15, 2017).
[308] 81 Fed. Reg. 68110, 68113 (Oct. 3, 2016).
[309] https://www.epa.gov/nsr/prevention-significant-deterioration-and-title-v-permitting-regulations-greenhouse-gases-ghg-and (last visited Apr. 26, 2019).
[310] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 20 (May 15, 2017)
[311] https://insideepa.com/daily-news/industry-seeks-presumptive-bact-guide-bid-extend-epas-nsr-relief

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Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
Title V	**Limit review of preconstruction permits**	**May 2017:** "ENGO [environmental organizations] have filed numerous petitions for objection to Title V permits based on their disagreement with the underlying construction permit . . . ."[312] The Forum's "highest-priority Title V item" is for EPA to "make clear that challenges to the construction of a new project or new plant must be resolved at the construction permit stage and a Title V permit does not offer protestants a second bite at the apple . . . ."[313] **Jan. 2019:** "EPA's [October 2017] interpretation of the proper scope of Title V review was eminently reasonable, if not compelled by statute and regulation."[314]	**Oct. 2017:** "[P]reconstruction permit terms and conditions should be incorporated [in Title V permits] without further review . . . ."[315] "[T]itle V permitting is not intended to second-guess the results of state preconstruction permit programs . . . ."[316] "The [Sierra Club] is now, in essence, asking for a 'second bite at the apple' through EPA oversight in title V. The availability of notice, opportunity to comment, and ability to seek judicial review of the underlying preconstruction permit . . . weighs heavily against an interpretation of title V as being an appropriate avenue to reevaluate these previous permitting authority decisions . . . ."[317]
Regional consistency rule	**N/A**	**Nov. 2015:** "The Forum questions the need for this rulemaking and believes that fairness and uniformity are best served by the continued application of existing rules. * * * The proposed rule is inconsistent with . . . the CAA and is not legally plausible on its face." [318] **May 2017:** "The Forum is currently litigating EPA's recently issued rule allowing for inconsistent policy and practice . . . . As stated in our [November 2015] comments on this final rule, inconsistency on fundamental issues like this violates the CAA."[319]	**Nov. 2017:** EPA is defending the Obama Admin's rule in court,[320] against a brief filed by Wehrum (on behalf of American Petroleum Institute) with two other Hunton lawyers (on behalf of the Air Permitting Forum).

[312] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 33 (May 15, 2017)
[313] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 32 (May 15, 2017)
[314] APF amicus brief supporting EPA, *Sierra Club v. EPA*, No. 18-1038, at 4 (D.C. Cir. Jan. 16, 2019).
[315] In the Matter of PacificCorp Energy Hunter Power Plant, Order on Petition No. VIII-2016-4 (Oct. 16, 2017), at 13, https://www.epa.gov/sites/production/files/2017-10/documents/pacificorp_hunter_order_denying_title_v_petition.pdf
[316] *Id.* at 14.
[317] *Id.* at 17.
[318] APF regional consistency comments, Docket Id. No. EPA-HQ-OAR-2014-0616-0016, at 1–2 (Nov. 3, 2015).
[319] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 34 (May 15, 2017).
[320] Proof Response Brief for EPA, *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, No. 16-1344 (D.C. Cir. Nov. 20, 2017).

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APPENDIX 3: The NAAQS Implementation Coalition

Topic	Sub-topic	"NAAQS Implementation Coalition" position	Trump EPA's position
NAAQS	**Narrowing the meaning of "ambient air"**[321]	**May 2017:** "Long-standing EPA policy . . . unrealistically requires evaluation of ambient air impacts at locations where individuals would not reasonably be allowed access, much less be exposed to emissions (*e.g.*, on a waterway, roadway, railway, or within a posted/patrolled property boundary) for the duration or averaging time . . . and frequency . . . of the current probabilistic NAAQS. * * * Modeling should not be required if human exposure at a site is unrealistic for the period addressed by a NAAQS."[322] **2019:** "[W]e support EPA's review of its ambient air policy."[323]	**May 2018:** "We are evaluating several key terms associated with the definition [of 'ambient air'] including 'general public,' 'access,' and 'building' to determine where additional flexibility may be appropriate."[324] **Nov. 2018:** "[S]takeholders have argued that the application of the ambient air policy is overly restrictive and that . . . the restrictive language from the 1980 letter that solely focuses on the use of a 'fence or other physical barriers' to preclude public access should be updated to provide for consideration of additional types of measures that are effective in deterring or precluding access to the land by the general public . . . ."[325] "The EPA's [draft] revised ambient air policy replaces 'a fence or other physical barriers' with 'measures, which may include physical barriers, that are effective in deterring or precluding access to the land by the general public.'"[326]

[321] *See, e.g.*, Sean Reilly, *Wehrum's old clients back 'ambient air' plan — documents*, GREENWIRE, Mar. 7, 2019, https://www.eenews.net/stories/1060123437
[322] Coalition comments, EPA-HQ-OA-2017-0190-36049, at A-4 to A-5 (May 15, 2017).
[323] NIC ambient air comments at 5 (Jan. 10, 2019), *available at* https://www.eenews.net/assets/2019/03/06/document_pm_01.pdf.
[324] Presentation by Anna Marie Wood, *NAAQS and Other Implementation Updates*, at slide 30 (Apr. 5, 2018).
[325] U.S. EPA, DRAFT REVISED POLICY ON EXCLUSIONS FROM "AMBIENT AIR" at 2 (Nov. 2018).
[326] U.S. EPA, DRAFT REVISED POLICY ON EXCLUSIONS FROM "AMBIENT AIR" at 5 (Nov. 2018).

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Topic	Sub-topic	"NAAQS Implementation Coalition" position	Trump EPA's position
NAAQS	**International emissions under CAA section 179B ("International border areas")**	**Feb. 2017:** "[EPA] requests comment on whether it is appropriate to limit CAA § 179B demonstrations to nonattainment areas adjoining international borders. We believe it is not."[327] **May 2017:** "EPA should not constrain 179B to border regions."[328]	**Presidential Memorandum, Apr. 2018:** "[W]ith respect to section 179B demonstrations or petitions, the Administrator shall ensure that EPA does not limit its consideration to emissions emanating from Mexico or Canada, but rather considers, where appropriate, emissions that may emanate from any location outside the United States . . . ."[329] **Dec. 2018:** "[A] demonstration prepared under CAA section 179B could consider emissions emanating from North America or intercontinental sources and is not restricted to areas adjoining international border areas . . . ."[330]
NAAQS	**CASAC composition**	**May 2017:** "CASAC has in recent years been imbalanced, being composed of members with generally similar backgrounds in terms of geography, background, and research interests. * * * There should be a better balance of representation on CASAC between academia, environmental and non-governmental organizations, states, and industry. * * * Consideration should be given to rotating terms . . . ."[331]	**Oct. 2017:** "[Federal Advisory Committee] membership should be balanced with persons from different parts of the country to create geographic diversity. * * * [M]embership should be rotated regularly."[332]
NASAC	**CASAC, removing academic researchers**	**May 2017:** "EPA should review and revise CASAC's 'conflict of interest' standards, particularly those relating to receiving EPA funding, in order to promote increased transparency in CASAC's review process."[333]	**Oct. 2017:** "[I]n addition to EPA's existing policies and legal requirements preventing conflicts of interest . . . it shall be the policy of the Agency that no member of an EPA federal advisory committee currently receive EPA grants . . . or in a position that otherwise would reap substantial direct benefit from an EPA grant."[334]

[327] Comments of NAAQS Implementation Coal., Docket Id. No. EPA-HQ-OAR-2016-0202, at 9 (Feb. 12, 2017).
[328] Coalition comments, EPA-HQ-OA-2017-0190-36049, at A-7 (May 15, 2017).
[329] Presidential Memorandum for the Administrator of the Environmental Protection Agency (Apr. 12, 2018).
[330] 83 Fed. Reg. at 63010 (Dec. 6, 2018).
[331] Coalition comments, EPA-HQ-OA-2017-0190-36049, at A-13 (May 15, 2017).
[332] Memorandum from Scott Pruitt, *Strengthening and Improving Membership on EPA Federal Advisory Committees*, at 2 (Oct. 31, 2017).
[333] Coalition comments, EPA-HQ-OA-2017-0190-36049, at A-13 to A-14 (May 15, 2017).
[334] Memorandum from Scott Pruitt, *Strengthening and Improving Membership on EPA Federal Advisory Committees*, at 3 (Oct. 31, 2017).

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Topic	Sub-topic	"NAAQS Implementation Coalition" position	Trump EPA's position
NAAQS	**CASAC; encouragement of fringe views**	**May 2017:** "[I]n recent years, the process has been to drive CASAC members towards consensus on a single response. This has served to hide the full range of interpretation that can be supported by the scientific evidence. * * * EPA should encourage CASAC letters that reflect the full range of viewpoints by CASAC members, including reporting minority views and the reasoning behind them."[335]	**May 2018:** "CASAC and EPA should, consistent with CASAC's charter, seek to find consensus, but should allow for individual CASAC members to share their own individual opinions when they fall outside committee consensus."[336]
NAAQS	**Primary (health-based) NO2 NAAQS, and Trump EPA's decision not to strengthen it**	**Sept. 2017:** "We support EPA's decision in the NO_2 Proposal to retain the current NO_2 NAAQS."[337]	"EPA is retaining the current primary NO_2 standards, without revision."[338]

[335] Coalition comments, EPA-HQ-OA-2017-0190-36049, at A-14 (May 15, 2017).
[336] Memorandum from Scott Pruitt to Asst. Admin'rs, *Back-to-Basics Process for Reviewing National Ambient Air Quality Standards*, at 10 (May 9, 2018).
[337] NIC comment, Docket Id. No. EPA-HQ-OAR-2013-0146-0145, at 1 (Sept. 25, 2017).
[338] 83 Fed. Reg. 17226, 17227 (Apr. 18, 2018)

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APPENDIX 4: The CCS Alliance

Topic	Sub-topic	"CCS Alliance" position	Trump EPA's position
Climate	**GHG NSPS for new power plants; decision to base the "best system of emission reduction" (BSER) for power plants in part on what can be achieved using partial carbon capture and storage (CCS) technology**	**May 2011:** "[C]arbon capture and sequestration (CCS) is not yet adequately demonstrated."[339] **June 2012:** "EPA's proposed GHG emission limits [based on CCS] will deter CCS rather than promote it."[340] **May 2014:** "There is not nearly enough experience with carbon capture to reasonably determine that it is adequately demonstrated. * * * EPA should withdraw the proposed rule. * * * Only in depleted oil and gas formations is there the variety of experience to show that large amounts of CO2 can be stored safely over the long term. Those formations do not exist in sufficient geographic dispersion throughout the United States to be considered broadly available."[341] **Nov. 2014:** "The Boundary Dam facility . . . has been operating only since October of this year. Thus, it offers very little evidence of reliability or efficiency on which to legally base a new rule."[342]	**2017:** "EPA . . . is reviewing the [2015 Rule] and, if appropriate, will as soon as practicable and consistent with law, initiate reconsideration proceedings to suspend, revise or rescind the rule."[343] **2018:** "EPA is proposing to revise its [2015] analysis and determine that CCS is not adequately demonstrated . . . ."[344] "[T]he EPA proposes to revise to the BSER . . . . The primary reason for this proposed revision is the high costs and limited geographic availability of CCS."[345] "While the carbon capture technology at the Boundary Dam is currently operating, that project experienced multiple issues with [the CCS technology] during its first year of operation . . . . EPA solicits comment on whether Boundary Dam's first-year operational problems cast doubt on the technical feasibility of fully integrated CCS."[346] **Wehrum:** "Today's actions reflect our approach of defining new, clean coal standards by data and the latest technological information, not wishful thinking."[347]

[339] Alliance comments, Docket Id. No. EPA-HQ-OAR-2011-0090-3120, at 1 (Mar. 18, 2011).
[340] Alliance comments, Docket Id. No. EPA-HQ-OAR-2011-0660-10070, at 1 (June 25, 2012).
[341] Alliance comments, Docket Id. No. EPA-HQ-OAR-2013-0495-9683, at 1–2, 6 (May 9, 2014).
[342] Alliance comments, Docket Id. No. EPA-HQ-OAR-2013-0602-23551, at 3 (Nov. 26, 2014).
[343] 82 Fed. Reg. 16330 (Apr. 4, 2017).
[344] 83 Fed. Reg. at 65441 (Dec. 20, 2018).
[345] *Id.* at 65426 (Dec. 20, 2018).
[346] *Id.* at 65444 (Dec. 20, 2018).
[347] https://www.epa.gov/newsreleases/epa-proposes-111b-revisions-advance-clean-energy-technology

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Message

From: Ware, Rochelle [Ware.Rochelle@epa.gov]
on behalf of OIG WEBCOMMENTS [OIG_WEBCOMMENTS@epa.gov]
Sent: 8/12/2019 1:12:51 PM
To: OIG Hotline [OIG_Hotline@epa.gov]; Collins, Kevin W. [Collins.Kevin@epa.gov]
CC: Sheehan, Charles [Sheehan.Charles@epa.gov]; Kaplan, Jennifer [Kaplan.Jennifer@epa.gov]; Shields, Edward [Shields.Ed@epa.gov]
Subject: FW: Environmental Defense Fund Letter re Wehrum-Alliance Meetings
Attachments: EDF Letter re Wehrum-Alliance Meetings (Aug. 7 2019).pdf; Attachment A-epw-report-carper-whitehouse-redefining-air-wehrum-7-2019.pdf; Attachment B-William-Wehrum-Complaint-29-MAY-2019.pdf

Good morning,

The following letter was received in the OIG Webcomments mailbox. We are forwarding to you for appropriate action.

v/r,

Rochelle

From: Laura Shields <lshields@edf.org>
Sent: Wednesday, August 07, 2019 4:25 PM
To: OIG WEBCOMMENTS <OIG_WEBCOMMENTS@epa.gov>
Cc: Alice Henderson <ahenderson@edf.org>
Subject: Environmental Defense Fund Letter re Wehrum-Alliance Meetings

Dear Acting Inspector General Sheehan,

Attached is a letter and supporting materials submitted on behalf of Environmental Defense Fund addressing undisclosed meetings between senior Environmental Protection Agency officials and industry representatives related to its proposed rule, "The Safer Affordable Fuel-Efficient ('SAFE') Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks," 83 Fed. Reg. 42,986 (Aug. 24, 2018), which is a joint rulemaking with the National Highway Traffic Safety Administration. These meetings were brought to our attention after the close of the comment period via a recently released congressional report and are of central relevance to this rulemaking.

Sincerely,

Laura Shields
Attorney, U.S. Clean Air

Environmental Defense Fund
2060 Broadway, Suite 300
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T 303 447 7224
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July 2019

Redefining Air:

Industry's Pipeline to Power at EPA's Office of Air and Radiation

Thomas R. Carper, Ranking Member of the U.S. Senate Environment and Public Works Committee

Sheldon Whitehouse, Ranking Member of the U.S. Senate Clean Air and Nuclear Safety Subcommittee

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EXECUTIVE SUMMARY

This report describes the efforts, outcomes, and potential ethical concerns associated with several industry organizations represented by Hunton Andrews Kurth LLP (formerly Hunton & Williams, hereafter "Hunton"). Hunton is the law firm that Bill Wehrum, the top air pollution regulator at the Environmental Protection Agency (EPA), and his deputy, David Harlow, worked at prior to their tenures at EPA. While at Hunton, Wehrum served as co-chairman of the firm's environmental practice and led the administrative law group.[1] As partners at the law firm, both Wehrum and Harlow advocated before EPA and the courts on behalf of some of the biggest polluters.

These Hunton-represented industry groups are similar to the recently dissolved Utility Air Regulatory Group (UARG), a "secretive utility industry coalition"[2] that has long-represented the interests of coal-fired power plants before air pollution regulators, and in the courts. Like UARG, these industry organizations superficially appear to be organizations with unique names, and officers such as "Executive Directors" and "Managers." However, these amorphous industry "groups," "coalitions," "forums," and "alliances" appear to have no independent existence apart from Hunton, and their officers are almost all Hunton lawyers. They appear to exist largely for the purpose of coordinating payments to Hunton for legal services, and to provide a well-funded, expert-led effort to influence EPA and the courts without revealing the identities of their members.

On June 26, 2019, EPA Administrator Andrew Wheeler announced that Wehrum would be leaving his position at EPA, thanking him for the "tremendous progress he has made" repealing climate regulations and "in so many other regulatory initiatives."[3]

This report demonstrates that Wehrum's "tremendous progress" was largely to the benefit of Hunton-represented industry groups, which have had remarkable success under his tenure achieving their policy objectives to roll back air pollution protections. And while Wehrum left the agency under the scrutiny of congressional oversight, after less than two years on the job, Harlow, his senior counsel, remains.

Staying behind as well are the Hunton-driven rollbacks that Wehrum and Harlow undertook, which will continue to have consequences for everyone who breathes air. These include major efforts to weaken or undermine landmark climate and air toxics regulations, such as the Clean Power Plan (CPP) and the Mercury and Air Toxics Standards (MATS) rule, at the expense of human health. For example, the Trump EPA proposed to repeal the Clean Power Plan despite the fact that, by the Trump EPA's own admission, doing so could prematurely kill 1,400 people per year.[4] Although the final rule stayed

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[1] Q&A With Hunton & Williams' Bill Wehrum, LAW360, May 6, 2013, https://www.huntonak.com/images/content/2/4/v2/2407/Law360_Bill_Wehrum_QA.pdf

[2] Zack Colman, *Industry group tied to EPA air chief dissolves*, POLITICO, May 10, 2019.

[3] Statement of Administrator Andrew Wheeler regarding the departure of Assistant Administrator Bill Wehrum, June 26, 2019 (press release).

[4] Lisa Friedman, *Cost of New E.P.A. Coal Rules: Up to 1,400 More Deaths a Year*, N.Y. TIMES, Aug. 21, 2018.

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largely the same in substance, the economic analyses were changed to no longer show those harms.[5] As another example, Wehrum withdrew the "Once In, Always In" policy for toxic air pollution, and on June 25, 2019 the Trump EPA issued a proposed rule to codify the shift, even while acknowledging that it would allow 3,912 facilities nationwide to substantially increase their toxic air pollution.[6] Independent analyses indicate that those sources could more than double their toxic air pollution under this new approach.[7]

But these higher-profile rollbacks are not the only Hunton-advocated policies being carried out by the Trump EPA. This investigation also identified numerous technical, often arcane, policy shifts sought by Hunton-represented industry groups that carry major air pollution implications. These policy shifts, and agency actions to implement them, illustrate the close relationship between Hunton and former Hunton employees who now direct this country's air pollution policy at EPA. Such shifts include the adoption of a novel legal interpretation of New Source Review regulations that was used to abandon EPA's legal posture in an enforcement action against a Hunton client, DTE Energy; a change to the meaning of "conflict of interest" that allowed EPA to purge academic researchers from several of its scientific advisory panels and replace them with industry-funded consultants; a redefinition of "ambient air" that would exclude more open air from being subject to the Clean Air Act; and even an argument that the Clean Air Act's looser requirements for "International border areas" should apply everywhere in the country, regardless of proximity to any international border.

This report also explores significant questions about the ongoing relationship between Wehrum, Harlow, and the member companies of the various Hunton-represented industry groups. Such questions include whether Wehrum and Harlow have been forthright about their past legal work on behalf of these entities, and whether they have adhered to the ethical requirements of public service. This investigation identifies circumstances in which Wehrum and Harlow may have involved themselves in litigation and other matters to benefit Hunton and former clients; failed to report the existence of former clients from which they should have been recused; and impermissibly met with former clients, including former clients that were not properly disclosed to agency ethics officials.

There has been good deal of reporting on the dissolution of UARG, which "has participated in every major EPA rulemaking affecting the electric generating industry" since the group was formed in 1977.[8] UARG repeatedly advocated in those rulemakings for shifts in public policy that would increase air pollution, exacerbate climate change, and limit public access to information about pollution in their communities.

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[5] https://www.epa.gov/sites/production/files/2019-06/documents/utilities_ria_final_cpp_repeal_and_ace_2019-06.pdf

[6] Proposed Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act at 95 (pre-publication version).

[7] *See* ENVTL. DEF. FUND, PRUITT'S NEW AIR TOXICS LOOPHOLE at 2 (Aug. 2018) (estimating that eligible facilities in the Houston-Galveston area could increase their toxic air pollution by 146% to 152% under the new approach).

[8] Defendant Duke Energy Corp.'s Reply, *United States et al. v. Duke Energy Corp.*, 2003 WL 25509066 (M.D.N.C. Feb. 13, 2003) (citing Declaration of Norman W. Fitchorn).

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For example, while at Hunton, one of Harlow's clients was DTE Energy, a UARG member. DTE sought Hunton's assistance in an EPA enforcement case alleging that one of the utility's coal-fired power plants had emitted pollution in violation of the Clean Air Act's New Source Review (NSR) program. In that case, Wehrum personally filed a brief as a lawyer for UARG in support of DTE's position.[9] Despite Wehrum's private practice advocacy, DTE Energy had not been successful in its efforts to resolve this NSR matter. The utility had already lost twice before the U.S. Court of Appeals for the 6th Circuit, and faces millions of dollars in penalties.

On December 7, 2017, shortly after Harlow and Wehrum left Hunton for EPA, the agency published a memorandum (known as the "DTE Memo"). The DTE Memo reversed the agency's position in Hunton's DTE case.[10] Furthermore, the release of the DTE Memo was timed so that DTE's Hunton lawyers could file it with the U.S. Supreme Court before the Court decided the very next day whether it would hear DTE's appeal.[11] These actions – along with other evidence suggesting that Wehrum and Harlow participated in the development of the DTE Memo, despite ethical rules barring their involvement in matters involving their particular clients (UARG and DTE Energy, respectively) – led Senator Sheldon Whitehouse (D-RI), along with Senate Environment and Public Works Committee Ranking Member Tom Carper (D-DE) and House Energy and Commerce Chairman Frank Pallone, Jr. (D-NJ) to ask the Acting Inspector General of the EPA on February 25, 2019 to undertake an investigation.[12] On May 10, 2019, following additional supplemental filings with the Acting Inspector General,[13] along with other disclosures[14] and congressional investigation,[15] UARG's "policy committee" announced that they would "disband" the organization.

UARG is not the only Hunton-represented industry group comprised of polluting interests with business before the EPA. On May 6, 2019, the offices of Senators Carper and Whitehouse discovered that language included by EPA in the DTE Memo was copied verbatim from a document that Hunton

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[9] Brief Amici Curiae of UARG et al. in Support of Defendants-Appellees, at *2, *United States v. DTE Energy Co. & Detroit Edison Co.*, 2012 WL 1656078 (May 8, 2012) (listing Wehrum as "Counsel for UARG").

[10] Memorandum from EPA Admin'r Scott Pruitt to Reg'l Administrators, *New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected Actual Applicability Test in Determining Major Modification Applicability*, at 8 (Dec. 7, 2017).

[11] Letter from Senator Whitehouse, Senator Carper, Representative Pallone to Charles J. Sheehan, Acting Inspector General, U.S. EPA, at 7–8 & Exhs. M–N (emails from EPA political appointee Mandy Gunasekara stating that the memorandum "needs to go out before" the Supreme Court considers whether to hear the DTE enforcement case), https://www.whitehouse.senate.gov/download/doj-ig-memo-letter.

[12] https://www.whitehouse.senate.gov/news/release/democrats-call-for-investigation-of-top-epa-officials-role-in-reversing-enforcement-position. An ethics watchdog group, Citizens for Responsibility and Ethics in Washington (CREW), later filed a supplemental complaint with the Inspector General. https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2019/05/28205410/William-Wehrum-Complaint-29-MAY-2019.pdf.

[13] https://www.whitehouse.senate.gov/download/wehrum-oig-supplemental-letter

[14] https://www.epw.senate.gov/public/index.cfm/press-releases-democratic?ID=E598EA19-BB86-4737-ABE8-BE97F356D11E

[15] https://energycommerce.house.gov/newsroom/press-releases/ec-leaders-launch-investigation-of-secretive-front-group-uarg-and-its-ties

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had submitted to EPA on behalf of the Air Permitting Forum,[16] a similar Hunton-represented industry group with little existence independent from the law firm.

The full list of Hunton organizations examined in this report includes:

- The **Utility Air Regulatory Group**, itself a former client of both Wehrum and Harlow, which until its recent demise was comprised of multiple trade organizations and coal-fired power plant operators, including at least three more former Wehrum clients (Dominion, Duke Energy, and Salt River Project) and at least two more former Harlow clients (DTE Energy and LG&E & KU Energy);

- The **Air Permitting Forum**, which nominally advocates on Clean Air Act permitting matters, and whose members include one former client shared by Wehrum and Harlow (Chevron), as well as at least three other former Wehrum clients (ExxonMobil, Georgia-Pacific, and General Electric), and six additional companies that are not former Wehrum or Harlow clients (Fiat Chrysler, Ford, General Motors, Toyota, Shell, and International Paper);

- The **Auto Industry Forum**, a "sub-coalition" of the Air Permitting Forum that represents several automakers on issues related to stationary source emissions, and whose members include at least Fiat Chrysler, Ford, General Motors, and Toyota;

- The **NAAQS Implementation Coalition**, which advocates for policy changes that would increase opportunities for political interference with, or otherwise weaken, air quality standards, and whose members include UARG (and thus UARG's members) and at least three other former Wehrum clients (the American Forest & Paper Association, the American Petroleum Institute, and the Brick Industry Association); and

- The **CCS Alliance**, which advocates on issues related to carbon capture and storage matters, and whose membership includes at least two former UARG members (the National Mining Association (NMA) and the National Rural Electric Cooperative Association (NRECA)), as well as Berkshire Hathaway Energy, NRG Energy, PacifiCorp, and Zurich North America.

This report provides a comprehensive examination of Hunton court filings, public comments, and regulatory petitions made on behalf of these five organizations in order to determine the extent to which they have influenced policy within the Trump EPA air office. Although the examination covers submissions to EPA and the courts extending back decades, this report focuses primarily on submissions made during the Trump Administration, including submissions made in response to EPA's April 2017 request for the identification of "regulations that may be appropriate for repeal, replacement, or modification."[17]

[16] https://www.epw.senate.gov/public/index.cfm/press-releases-democratic?ID=E598EA19-BB86-4737-ABE8-BE97F356D11E

[17] 82 Fed. Reg. 17793 (Apr. 13, 2017).

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The analysis shows that since the beginning of the Trump Administration, these organizations have been highly successful in obtaining policy outcomes that benefit their corporate clients at the expense of everyone who breathes air (Finding #1). They also raise more questions about whether Wehrum and Harlow have been forthright in their ethical obligations to put the public trust above the interests of their friends and former clients, and to avoid even the appearance of impropriety (Finding #2).

In sum, this investigation indicates that private companies no longer need to pay for Hunton lawyers to effectuate their goals, because those very same lawyers are now representing their interests at the highest levels within EPA, at the taxpayers' expense. Summaries of the key findings are below.

SUMMARY OF FINDING #1: With Wehrum and Harlow at EPA, Hunton-represented industry groups are getting the policy results they seek.

Hunton-represented industry groups have sought sweeping regulatory changes that would increase air pollution, exacerbate climate change, and reduce the amount of pollution information available to the public. Among the dozens of changes, Hunton and its organizations have asked EPA to weaken greenhouse gas requirements for new and existing coal-fired power plants; to allow the largest polluters to release more toxic air pollution; and to allow upwind power plants to pollute more downwind communities. These Hunton-represented industry groups have also made highly technical and novel arguments that EPA has adopted or is in the process of adopting, such as how to account for certain types of benefits when conducting economic analyses for mercury regulations, how to sideline independent scientists on scientific advisory boards, or even how to redefine what counts as "ambient air" protected by the Clean Air Act in the first place. Specifically:

- Although **UARG** has taken dozens of industry-friendly positions on the Clean Air Act, early in the Trump Administration it emphasized 17 rules, sets of rules, or programs it recommended be withdrawn, revisited, or severely weakened. Of those, the Trump EPA has already taken actions responsive to eight of UARG's most significant requests to weaken air pollution rules, including the reversal adopted in the DTE Memo.[18]

- The **Air Permitting Forum** (an umbrella group that includes the **Auto Industry Forum**) prioritized 19 changes to permitting requirements, emission standards, or the National Ambient Air Quality Standards (NAAQS). Of those priorities, the Trump EPA has already formally adopted eight rollbacks – including using verbatim text submitted by the Forum in the DTE Memo – and has stated that it is actively considering another two of the Forum's priorities.[19]

[18] The only UARG priority that the Trump EPA appears to have proposed rejecting is to remove the subcategory "stationary combustion turbines" from the Clean Air Act's hazardous air pollutant (HAP) program. That is because the D.C. Circuit ruled 12 years ago that EPA has no authority to remove a subcategory from HAP regulation. However, the Trump EPA has proposed that no additional health-based standards should be required for the subcategory.

[19] The only Forum priority that the Trump EPA appears to have rejected outright was withdrawal of an EPA rule regarding how the agency would treat disagreements among federal courts regarding the Clean Air Act – a rule

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- The **NAAQS Implementation Coalition** requested dozens of changes to how the NAAQS are developed and implemented. The Coalition's most notable successes have been to undermine the science-based NAAQS development process, which by statute is led by the independent Clean Air Scientific Advisory Committee (CASAC). The Trump EPA has adopted the Coalition's recommendations to change CASAC's membership – including through the appointment and elevation of Committee members who have scientific views that are well outside the mainstream – and changed the definition of "conflict of interest" to allow for the removal of independent members from academia, while adding industry-funded members. The full extent of Coalition's successes may become more evident as the Trump EPA reviews the NAAQS for ground-level ozone (smog) and particulate matter (soot), to be proposed in March 2020.

- Although the **CCS Alliance** nominally promotes carbon capture and storage (CCS) technology, its submissions to EPA's air office have largely been to advocate that EPA should *not* use the existence of partial CCS technology as the basis for any air pollution standards. The Trump EPA has proposed to no longer use partial CCS technology to set greenhouse gas emission limitations for new power plants, echoing the Alliance's positions.

SUMMARY OF FINDING #2: Former Hunton lawyers Wehrum and Harlow appear to have violated ethical requirements in their rush to serve former clients tied to Hunton-represented industry groups.

Wehrum and Harlow's continued engagement with their former clients and Hunton-represented industry groups (and the members thereof) raises numerous ethical questions for EPA's Designated Ethics Official, EPA's Inspector General, and the U.S. Office of Government Ethics. Specifically, the "Trump Ethics Pledge" (Executive Order 13770) prohibits Wehrum and Harlow, "for a period of 2 years from the date of [their] appointment[s]," from participating in any meeting, any communications, or "any particular matter involving specific parties that is directly and substantially related to [their] former employer [Hunton] or former clients, including regulations . . . ."[20] A limited exception to the Trump Ethics Pledge permits them to participate in "communications and meetings" with Hunton or their former clients, but only if the event is both (1) on a matter of general applicability, and (2) "open to all interested parties," a phrase interpreted to mean "*five or more* stakeholders" representing a diversity of viewpoints, "even if *one* of the stakeholders is a former employer or former client."[21]

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unanimously upheld by courts as lawful against a legal challenge brought by Wehrum himself in 2016 when he was in private practice.

[20] E.O. 13770 § 1, ¶ 6 ("Trump Ethics Pledge").

[21] Memorandum from Robert I. Cusick, Dir. of U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, DO-09-011, at 1–2 (Mar. 26, 2009) (explaining the meaning of the phrase "open to all interested parties") (emphasis added); Legal Advisory from David J. Apol, General Counsel of U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, LA-17-02, at 1 (Feb. 6, 2017) (emphasis added) ("With respect to [President Trump's] Executive

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As of July 2, 2019, neither Wehrum nor Harlow had received a waiver from the Trump Ethics Pledge.[22] In addition, the Office of Government Ethics' impartiality regulations and Wehrum's pre-confirmation ethics agreement make his recusal from such meetings mandatory, unless he had received prior written authorization from an agency ethics official.[23] As of September 29, 2018, Wehrum had never received prior authorization from an agency ethics official to participate in a matter otherwise prohibited by the Office of Government Ethics regulations.[24]

This report demonstrates that:

a. ***Wehrum and Harlow appear to have violated the terms of the Trump Ethics Pledge and Ethics in Government Act regulations by participating in the development of the DTE Memo.*** Although Wehrum and Harlow were both recused from working on "any particular matter" in which a recent former client is a party, or in which Hunton "represents a party," Wehrum and Harlow appear to have violated this ethical requirement by involving themselves in the development of the DTE Memo, in which EPA (1) analyzed litigation in which DTE, a former Harlow client, was represented by Hunton, and in which Wehrum entered an appearance on behalf of UARG; (2) reversed EPA policy on the eve of the Supreme Court's consideration of this litigation to adopt the position Hunton advocated on behalf of its clients that the agency should not "second-guess" polluters' own calculations of how much pollution they expect to emit; (3) directly copied language submitted to EPA by Hunton on behalf of the Air Permitting Forum into the DTE Memo; and (4) cited the Hunton-DTE litigation as the basis for that shift in policy. Although EPA previously stated that Wehrum was not involved in developing the DTE Memo,[25] Wehrum subsequently acknowledged this was false.[26]

b. ***In his recusal statement, Wehrum failed to disclose at least three former clients that he previously represented in court – the Alliance of Automobile Manufacturers; the Minnesota Trucking Association; and the Minnesota Automobile Dealers Association***[27] – in addition to two confidential clients he is contractually prohibited from

Order 13770, ethics officials and employees may continue to rely on OGE's prior guidance regarding [President Obama's] Executive Order 13490 to the extent that such guidance addresses language common to both orders").

[22] U.S. Office of Gov't Ethics, *USOGE | Agency Ethics Pledge Waivers (EO 13770)* (last visited July 2, 2019).

[23] *See* Letter from William L. Wehrum to Kevin S. Minoli, Designated Agency Ethics Official, U.S. EPA, at 1 (Aug. 28, 2017) (citing 5 C.F.R. § 2635.502(d)).

[24] Letter from Kevin S. Minoli, Designated EPA Ethics Official, to Sen. Sheldon Whitehouse, at 1 (Sept. 29, 2018) ("To date, Mr. Wehrum has not received any waivers or authorizations issued pursuant to Executive Order 13770, 18 U.S.C. § 207(b)(1), or 5 C.F.R. § 2635.502(d).").

[25] https://thehill.com/policy/energy-environment/364015-epa-works-to-ease-air-pollution-permitting-process

[26] Juliet Eilperin, *EPA regulator skirts the line between former clients and current job*, Wash. Post (Feb. 25, 2019).

[27] *See, e.g.*, Mem. of Law in Support of Mot. For Partial Summary Judgment, Doc. 47 at *27, *Minn. Trucking Ass'n et al. v. Stine et al.*, No. 15-cv-2045-JRT-KMM (D. Minn. Sept. 29, 2016) (listing Wehrum and five other lawyers, including two others from Hunton, as "Attorneys for Plaintiffs Minnesota Trucking Association, Minnesota

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disclosing. Wehrum's failure to disclose his recent former clients frustrates the "screening arrangement" in his recusal statement, which stated that his subordinates would "assist in screening EPA matters" involving the entities he listed to ensure his compliance with ethical rules. Furthermore, although the recusal statements for both Wehrum and Harlow disclosed "confidential" clients, only Harlow's statement acknowledges his personal obligation "not to participate in specific party matters for the duration of my ethics obligation," even for clients "who are not listed."[28]

c. ***Wehrum has had at least six meetings with one of his undisclosed former clients, the Alliance of Automobile Manufacturers, in apparent violation of Ethics in Government Act regulations and the Trump Ethics Pledge.***[29] None of these meetings appear to have been "open to all interested parties" as the Office of Government Ethics defines that term, and were thus impermissible even if Wehrum only spoke about generally applicable regulations affecting his former client's interests. All members of the Hunton-represented industry group the Auto Industry Forum are also members of the Alliance of Automobile Manufacturers.

d. ***Wehrum and possibly Harlow appear to have artificially – and perhaps improperly – limited their list of former clients from which they are recused.*** Although Wehrum and Harlow were nominally recused from certain meetings with "UARG," their recusal statements imposed no limits on discussions with *UARG members* (1) who paid hefty UARG "dues" that went almost exclusively to Hunton (and thus to Wehrum and Harlow as Hunton partners), or (2) with whom Wehrum and Harlow may have developed an attorney-client or other privileged relationship, even absent direct billing. Under D.C. attorney ethics rules it is "well established" that "neither a written agreement nor the payment of fees is necessary to create an attorney-client relationship."[30] Additionally, Hunton and UARG have successfully argued in court that Hunton lawyers and UARG members have attorney-client privileged conversations, adding further credence to the notion that Wehrum and Harlow should have listed more UARG members as former clients in their recusal statements.

e. ***Wehrum repeatedly met with clients he worked with in private practice – actions that appear to violate the intent of the Trump Ethics Pledge and Wehrum's own ethics agreement.*** A review of Wehrum's calendars shows that at least 10 different UARG members have been in attendance at nine separate meetings with Wehrum (American Electric Power; Dominion Energy; Duke Energy; Minnesota Power; Otter Tail Power; Southern Company;

Automobile Dealers Association, Alliance of Automobile Manufacturers, American Petroleum Institute, and American Fuel & Petrochemical Manufacturers").

[28] *Compare* Harlow recusal at 2 nn.1–2 ("For my former clients who are not listed, I understand that I am personally obliged not to participate in specific party matters for the duration of my ethics obligations."), *with* Wehrum recusal at 2 n.1 (simply acknowledging the existence of two "confidential clients").

[29] Wehrum has had at least six small meetings with his former client the Alliance for Automobile Manufacturers to discuss regulatory policy: 11/27/2017 (with one other entity); 12/27/2017 (alone with board); 2/21/2018 (with lawyers/lobbyists); 4/16/2018 (alone); 5/22/2018 (alone); 5/23/2018 (alone), and 7/16/2018 (with one other entity).

[30] *In re Lieber*, 442 A.2d 153, 156 (D.C. 1982).

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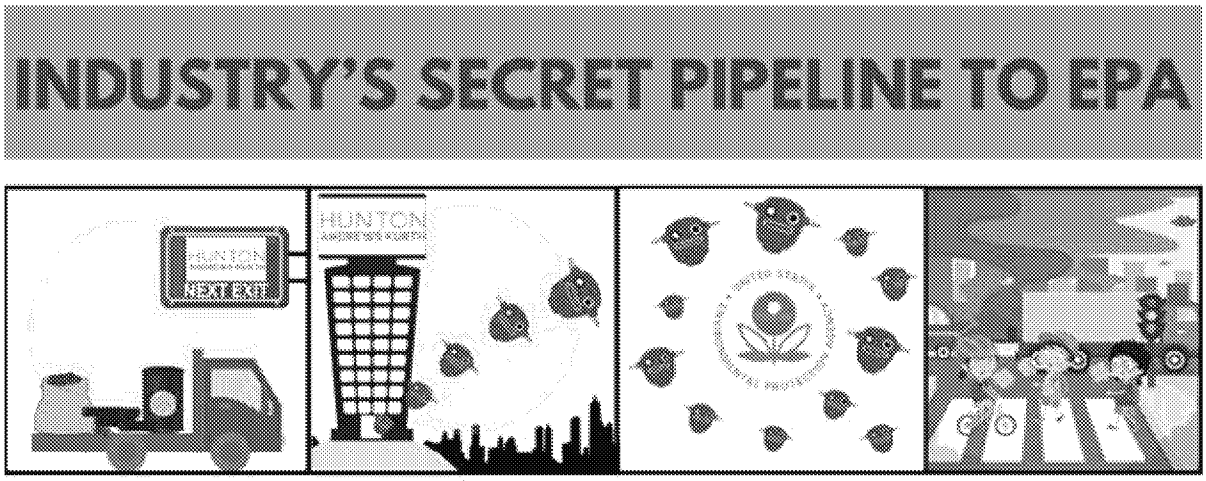
the American Coalition for Clean Coal Electricity; the Edison Electric Institute; the National Mining Association; and the National Rural Electric Cooperative Association). On December 7, 2017, the same day EPA issued the DTE Memo, Wehrum gave a closed-door briefing on Clean Air Act regulatory developments at his former employer Hunton. This presentation occurred during a two-day set of meetings at Hunton that appears to have been a pre-planned gathering of UARG's membership. Such a gathering raises the prospect that the event was really a meeting with a single entity, UARG, which Wehrum was prohibited from meeting with alone – not a meeting with five parties. In any event, the meeting was also not "open to all interested parties" as required by the Trump Ethics Pledge, because Hunton only invited its own clients to this closed-door meeting. Wehrum also held two private meetings with his former client General Electric (which is also a member of the Air Permitting Forum). Under the terms of his ethics agreement, Wehrum is supposed to be recused from "any meetings or communications relating to the performance of [his] official duties" with his former clients or employer – the only exception being for meetings with at least five parties present where the discussion is limited to matters of general applicability. The purpose of these meetings is unknown; one of these meetings was solely with General Electric, while the other was with five members of the Gas Turbine Association, which at the time of the meeting was chaired by a General Electric manager.



Auto, oil & gas, lumber, & coal industries hire law firm Hunton Andrews Kurth LLP to help them achieve their policy objectives to roll back air pollution protections.

Hunton Andrews Kurth LLP creates groups like Utility Air Regulatory Group, Air Permitting Forum, Auto Industry Forum, NAAQS Implementation Coalition & CCS Alliance. The companies who pay for these groups are not disclosed.

These groups lobby EPA. The public doesn't know which companies are behind the effort.

EPA rolls back air regulations. Polluters profit. Public health suffers.

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SECTION #1: With Wehrum and Harlow at EPA, Hunton-represented industry groups are getting the policy results they seeking.

Introduction

This report describes a comprehensive examination of Hunton court filings, public comments, and regulatory petitions made on behalf of amorphous "coalitions," "forums," "groups," and "alliances," that are secretive about their membership and have little existence outside the Hunton law firm. In fact, the Hunton-represented industry groups described in this report appear to exist solely for the purposes of coordinating payments to Hunton for legal services. They are not incorporated anywhere, hold no legal status, and are not required to publicly disclose their members. Their "staff" are attorneys at Hunton, where Wehrum and Harlow worked before assuming their roles at EPA. The organizations exist only on paper, and among the benefits they impart on their "members" is the assumption of anonymity and the ability to coordinate a well-funded, expert-led effort to influence EPA under the public's radar.

Hunton-represented industry groups are achieving remarkable success with their policy objectives, on everything from major efforts to roll back landmark climate and toxic air pollution regulations, to more technical changes that allow for more air pollution such as by narrowing the definition of "ambient air" or expanding the Clean Air Act's "International border areas" to include states without international borders.

Most of these Hunton-represented industry groups filed comments in response to EPA's April 2017 request for the identification of "regulations that may be appropriate for repeal, replacement, or modification."[31] One of the groups (UARG) sought 17 rollbacks, and the Trump EPA air office has acted on the eight most significant ones. Another group, the Air Permitting Forum, sought 13 changes to weaken Clean Air Act permitting programs, and the Trump EPA air office has acted upon or has stated it is actively considering eight of the requests. Still another Hunton-represented industry group formed to weaken the National Ambient Air Quality Standards (NAAQS) program has seen the Trump EPA begin to implement its suggestions for doing so, including by removing government-funded academics from science advisory panels under the guise of "conflict of interest," while adding industry-funded consultants who have long questioned the health effects of pollution.

Appendices to this report contain more detailed information, including quotes and citations, to where the Trump EPA appears to be granting the requests of these Hunton-represented industry groups. Research revealed at least five such organizations represented by Hunton that have advocated for policy changes from the EPA air office:

- Utility Air Regulatory Group (UARG)
- Air Permitting Forum ("the Forum")
- Auto Industry Forum (AIF)

[31] 82 Fed. Reg. 17793 (Apr. 13, 2017).

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- CCS Alliance ("the Alliance")
- NAAQS Implementation Coalition ("the Coalition")

In some cases, these organizations are also members of each other. For example, UARG is a "member" of the NAAQS Implementation Coalition, and the Auto Industry Forum is a "sub-coalition" of the Air Permitting Forum. This makes it particularly difficult to determine who is a member of each group. In all cases, however, the public-facing representatives of these organizations are lawyers at Hunton.

Below are descriptions of each Hunton-represented industry group, along with a summary of some of the long-desired policy goals the groups are achieving from the Trump EPA's air office. This report includes detailed appendices cataloguing these and other positions taken by the Hunton-represented industry groups that the Trump EPA's air office has subsequently adopted.

a. The Utility Air Regulatory Group (UARG)

One of Wehrum's and Harlow's mutual clients was the recently-disbanded Utility Air Regulatory Group (UARG), which advocates against pollution limits for fossil fuel-fired power plants and their related interests (*e.g.*, coal mining). In court filings, UARG's Hunton lawyers have stated that, "since its inception in 1977, UARG has participated in every major EPA rulemaking affecting the electric generating industry."[32] UARG has alternatively described itself as an "informal consortia" of power plant operators and "national associations";[33] "an ad hoc, unincorporated association" of electricity generators and "industry groups";[34] and as "a not-for-profit association" of individual [electric] generating companies and national trade associations."[35]

In 1988, UARG counted 64 individual electric utility companies among its members, as well as three related trade associations.[36] By 2017, UARG's membership consisted of 25 power plant companies, five coal-related trade associations, and the federally owned Tennessee Valley Authority.[37]

Together, Hunton and UARG have been among the most prolific industry-funded participants in EPA rulemakings and litigation under the Clean Air Act (CAA). In 2017, Mr. Wehrum accepted an award for Hunton's representation of UARG and others fighting public health protections at EPA, stating that those fights are "very important issues to our clients, and we are doing everything we can

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[32] Defendant Duke Energy Corp.'s Reply, *United States et al. v. Duke Energy Corp.*, 2003 WL 25509066 (M.D.N.C. Feb. 13, 2003) (citing Declaration of Norman W. Fitchorn).

[33] Hunton & Williams comments of UARG et al., Docket Id. No. 102-RQ-14-116, at 1 (Aug. 25, 1983).

[34] Brief for Intervenor-Petitioners UARG et al., Case Nos. 14-1112 & 14-1151 at v (D.C. Cir.) (filed Dec. 30, 2014).

[35] *See* Comments of UARG, Docket Id. ID No. EPA-HQ-OAR-2017-0355-24421 (Aug. 31, 2018).

[36] *See Maine v. Thomas*, 690 F. Supp. 1106, 1107 n.2 (D. Me. 1988) (describing those entities all as "members of the Utility Air Regulatory Group").

[37] Leaked UARG Policy Committee document

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to represent them successfully in these issues."[38] Wehrum's nomination to lead the Trump EPA air office was announced less than nine months later.

While Hunton may attempt to imply that "UARG" is an organization with meaningful independence from Hunton, the facts indicate otherwise:

- Documents indicate that although UARG counts many corporations and trade associations among its "members," the organization itself has little existence outside the walls of Hunton's firm. Indeed Hunton itself "founded" UARG in the late 1970s,[39] and has served as counsel to UARG and its members ever since.

- An internal budget proposal presented to the "UARG Policy Committee" in June 2017 sought nearly $2 million in "dues" from UARG members, to cover work during the period "June 23 to early September 2017."[40] Although couched as a request for "technical consultant *and* legal support," only 2.3% of the proposed budget ($45,000 out of $1,955,000) would have supported technical services. The remaining 97.7% went to Hunton for legal services in 11 subject areas.

- Hunton appeared to be in control of day-to-day management and growth of UARG itself. For example, Hunton was the sole entity paid for UARG's "planning/general coordination," with $100,000 in legal fees proposed to go to Hunton in exchange for "continuation of efforts to recruit new members" for UARG.

The following is a list of all UARG's members as of June 2017, shortly before Wehrum and Harlow left for EPA.[41] The five Wehrum/Harlow clients from which they are formally recused are also noted below:[42]

- American Electric Power
- Ameren
- Consumers Energy
- **Dominion (Wehrum recused)**
- **DTE Energy Co. (Harlow recused)**
- **Duke Energy Corp. (Wehrum recused)**
- Dynegy Inc.
- Eversource Energy/Pub Service of N.H.
- FirstEnergy Corp.
- Kansas City Power & Light Co.

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[38] Stan Parker, *Environmental Group Of The Year: Hunton & Williams*, LAW360, Jan. 17, 2017 (9:59 PM EST).

[39] *United States v. Illinois Power,* Civil Action No. 99-CV-833-MJR (S.D. Ill. April 24, 2003) (J. Proud).

[40] Leaked UARG Policy Committee document at 1.

[41] *See id.* at 6.

[42] *See* Wehrum recusal at 2 (listing former clients); Harlow recusal at 2 (listing former clients).

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- **LG&E & KU Energy LLC (Harlow recused)**
- Luminant
- Minnesota Power Co./ALLETE
- NiSource Inc.
- Oglethorpe Power Corp.
- Ohio Valley Electric Corp.
- Otter Tail Power Co.
- Pinnacle West/Arizona Public Service
- **Salt River Project (Wehrum recused)**
- South Carolina Elec & Gas Co. (SCANA)
- Southern Company Services
- Tri-State Generation & Transmission
- Tucson Electric Co.
- Wabash Valley Power Association
- WeEnergies
- American Coalition for Clean Coal Electricity
- American Public Power Association
- EEI-J/E [Edison Electric Institute]
- National Rural Electric Cooperative Association (NRECA)
- National Mining Association (NMA)
- Tennessee Valley Authority (TVA)

UARG's 2018 budgeting document, prepared for a meeting less than three months before Wehrum was nominated, had projected that the group would require an overall budget of between $8.2 and $8.5 million. The precise amount, UARG wrote, would depend on whether "the new Administration is ready and able in 2018 to undertake a substantial number of initiatives to reform the unreasonable Clean Air Act programs of the previous Administration...."[43] Wehrum has stated that he does not remember this two-day UARG meeting, at which his former client voted on whether to pay Hunton millions of dollars in legal fees, but others have confirmed he attended.[44]

UARG has taken dozens of industry-friendly positions on the Clean Air Act, the most salient of which can be found in Appendix 1 to this report alongside the status of corresponding Trump EPA actions.

[43] *See* Leaked UARG Policy Committee document at 3 (projecting an $8.2 million budget request, or potentially "3-4% higher than that" depending on the Trump EPA's ambitions).

[44] Zack Colman, *Industry group tied to EPA air chief dissolves,* POLITICO, May 10, 2019.

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In May 2017, UARG submitted a prioritized set of 17 rules, sets of rules, or programs it suggested should be withdrawn, revisited, or changed in ways that would severely weaken public health protections.[45] Of those 17 rollbacks, the Trump EPA has taken concrete steps to effectuate the eight most significant matters:

1. UARG asked EPA to repeal the Clean Power Plan's greenhouse gas (GHG) emission guidelines for certain existing power plants, and to replace them with weaker requirements and significant room for states to create further loopholes. The Trump EPA issued a final rule doing so in June 2019. The Trump EPA's own analysis of the proposal projected that it could prematurely kill 1,400 people a year by 2030.[46] Although the final rule stayed largely the same in substance, the economic analyses were changed to no longer show those harms.[47]

2. UARG asked EPA to repeal or revise GHG limits for new power plants. The Trump EPA has proposed to do so, and to finalize the rule in December 2019.

3. UARG asked EPA to weaken the framework interstate pollution rules. On August 31 and October 19, 2018, the Trump EPA issued memoranda and guidance documents that would allow for more interstate air pollution under those framework rules.[48]

4. UARG asked EPA to make changes to the New Source Review (NSR) permitting program that would allow older sources to continue polluting without having to install additional controls. The Trump EPA has proposed rules and issued guidance documents to weaken NSR in at least five different ways, starting December 7, 2017 with the "DTE Memo," which announced that the agency would no longer "second guess" the projections of UARG members and other large polluters regarding whether upgrades would "significantly increase" emissions and thus require pollution controls. Wehrum and Harlow's involvement in developing the DTE Memo raises substantial ethical concerns, as discussed in Section 2 of this report. The Trump EPA has announced plans to propose multiple changes to the NSR program in the summer of 2019.

5. UARG asked EPA to weaken the rules restricting regional haze in national parks and wilderness areas. On December 20, 2018 and April 4, 2019, the Trump EPA issued guidance documents to that effect,[49] and also announced in a letter to Hunton that it would propose a rule to accomplish other related UARG-sought changes.

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[45] Hunton comments for UARG, Docket Id. No. EPA-HQ-OA-2017-0190-40140 (May 12, 2017).

[46] Lisa Friedman, *Cost of New E.P.A. Coal Rules: Up to 1,400 More Deaths a Year*, N.Y. TIMES, Aug. 21, 2018.

[47] https://www.epa.gov/sites/production/files/2019-06/documents/utilities_ria_final_cpp_repeal_and_ace_2019-06.pdf

[48] *See* Stuart Parker, *EPA Guidance Grants States 'Flexibilities' To Avoid Interstate Air Mandates*, INSIDEEPA, Nov. 1, 2018.

[49] *See, e.g.*, Stuart Parker, *EPA Expands Air Data Waivers for 'Exceptional' Events, Sparking Criticism*, INSIDEEPA (Apr. 11, 2019) (noting that the expanded waivers could be used in "selecting data to show compliance with EPA's rule limiting regional haze).

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6. UARG asked EPA to repeal a rule that, if repealed, would allow states to create loopholes where polluters can emit unlimited quantities of air pollution during certain operational phases, such as when the facility is "malfunctioning." The Trump EPA has proposed to partially repeal that rule, and has told courts that it is considering whether to allow additional loopholes.

7. UARG asked EPA to reconsider the GHG emission guidelines for municipal solid waste landfills – presumably to establish regulatory precedents that could limit similar EPA regulations of existing coal-fired power plants. The Trump EPA announced that it is reconsidering the landfill rule and, separately, has proposed to postpone some of the rule's implementation deadlines from six months to two years.

8. UARG asked EPA to reduce the electronic reporting requirements for emissions of hazardous air pollution under the Mercury and Air Toxics Standards (MATS) rule. The Trump EPA has granted power plants a two-year reprieve from these requirements, and has also proposed to reverse the economic and legal underpinning of the entire MATS rule.

EPA appears to have outright rejected only one UARG request from this prioritized wish list: a request to remove the "stationary combustion turbine" subcategory from regulation under the Clean Air Act's hazardous air pollution program. EPA has proposed to reject this request because a D.C. Circuit case expressly holds that EPA has no legal ability to remove subcategories (rather than categories) from regulation under the hazardous air pollution program.[50] However, the Agency proposed to determine that no additional health-based controls on the subcategory were necessary.

b. The Air Permitting Forum ("the Forum") and its sub-coalition, the Auto Industry Forum (AIF)

Another opaque "coalition" nominally housed at Hunton is the Air Permitting Forum ("the Forum"). In public comments, the Forum has described itself as "a coalition of manufacturing companies focused on stationary source implementation issues under the Clean Air Act"[51] who "are subject to numerous CAA regulatory requirements . . . ."[52] The Forum is closely associated with the Auto Industry Forum (AIF), which describes itself as a "sub-coalition" within the Forum that is focused on stationary source regulations affecting the automobile manufacturing industry.[53] Because AIF is a sub-entity of the larger "Forum," this investigation ascribes the Forum's policy positions to all of its members, including those within the smaller AIF entity.

[50] 84 Fed. Reg. 15046, 15068 (Apr. 12, 2019).

[51] Forum comments on Title V rule, Docket Id. No. EPA-HQ-OAR-2016-0194-0031, at 1 (Oct. 24, 2016).

[52] Forum comments on CPP repeal, Docket Id. No. EPA-HQ-OAR-2017-0355-19903, at 1 (Apr. 26, 2018),

[53] Forum comment on stratospheric ozone, Docket Id. No. EPA-HQ-OAR-2003-0167-0166 at 1 (March 7, 2012).

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The Forum originally existed outside of Hunton, but the organization's two longtime lawyers were hired by Hunton in June 2016.[54] Since then, Wehrum and Harlow's former law firm has represented the Forum on numerous matters before EPA and the courts, including in litigation filed jointly with Wehrum himself against EPA.[55]

Like UARG, the Forum does not have any apparent physical address, or even a public website. In the headers for the Forum's and AIF's public comments, the organization has listed individuals serving in various roles for the groups, such as an "Executive Director," "Director," "Counsel," and "Manager" – but all of these individuals are lawyers employed by the Hunton law firm, and their contact information is their Hunton email address.[56]

Unlike UARG, however, neither the Forum nor its sub-coalition AIF are listed as a former client of Wehrum or Harlow. Accordingly, it appears that neither Wehrum nor Harlow have recused themselves from meetings with, or working on particular matters related to, the Forum or its representatives.

Evidence suggests that the Forum is comprised of at least some former Wehrum and Harlow clients. In May 2015, 18 individuals associated with the Forum met with EPA staff about Clean Air Act rulemakings. As required,[57] EPA staff docketed summaries of those meetings, including a list of attendees representing the Forum.[58] In addition to three lawyers (all of whom would later join Hunton), the Forum's representatives included employees from four automakers, three oil and gas companies, two pulp and paper companies, and General Electric. Forum members from whom Wehrum or Harlow are recused are noted below:

- Fiat Chrysler
- Ford
- General Motors
- Toyota
- **Chevron (Wehrum & Harlow recused)**
- **ExxonMobil (Wehrum recused)**
- Shell
- **Georgia-Pacific (Wehrum recused)**
- International Paper
- **General Electric (Wehrum recused)**

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[54] https://www.huntonak.com/en/news/chuck-knauss-and-shannon-broome-join-global-environmental.html

[55] *See* Proof Petitioners' Opening Brief, *Nat'l Envtl. Dev. Assn's Clean Air Project v. EPA*, Case No. 16-1344 (D.C. Cir. Aug. 30, 2017) (brief filed by Wehrum on behalf of the American Petroleum Institute, alongside other Hunton lawyers on behalf of the Air Permitting Forum).

[56] *See, e.g.*, Forum comments on CPP repeal, Docket Id. No. EPA-HQ-OAR-2017-0355-19903, at 1 (Apr. 26, 2018).

[57] *See Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977).

[58] *See* U.S. EPA, "Summary of EPA Stakeholder Meeting – Air Permitting Forum; May 19, 2015"; U.S. EPA "Summary of Meeting with the Air Permitting Forum on May 20, 2015."

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The Hunton-represented Forum has been highly successful in getting EPA to adopt its policy positions on rollbacks – so much so that language written by Hunton lawyers for the Forum was copied verbatim into the DTE Memo, without attribution, as part of EPA's justification for rolling back New Source Review permitting requirements. Specifically, Hunton's submittal to EPA on behalf of the Forum stated that:

> "While historically EPA has recognized that a source must exercise judgment to exclude increases for which the project is not the 'predominant cause,' more recent EPA actions reflect the view that all emission increases are presumed to be caused by the change."[59]

Despite the fact that this statement was erroneous,[60] nearly identical language appeared without explanation in EPA's DTE Memo disavowing the federal government's position in litigation involving Hunton, UARG, and a UARG member:

> "Because increased emissions may be caused by multiple factors, the EPA has recognized that the source must exercise judgment to exclude increases for which the project is not the 'predominant cause.'"[61]

The only other instance in which this particular legal argument was made – albeit not with the same words – was also by Hunton. Hunton made this argument in briefs defending UARG member DTE Energy from the EPA enforcement action that was the impetus for the agency's DTE Memo.[62, 63]

EPA's use of language supplied by the Forum in the DTE Memo is only the tip of the iceberg. Like UARG, the Forum has achieved remarkable success in convincing EPA to change its position in ways that mirror the Forum's advocacy. The May 2017 Forum document that EPA plagiarized included a wish list of 19 desired rollbacks of Clean Air Act permitting requirements and emission limits, and of the National Ambient Air Quality Standards.

As of July 2019, the Trump EPA has adopted six of the Forum's air permitting and emission standard rollbacks in final rules, orders, and/or final guidance documents, or a combination – including the substance of the DTE Memo described above:

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[59] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 12 (May 15, 2017).

[60] https://energycommerce.house.gov/newsroom/press-releases/pallone-whitehouse-carper-raise-new-questions-about-wehrum-s-involvement-in

[61] DTE Memo at 7.

[62] https://www.whitehouse.senate.gov/news/release/whitehouse-carper-pallone-raise-new-questions-about-wehrum

[63] This is not the first time Bill Wehrum appears to have copy-pasted text verbatim from documents provided by his former clients. In 2004, while Wehrum was serving as chief counsel in the Bush Administration's Office of Air and Radiation, EPA proposed mercury emissions rules that *also used verbatim text from his former law firm* – in that case, the firm Latham & Watkins. *See* Eric Pianin, *Proposed Mercury Rules Bear Industry Mark*, WASH. POST, (Jan. 31, 2004).

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1. With respect to air toxics, the Forum asked the EPA to withdraw its "once in, always in" policy that requires major sources of toxic air pollution to continue meeting strong emission limits. In a January 25, 2018 memorandum from Wehrum, the Trump EPA withdrew the policy, and on June 25, 2019 proposed a rule that would enshrine the looser toxic air pollution limits in regulation.[64] The Forum and UARG joined litigation helping the Trump EPA defend the issuance of what they call, "the Wehrum Memo," in court.[65] If the withdrawal of the "once in, always in" policy is finalized, the Trump EPA projects that 3,912 facilities nationwide – nearly half of all major air toxic polluters – could substantially increase their toxic air pollution.[66] Independent analyses indicate that those sources could more than double their toxic air pollution under the new approach.[67] The Trump EPA has acknowledged that it conducted no health or environmental analysis before Wehrum withdrew the policy in 2018.[68]

2. With respect to New Source Review, the Forum asked EPA to "reduce, if not eliminate, federal second-guessing" of state permitting programs to ensure compliance with legal requirements. The Trump EPA has issued a memorandum calling for "General Deference" to states and tribes implementing those programs.[69]

3. With respect to New Source Review, the Forum also asked EPA to "clarify its position" regarding deference to polluters' projections of their own emissions, and included language inaccurately characterizing the types of pollution that EPA has allowed sources to exclude from their calculations. The Trump EPA issued the DTE Memo "to provide greater clarity" on that issue, and adopted verbatim without citation the Forum's novel legal argument, which itself mirrored Hunton's position on behalf of a UARG member in the DTE litigation. As discussed in Section 2, Wehrum and Harlow's involvement in developing the DTE Memo raises serious ethical concerns.

4. With respect to New Source Review, the Forum also asked EPA to expand the scope of "netting," which allows polluters to upgrade old equipment – and prolong the life of their facility – without triggering new pollution control requirements. In guidance, the Trump EPA changed its interpretation of its rules to allow for that exact expansion of project netting – now called "project emissions accounting" – and in March 2019 it sent a proposal to OMB

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[64] https://www.epa.gov/sites/production/files/2019-06/documents/frn_mm2a_proposal_and_reg_text_6_25_19.pdf

[65] *See generally* Intervenor-Respondents Air Permitting Form, et al. Final Response to Petitioners' Opening Brief, *Calif. Communities Against Toxics v. U.S. Envtl. Protection Agency*, 2019 WL 858013 (D.C. Cir.).

[66] Proposed Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act at 95 (pre-publication version).

[67] ENVTL. DEF. FUND, PRUITT'S NEW AIR TOXICS LOOPHOLE at 2 (Aug. 2018) (estimating that eligible facilities in the Houston-Galveston area could increase their toxic air pollution by 146% to 152% under the new approach).

[68] Testimony of Scott Pruitt, Senate Comm. on Env't and Publ. Works, Jan. 30, 2018, https://www.c-span.org/video/?440282-1/epa-administrator-pruitt-testifies-senate-oversight-hearing&live&start=1832

[69] Memorandum from Andrew R. Wheeler, *Principles and Best Practics for Oversight of Federal Environmental Programs Implemented by States and Tribes* at 3 (Oct. 30, 2018).

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that would enshrine the change in EPA regulations.[70] EPA expects to publish the proposal sometime in July 2019.[71]

5. With respect to New Source Review, the Forum also asked EPA to lift the agency's stay of a 2009 rule finalized in the last week of the George W. Bush Administration, which would have allowed polluters to artificially divide the significant emissions from construction projects into smaller pieces, and thereby claim that no individual piece significantly increases emissions. The Trump EPA decided it would lift the Obama Administration EPA's stay of this "aggregation" rule, allowing the Bush Administration rule to come into effect.[72]

6. With respect to the Clean Air Act's core operating permit program, the Forum's "highest priority" was to limit the public's ability to challenge certain illegal permit conditions before EPA – what the Forum derisively referred to as "a second bite at the apple." The Trump EPA rejected a Sierra Club petition on that precise basis, stating the group was, "in essence, asking for a 'second bite at the apple' . . . ."[73]

The Trump EPA has also stated that it is actively considering two more of the Forum's permitting rollbacks:

7. With respect to New Source Review, the Forum asked EPA to expand the "debottlenecking" rule, which would allow major polluters to ignore emissions increases that upgrades cause at other parts of the plant. In October 2017, the Trump EPA listed changes to the debottlenecking rule as one of the "important areas" it would assemble a task force to review.[74]

8. With respect to New Source Review, the Forum also asked EPA to redefine the word "routine," so that even changes that "occur only once or twice during the life of a plant" are considered routine and thus exempt from triggering additional pollution control requirements. In April 2018, the Trump EPA said it was "evaluating the need to clarify the interpretation and appropriate application" of this exception to New Source Review.[75]

In addition to permitting rollbacks, the Forum also sought a number of other changes to the way EPA establishes and implements the National Ambient Air Quality Standards (NAAQS). The full scope of the Forum's success in influencing the Trump EPA regarding the NAAQS will become clear as the agency undertakes a major scientific review of the NAAQS for particulate matter (soot) and ground-

[70] Memorandum from Scott Pruitt, Admin'r, to Reg'l Admin'rs, *Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program* (Mar. 13, 2018).

[71] https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2060-AT89

[72] 83 Fed. Reg. 57324, 57324 (Nov. 15, 2018).

[73] *In re PacificCorp Energy Hunter Power Plant*, Order on Petition No. VIII-2016-4 at 17 (Oct. 16, 2017).

[74] U.S. EPA, FINAL REPORT ON REVIEW OF AGENCY ACTIONS THAT POTENTIALLY BURDEN THE SAFE, EFFICIENT DEVELOPMENT OF DOMESTIC ENERGY RESOURCES UNDER EXECUTIVE ORDER 13783 at 2 (Oct. 25, 2017).

[75] Anna Marie Wood, U.S. EPA, *NAAQS and Other Implementation Updates* at slide 33 (Apr. 5, 2018).

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level ozone (smog), but early signs indicate substantial influence. Most notably, the Trump EPA appears determined to undermine the scientific reviews underpinning the NAAQS. The seven-member Clean Air Scientific Advisory Committee (CASAC) is charged by law with providing independent advice on the public health and environmental science of air pollution. Whereas CASAC was previously "a committee of nationally and internationally recognized researchers at the leading edge of their fields,"[76] the Trump EPA has replaced all but one of the academic research scientists, and appointed as chair a fossil fuel consultant, Tony Cox, who disputes the well-established health effects of particulate matter (PM).[77,78] The Trump EPA then disbanded a 20-person panel of experts who advise CASAC specifically on PM science, leaving CASAC – according to the Trump appointees' own admission – unable to conduct a "meaningful independent scientific review" of the literature.[79] The Trump EPA further recommended that individual CASAC members should be allowed to share their own personal views of the science with EPA political officials, even when those views "fall outside the committee consensus."[80] Combined, these changes to undermine in-depth scientific review and to elevate fringe views of CASAC members, could provide cover for EPA political appointees to differ wildly from mainstream public health science when setting the NAAQS.

During the time Wehrum was at the helm of the Trump EPA air office, the agency sought to adopt several Forum-proposed rollbacks concerning the NAAQS, such as:

9. The Forum asked EPA to review how it evaluates the health benefits that come from reducing PM pollution, even if the reductions are in places already meeting the NAAQS. Five months later, in an October 2017 proposal concerning the Clean Power Plan, the Trump EPA floated the possibility that any benefits from PM reductions below the NAAQS levels could be treated as "zero" benefit.[81] In May 2019, Wehrum publicly questioned[82] the public health benefits of PM reductions caused by the MATS rule in areas achieving the NAAQS. In June 2019, rather than rely on the agency's independent science advisory boards, the Trump EPA "invite[d] the

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[76] Letter from former members of CASAC Particulate Matter Review Panel to Tony Cox, CASAC Chair, at 2 (Dec. 10, 2018).

[77] Stuart Parker, *CASAC Research Scientist Attacks Panel Chairman's NAAQS Review Shift*, INSIDEEPA (Mar. 26, 2019).

[78] *See*, U.S. EPA, *Health and Environmental Effects of Particulate Matter (PM)*, https://www.epa.gov/pm-pollution/health-and-environmental-effects-particulate-matter-pm (last visited July 2, 2019).

[79] *See* Letter from Tony Cox, Chair of CASAC, to Andrew Wheeler, EPA Admin'r, at 2 (Apr. 10, 2019) (stating that "CASAC recommends that the EPA reappoint the previous CASAC PM panel (or appoint a panel with similar expertise)," among other recommendations, in order to review an integrated scientific assessment that will "enable independent scientific review" by CASAC).

[80] Memorandum from Scott Pruitt to Asst. Admin'rs, *Back-to-Basics Process for Reviewing National Ambient Air Quality Standards*, at 10 (May 9, 2018).

[81] 82 Fed. Reg. 48035, 48044 (presenting an "alternative approach" to calculate premature death from particulate matter in which "Forgone $PM_{2.5}$ co-benefits fall to zero in areas whose model-predicted air quality is at or below the annual average $PM_{2.5}$ NAAQS").

[82] Lisa Friedman, *E.P.A. Plans to Get Thousands of Pollution Deaths Off the Books by Changing Its Math*, N.Y. TIMES, May 20, 2019.

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public to nominate scientific experts" who could review a forthcoming reexamination of how PM benefits are calculated.[83]

10. The Forum asked EPA to reexamine how it treats "foreign sources of emissions" for purposes of achieving the NAAQS.[84] The Trump EPA now states that the Clean Air Act's weaker "International border area" provision is no longer restricted to areas on the international border, and instead applies to any emissions that can be traced back to foreign countries.[85]

Indeed, this investigation could find only one change sought by the Forum that the Trump EPA has expressly rejected: Repealing an EPA "regional consistency" rule that four Hunton lawyers – including Bill Wehrum himself – were challenging in court. EPA defended the rule against Hunton's challenge, and the D.C. Circuit unanimously rejected Hunton's arguments on June 8, 2018, seven months after Wehrum began his current tenure at EPA.[86]

c. The NAAQS Implementation Coalition ("the Coalition")

The NAAQS Implementation Coalition ("the Coalition") appears to have been established at Hunton in 2011, which is also when it submitted its first public comments to EPA (in that case, asking the agency to weaken the way it models violations of air quality standards).[87]

Like the other Hunton-represented industry groups, the Coalition has no public website, no apparent physical address, and no employees other than its Hunton "counsel."

In recent years, the Coalition has been similarly opaque about its membership and funding, instead merely describing itself as being "comprised of trade associations, companies, and other entities who confront difficulties in permitting and operating facilities" pursuant to EPA's National Ambient Air Quality Standards (NAAQS), particularly for smog-forming ozone.[88] However, the Coalition's first-ever public comment – filed in 2011 by a former managing partner of Hunton's Washington, D.C. office – lists the following organizations as some of the members:[89]

- American Chemistry Council
- **American Forest & Paper Association (Wehrum recused)**

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[83] *See* 84 Fed. Reg. 27632 (June 13, 2019).

[84] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 25 (May 15, 2017).

[85] 83 Fed. Reg. at 63010 (Dec. 6, 2018) ("a demonstration prepared under CAA section 179B [the Clean Air Act's international border areas provision] could consider emissions emanating from . . . intercontinental sources and is not restricted to areas adjoining international border areas . . . .").

[86] *Nat'l Envtl. Dev. Assn's Clean Air Project v. EPA*, No. 16-1344 (D.C. Cir. June 8, 2018).

[87] Coalition comment on SO2 guidance, Docket Id. No. EPA-HQ-OAR-2010-1059-0057 (Dec. 2, 2011).

[88] https://www.uschamber.com/sites/default/files/2.13.17-_coalition_comments_to_epa_on_proposed_nonattaniment_area_classifications_and_sip_requirements_for_2015_ozone_naaqs.pdf

[89] Coalition comment on SO2 guidance, Docket Id. No. EPA-HQ-OAR-2010-1059-0057, at 2 n.1 (Dec. 2, 2011),

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- **American Petroleum Institute (Wehrum recused)**
- American Wood Council
- **Brick Industry Association (Wehrum recused)**
- Corn Refiners Association
- National Oilseed Processors Association
- Rubber Manufacturers Association
- **Utility Air Regulatory Group (Wehrum and Harlow recused)**

In May 2017, the Coalition filed detailed comments with EPA asking for 21 major changes to how EPA reviews and implements the NAAQS, which form the core of the Clean Air Act. The Trump EPA has not yet had the opportunity to review air quality standards for the two most significant NAAQS pollutants, particulate matter and smog-forming ozone. However, the Trump EPA is currently undertaking reviews of those air quality standards, and has announced its intention to propose standards for both pollutants in March 2020.[90] The Trump EPA also recently disbanded a 20-person panel of experts on particulate matter.[91] The main Clean Air Science Advisory Committee that will advise on public health risks now has only one academic research scientist, and is led by an industry-backed consultant who disputes[92] the well-established health effects of particulate matter.[93]

The full scope of the Coalition's success in influencing the Trump EPA will become clear as those standards develop, but early signs indicate substantial influence. Thus far, the Trump EPA has adopted at least five of the Coalition's recommended reforms for NAAQS review and implementation:

1. Similar to the Forum, the Coalition asked EPA to expand the Clean Air Act's "International border areas" provisions to reduce air quality protections in states without any international borders. The Trump EPA now states that the weaker "International border area" provision is no longer restricted to areas on the international border.[94]

2. The Coalition asked EPA to change the meaning of "conflict of interest" to remove public health scientists who receive EPA research grants from the agency's science advisory boards, even while adding industry-funded scientists. Five months later, on October 31, 2017, the

[90] https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2060-AU40 (ozone); https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2060-AS50 (particulate matter).

[91] Lisa Friedman, *E.P.A. to Disband a Key Scientific Review Panel on Air Pollution*, N.Y. TIMES, Oct. 11, 2018.

[92] Stuart Parker, *CASAC Research Scientist Attacks Panel Chairman's NAAQS Review Shift*, INSIDEEPA (Mar. 26, 2019).

[93] *See*, U.S. EPA, *Health and Environmental Effects of Particulate Matter (PM)*, https://www.epa.gov/pm-pollution/health-and-environmental-effects-particulate-matter-pm (last visited July 2, 2019).

[94] 83 Fed. Reg. at 63010 (Dec. 6, 2018) ("a demonstration prepared under CAA section 179B [the Clean Air Act's international border areas provision] could consider emissions emanating from . . . intercontinental sources and is not restricted to areas adjoining international border areas . . . .").

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Trump EPA changed its conflict of interest rules to exclude any researchers who receive EPA grants to study pollution.[95]

3. The Coalition asked EPA to narrow the meaning of "ambient air," which would reduce the amount of outdoor air protected by the Clean Air Act in the first instance. The Trump EPA publicly circulated draft guidance that would redefine "ambient air" to exempt more outdoor air from pollution protections.[96] Other Hunton-represented industry groups, such as the Forum, submitted comments to EPA supporting this redefinition.

4. The Coalition characterized the main NAAQS science committee as "imbalanced," with members who live in similar parts of the country, and suggested that the members "should be given rotating terms." In October 2017, the Trump EPA called for membership in its scientific committees to "be balanced" with "geographic diversity," and stated that "membership should be rotated regularly."[97]

5. The Coalition criticized efforts of the main NAAQS science committee to develop "consensus" around widely accepted science, stating that members with "minority views" should be allowed to report those to EPA political appointees as alternative takes on the science. In May 2018, the Trump EPA stated that although the committee should "seek to find consensus," individual committee members should be allowed "to share their own individual opinions when they fall outside committee consensus."[98] When coupled with the Trump EPA's replacement of impartial research scientists with industry-backed consultants, this change could allow politics to interfere with the science-based NAAQS-setting process.

d. The CCS Alliance ("the Alliance")

The Alliance describes itself as "a coalition of entities, spanning a number of economic sectors, that share a common interest in removing the impediments to investment in and development of carbon capture and storage ("CCS"), as well as mitigating the potential risks associated with the deployment of this technology."[99]

The Alliance has a website (ccsalliance.net), but the site is currently inactive for "scheduled maintenance."[100] However, the Internet Archive shows what the website looked like before it went

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[95] Memorandum from Scott Pruitt, *Strengthening and Improving Membership on EPA Federal Advisory Committees*, at 3 (Oct. 31, 2017).

[96] U.S. EPA, DRAFT REVISED POLICY ON EXCLUSIONS FROM "AMBIENT AIR" (Nov. 2018).

[97] Memorandum from Scott Pruitt, *Strengthening and Improving Membership on EPA Federal Advisory Committees*, at 2 (Oct. 31, 2017).

[98] Memorandum from Scott Pruitt to Asst. Admin'rs, *Back-to-Basics Process for Reviewing National Ambient Air Quality Standards*, at 10 (May 9, 2018).

[99] Comments of the CCS Alliance, Docket Id. No. EPA-HQ-OW-2008-0390-0178, at 1 (Dec. 22, 2008).

[100] www.ccsalliance.net

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inactive sometime in late 2016 or early 2017.[101] That website bore the "Hunton & Williams" logo along the top. In addition, "Hunton & Williams" is incorporated into the CCS Alliance logo. The Alliance lists the D.C. office of Hunton & Williams on the front page, along with Hunton's telephone number. For entities seeking to "join the CCS Alliance," the website provided the contact information for Hunton, as well as for a Hunton law partner (Frederick R. Eames), and the Gmail address of an energy lobbyist who does not appear to work at Hunton.[102] Hunton appears to have been paid approximately $860,000 by the Alliance over seven years (2009–2015) to lobby Congress on various pieces of climate change legislation.[103] Hunton terminated its lobbying engagement with the Alliance in early 2016.[104]

In some cases, the Alliance produced white papers that were then cited by other Hunton organizations. For example, UARG cited an Alliance "study" to oppose the use of CCS technology in Clean Air Act rulemakings.[105]

The Alliance – which has called coal "indispensable" to meeting electricity demands – is comprised of entities that would likely lose out financially if EPA required the use of CCS technology to capture and store carbon emissions. In comments submitted to EPA in 2008,[106] the Alliance listed the following as its members:

- Berkshire Hathaway Energy[107]
- MidAmerican Energy Holdings, a Berkshire subsidiary
- National Mining Association (former UARG member)
- National Rural Electric Cooperative Association (former UARG member)
- NRG Energy
- PacifiCorp
- Zurich North America

With respect to EPA rulemakings, the Alliance appears to favor the use of CCS technology – except to the extent it would have an adverse effect on the burning of coal for electricity. For example, in 2008 the Alliance argued that CCS technology is "the only tool now on the horizon" that could address "in a major way and within a mid-term timeframe" the "very large quantities of CO_2 emissions" from fossil fuel power plants.[108] In that rulemaking, the Alliance was urging EPA to authorize the geologic sequestration of CO2 under the Safe Drinking Water Act. But when it came to actually requiring even

[101] https://web.archive.org/web/20150405023737/http://www.ccsalliance.net/

[102] https://web.archive.org/web/20150405023929/http://www.ccsalliance.net/join/

[103] *See* PROPUBLICA, *Lobbying for CCS Alliance by HUNTON & WILLIAMS LLP* (last visited July 2, 2019).

[104] *Id.*

[105] *See* UARG comment, Docket Id. No. EPA-HQ-OAR-2008-0318-1550, at 117 n.29 (Nov. 28, 2008),

[106] Alliance comments, Docket Id. No. EPA-HQ-OW-2008-0390-0178, at 1 n.2 (Dec. 22, 2008).

[107] Comments of Berkshire Hathaway Energy, Docket Id. No. EPA-HQ-OAR-2013-0495-10052, at 2 (May 9, 2014).

[108] Alliance comments, Docket Id. No. EPA-HQ-OW-2008-0390-0178, at 2 (Dec. 22, 2008).

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the *partial* use of CCS technology, the Alliance balked, repeatedly arguing that it was not "adequately demonstrated" for even brand new coal plants.

The Alliance's views on partial CCS appear to now be echoed by the Trump EPA air office:

1. In May 2011, the Alliance argued that partial CCS for new coal-fired power plants "is not adequately demonstrated" because it does "not exist in sufficient geographic dispersion." In December 2018, the Trump EPA proposed to revise that Obama EPA standard, with the "primary reason" for its proposed rollback being "the high costs and limited geographic availability of CCS." In proposing the standard, Wehrum stated in a press release that the rollback "reflects our approach of defining new, clean coal standards by data and the latest technological information, not wishful thinking."

2. The Alliance criticized the landmark Boundary Dam power plant, which uses CCS, claiming its first year of operation "offers very little evidence of reliability or efficiency" for regulatory purposes. The Trump EPA's proposed rollback of the standard cited "multiple issues" at the Boundary Dam power plant, and solicited comment on whether the facility's "first year operational problems cast doubt" on the standard.

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SECTION #2: While at the Trump EPA, former Hunton lawyers Wehrum and Harlow appear to have violated ethical requirements in their rush to serve former clients and Hunton-represented industry groups

Before becoming EPA's top air pollution regulator on November 20, 2017, Bill Wehrum was a lawyer at the law firm Hunton Andrews Kurth LLP (at the time, Hunton & Williams LLP). Wehrum served as co-chairman of Hunton's environmental practice and led the administrative law group,[109] advocating before EPA and the courts on behalf of some of the biggest polluters in America. One of Wehrum's colleagues at Hunton, a partner named David Harlow, joined EPA as "senior counsel" in the air pollution office on October 1, 2017.[110]

This investigation leads to several ethics-related conclusions:[111]

(a) Wehrum and Harlow appear to have worked improperly to benefit Hunton and a UARG member in an ongoing EPA enforcement action;

(b) Wehrum failed to disclose the existence of at least three former clients in his recusal statement;

(c) Wehrum met at least six times with an undisclosed former client;

(d) Wehrum and Harlow listed only "UARG" as their client, but not its constituent members with whom they likely also developed attorney-client relationships pursuant to D.C.'s attorney ethics rules;

(e) Wehrum met at least nine times with UARG members, almost always in situations that would not comply with ethical rules for former clients, including one meeting at Hunton's office on the same day EPA released the DTE Memo; and

(f) Wehrum held at least two additional apparently improper meetings with a former client, General Electric, which is also a member of a Hunton-represented industry group.

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[109] Q&A With Hunton & Williams' Bill Wehrum, LAW360, May 6, 2013, https://www.huntonak.com/images/content/2/4/v2/2407/Law360_Bill_Wehrum_QA.pdf

[110] Kevin Bogardus, *Chemicals official cleared to weigh in on industry litigation*, E&E NEWS (Mar. 1, 2018).

[111] This report was unable to as comprehensively evaluate David Harlow's ethical conduct while at EPA because of a lack of public records regarding his schedules and communications while at EPA, as compared to William Wehrum.

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Introduction

As political appointees at EPA, both Wehrum and Harlow signed "Recusal Statements" drafted with the guidance of agency ethics officials and designed to identify and address conflicts of interests. Although Harlow signed his recusal statement within the requisite 3-month timeframe[112] – and indeed addressed it to Wehrum as his supervisor – Wehrum's own recusal statement was signed after a substantial delay of 10 months and demands from public officials, notably Senator Whitehouse, that he do so.[113] In connection with his nomination to lead the Trump EPA air office, Wehrum further committed to recuse himself from participating personally and substantially in any particular matter involving Hunton or his former clients without obtaining written pre-approval – regardless of whether a reasonable person would question his impartiality.[114]

The recusal statements outline various ethics obligations for Wehrum and Harlow, particularly under the so-called "Trump Ethics Pledge."[115] Similar to the Ethics in Government Act regulations,[116] which also apply to Wehrum and Harlow, the Ethics Pledge prohibits them from participating "for a period of 2 years from the date of [their] appointment[s]" "in any particular matter involving specific parties that is directly and substantially related to [their] former employer or former clients, including regulations . . . ."[117]

Both Wehrum and Harlow understood that this two-year ban applies to interactions with Hunton, their former employer, and with their former clients. To that effect, each included a list of former clients in his recusal statement – 37 for Wehrum, seven for Harlow. In addition, Wehrum and Harlow noted that they have confidential clients (two for Wehrum, one for Harlow) they are contractually prohibited from disclosing.[118] It is unknown whether ethics officials are aware of the identities of those clients, or if Wehrum or Harlow have met with those clients.

Each recusal statement outlines what the so-called Trump Ethics Pledge covers, as Wehrum and Harlow were advised by EPA's ethics officials:

> [F]or the purposes of this pledge obligation, the term "particular matters involving specific parties" is broadened to include any meetings or other communication relating to the performance of my official duties, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested

[112] 5 C.F.R. § 2634.802(b).

[113] *See* Sean Reilly, *Under pressure, Wehrum details recusal obligations*, GREENWIRE, Sept. 18, 2018

[114] *See* Letter from William L. Wehrum to Kevin S. Minoli, Designated Agency Ethics Official, U.S. EPA, at 1 (Aug. 28, 2017).

[115] E.O. 13770, Ethics Commitments by Executive Branch Appointees (Jan. 28, 2017) ("Trump Ethics Pledge").

[116] 5 C.F.R. pt. 2635.

[117] *Id.* § 1, ¶ 6.

[118] Wehrum Recusal at 2 n.1; Harlow Recusal at 2 n.2.

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> parties. I am further advised that the term "open to all interested parties" means five or more parties.[119]

Wehrum purportedly delayed signing his recusal statement over confusion regarding these terms. Wehrum asserted that the delay was due to having received, "three different interpretations" about what it meant to be recused from a "particular matter involving specific parties," telling the New York Times, "[W]hat I don't want to do is sign a recusal letter and then have the rules change again."[120] It is unknown what "three different interpretations" Wehrum received, who they came from, and whether in the 10-month interim before signing, Wehrum followed the requirements as they were ultimately outlined in his recusal statement.

Strangely, Wehrum's recusal statement contains a glaring omission when compared with other EPA recusal statements signed both before and after his own. For example, the recusal statements of Andrew Wheeler (signed May 24, 2018),[121] of Peter Wright[122] and Anne Idsal[123] (both signed July 24, 2018), and of David Dunlap[124] (signed Dec. 19, 2019) all state that "open to all interested parties" means at least five parties who "represent a diversity of interests" rather than "one shared perspective" or "the same united perspective." The recusal statement that Wehrum signed September 17, 2018 omitted that critical language.

a. Wehrum and Harlow appear to have violated the terms of the Trump Ethics Pledge and Ethics in Government Act regulations by participating in the development of the DTE Memo.

While at Hunton, David Harlow represented DTE Energy, a UARG member. DTE sought Hunton's assistance in an EPA enforcement case alleging that one of the utility's coal-fired power plants had emitted pollution in violation of the Clean Air Act's New Source Review (NSR) program. In that case, Wehrum personally filed a brief as a lawyer for UARG in support of DTE's position.[125] DTE Energy lost twice before the U.S. Court of Appeals for the 6th Circuit, and faces millions of dollars in penalties. In May 2017, Hunton lawyers lobbied EPA to reform the Clean Air Act's NSR program, stating that the DTE Energy litigation specifically "highlight[ed] the uncertainty these [NSR]

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[119] Wehrum Recusal at 2; Harlow Recusal at 2.

[120] Eric Lipton, *As Trump Dismantles Clean Air Rules, an Industry Lawyer Delivers for Ex-Clients*, N.Y. TIMES (Aug. 19, 2018).

[121] Wheeler Recusal at 2 (May 24, 2018)

[122] Wright Recusal at 1 (July 24, 2018)

[123] Idsal Recusal at 2 (July 24, 2018)

[124] Dunlap Recusal at 2 (Dec. 29, 2018)

[125] Brief Amici Curiae of UARG et al. in Support of Defendants-Appellees, at *2, *United States v. DTE Energy Co. & Detroit Edison Co.*, 2012 WL 1656078 (May 8, 2012) (listing Wehrum as "Counsel for UARG").

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regulations have created," and justified reform.[126] In July 2017, DTE filed a petition for certiorari with the U.S. Supreme Court, asking the Court to reverse the judgment against it.

Then, in December 2017, shortly after Harlow and Wehrum left Hunton for EPA, the agency published a memorandum (known as the "DTE Memo"). The DTE Memo reversed the agency's position in Hunton's DTE case, stating (like Hunton had) that the DTE case was evidence of "uncertainty regarding the applicability of NSR permitting requirements": When determining whether a major polluter expected to significantly increase its emissions as a result of a major project, the agency would no longer "'second guess[]' the owner or operator's emissions projections,"[127] as EPA had done in the DTE litigation. The memorandum was issued December 7, 2017, intentionally timed to give DTE's Hunton lawyers time to file it with the U.S. Supreme Court as the Court was considering DTE's petition for certiorari the very next day.[128] That same day, at the request of one of DTE's lawyers in the litigation, Wehrum gave a speech at Hunton before UARG (of which DTE is a member).

Evidence subsequently emerged through the Freedom of Information Act (FOIA) that Wehrum and Harlow appear to have participated in the development of the DTE Memo, despite ethical rules barring their participation in matters involving their particular clients, or in matters where their former employer Hunton represented a client. This evidence, along with other materials, led Senator Sheldon Whitehouse (D-RI), along with Senate Environment and Public Works Committee Ranking Member Tom Carper (D-DE) and House Energy and Commerce Chairman Frank Pallone, Jr. (D-NJ), to ask the Acting Inspector General of the Environmental Protection Agency (EPA) on February 25, 2019 to undertake an investigation of Wehrum's and Harlow's role in helping to reverse EPA's position in the DTE enforcement action to benefit DTE Energy and Hunton.[129]

On March 20, 2019, Senator Whitehouse, Ranking Member Carper, and Chairman Pallone informed the Acting Inspector General in a supplemental letter that, in the DTE Memo, EPA adopted without discussion a novel interpretation of NSR regulations that had previously been enunciated only by Hunton's lawyers in the underlying DTE litigation.[130] On May 6, 2019, the offices of Senators Carper

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[126] Hunton comments for UARG, Docket Id. No. EPA-HQ-OA-2017-0190-40140, at 17 n.37 (May 12, 2017) (citing litigation against DTE Energy in the U.S. Court of Appeals for the Sixth Circuit).

[127] Memorandum from EPA Admin'r Scott Pruitt to Reg'l Administrators, *New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected Actual Applicability Test in Determining Major Modification Applicability*, at 8 (Dec. 7, 2017).

[128] Letter from Senator Whitehouse, Senator Carper, Representative Pallone to Charles J. Sheehan, Acting Inspector General, U.S. EPA, at 7–8 & Exhs. M–N (emails from EPA political appointee Mandy Gunasekara stating that the memorandum "needs to go out before" the Supreme Court considers whether to hear the DTE enforcement case). The May 2019 complaint by CREW also discusses circumstances demonstrating that EPA's memorandum was essentially a litigation memorandum crafted to support Hunton's aims and timed for maximum effect on the DTE litigation.

[129] https://www.whitehouse.senate.gov/news/release/democrats-call-for-investigation-of-top-epa-officials-role-in-reversing-enforcement-position.

[130] https://www.whitehouse.senate.gov/download/wehrum-oig-supplemental-letter

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and Whitehouse identified language in the DTE Memo, this time copied verbatim from a document that Hunton had submitted to EPA on behalf of the Air Permitting Forum, a similar Hunton-represented industry group with no existence outside the law firm.[131]

Any involvement by Wehrum or Harlow in the DTE Memo would seem to fit squarely within the prohibition on involvement in particular matters with specific parties who are former clients or represented by former employers: DTE Energy, a former client of Harlow, was a specific party represented by the former employer of both Wehrum and Harlow, facing millions of dollars in penalties and damages in a specific enforcement matter in which Wehrum had personally made an appearance while in private practice.

Although EPA originally stated that Wehrum had no involvement in reviewing the DTE Memo, he subsequently admitted to *The Washington Post* that this was not true, and additional reporting from other sources indicates that the discussion with Wehrum "cover[ed] topics such as the memo's potential impact on future EPA enforcement activities and the need to issue it before the Supreme Court conference on the DTE case."[132]

Indeed, documents obtained under FOIA corroborate those reports by revealing that EPA political appointees were intent on issuing the DTE Memo on a timeframe where it could impact the DTE litigation. For example, one EPA political appointee wrote: "I thought we may have more time, but know now that the cert hearing [Supreme Court's conference to consider which appeals to hear] is planned for Wednesday. This memo needs to go out before."[133] The DTE Memo was posted on EPA's web page sometime during the evening of December 7, 2017,[134] the same day that Wehrum had spoken to a private meeting of UARG members at his old Hunton office. The next morning, DTE's Hunton lawyers – not EPA or the Department of Justice lawyers opposing them in the case – informed the Supreme Court about the DTE Memo.[135]

Wehrum's participation appears to have been both personal and substantial. As the ethics watchdog Citizens for Responsibility and Ethics in Washington (CREW) explained in a complaint it filed with EPA's Acting Inspector General: "OGE's regulations explain that participation 'may be substantial even though it is not determinative of the outcome of a particular matter.'" [136] Moreover, the efforts by Wehrum's deputy to redact "potentially offending language" from a draft of the DTE Memo being reviewed by Wehrum "did not negate his participation" in the DTE Memo's development, "for both

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[131] https://www.epw.senate.gov/public/index.cfm/press-releases-democratic?ID=E598EA19-BB86-4737-ABE8-BE97F356D11E

[132] Juliet Eilperin, *EPA regulator skirts the line between former clients and current job*, Wash. Post (Feb. 25, 2019).

[133] *See* Letter from Sen. Whitehouse, Sen. Carper and Rep. Pallone, to Charles J. Sheehan, Acting Inspector General at 7 & n.19 (Feb. 21, 2019). Gunasekara's email misstates the day of the conference; it was actually scheduled for Friday (December 8), not Wednesday, of that week.

[134] *Id.* at 8.

[135] *Id.* at 101 (Exhibit P).

[136] Letter from Noah Bookbinder to Charles Sheehan at 3–4, 10–13, May 29, 2019 (citing 5 C.F.R. § 2635.401(b)(4)).

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his Ethics Pledge and his ethics agreement establish the duty to recuse from a 'particular matter involving specific parties' and not merely parts of the matter."[137]

Federal ethics regulations prohibit officials from taking certain actions where there is and appearance of a lack of impartiality.[138] Accordingly, Wehrum and Harlow should have consulted with ethics officials, which it appears that Wehrum did not do. Specifically, federal ethics regulations require employees to recuse from participation in "a particular matter involving specific parties" that is "likely to have a direct and predictable effect on the financial interest of . . . a person with whom he has a covered relationship," or a person who "represents a party to such a matter."[139] Employees are advised to seek assistance from ethics officials and supervisors in determining "whether a relationship would cause a reasonable person to question his impartiality . . . ."[140] In addition, even if a matter is not "specifically described" in this ethics rule, an employee concerned that circumstances "would raise a question regarding his impartiality should use the [pre-authorization] process to determine whether he should or should not participate in a particular matter."[141] According to EPA's ethics officials, Wehrum had not received any such waivers as of September 29, 2018.[142]

b. In his recusal statement, Wehrum failed to disclose at least three former clients that he previously represented in court – the Alliance of Automobile Manufacturers; the Minnesota Trucking Association; and the Minnesota Automobile Dealers Association.

If an agency's designated ethics official is not made aware of potential conflicts by a political appointee, the recusal statement approved by the official may be both incomplete and inadequate. Wehrum's recusal statement does not list at least three recent former clients he represented in litigation: the Alliance of Automobile Manufacturers; the Minnesota Trucking Association; and the Minnesota Automobile Dealers Association.

In 2015, a number of entities challenged a Minnesota law related to biofuels. In 2016, Wehrum filed a brief in the case along with five other lawyers – including two from Hunton – where they were listed as "Attorneys for Plaintiffs Minnesota Trucking Association, Minnesota Automobile Dealers Association, Alliance of Automobile Manufacturers, American Petroleum Institute, and American Fuel & Petrochemical Manufacturers."[143]

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[137] *Id.*

[138] *See generally* 5 C.F.R. § 2635.502.

[139] *Id.* § 2635.502(a).

[140] *Id.* § 2635.502(a)(1).

[141] *Id.* § 2635.502(a)(2).

[142] Letter from Kevin S. Minoli, Designated EPA Ethics Official, to Sen. Sheldon Whitehouse, at 1 (Sept. 29, 2016) ("To date, Mr. Wehrum has not received any waivers or authorizations issued pursuant to Executive Order 13770, 18 U.S.C. § 207(b)(1), or 5 C.F.R. § 2635.502(d).").

[143] *See, e.g.*, Mem. of Law in Support of Mot. For Partial Summary Judgment, Doc. 47 at *27, *Minn. Trucking Ass'n et al. v. Stine et al.*, No. 15-cv-2045-JRT-KMM (D. Minn. Sept. 29, 2016) (listing Wehrum and five other lawyers, including two others from Hunton, as "Attorneys for Plaintiffs Minnesota Trucking Association, Minnesota

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Wehrum's recusal statement includes the latter two plaintiffs (American Petroleum Institute and the American Fuel & Petrochemical Manufacturers), but not the other three. Accordingly, there was no way for the EPA air office employees identified in Wehrum's recusal statement to properly screen him from participating in meetings with those clients. As described below, Wehrum has in fact met with one of those undisclosed former clients in a manner that appears to violate the Ethics Pledge and the Ethics in Government Act regulations.

In addition to Wehrum's undisclosed clients, both Wehrum's and Harlow's recusal statements acknowledge that they each have "confidential" clients whose identities they contractually cannot disclose. However, only Harlow's recusal statement further acknowledges that, with respect to "clients who are not listed," he has a personal obligation "not to participate in specific party matters for the duration of my ethics obligation."[144] Wehrum's recusal statement includes no such acknowledgment.

c. Wehrum had at least six meetings with one of his undisclosed clients, the Alliance of Automobile Manufacturers, in violation of the Trump Ethics Pledge and potentially in violation of Ethics in Government Act regulations.

Wehrum had at least six meetings with one of his undisclosed clients, the Alliance of Automobile Manufacturers, including giving a speech before its board. This appears to violate Ethics in Government Act regulations and the Trump Ethics Pledge. Wehrum did not receive an ethics waiver for any of these meetings, and because none of them were "open to all interested parties," they thus appear to have been impermissible even if Wehrum only spoke about generally applicable regulations affecting his former client's interests.

Specifically, according to records obtained via FOIA and the EPA website, Wehrum met with his undisclosed client the Alliance for Automobile Manufacturers on:

- **Nov. 27, 2017,** with one other entity, to discuss fuel economy and greenhouse gas standards;
- **Dec. 27, 2017,** "to meet some of the Auto Alliance Board members";
- **Feb. 21, 2018**, with some of his former client's (current) lawyers and lobbyists, to discuss fuel economy and greenhouse gas testing;
- **Apr. 16, 2018**, to discuss an unknown topic alone with his former client;

Automobile Dealers Association, Alliance of Automobile Manufacturers, American Petroleum Institute, and American Fuel & Petrochemical Manufacturers").

[144] *Compare* Harlow recusal at 2 nn.1–2 ("For my former clients who are not listed, I understand that I am personally obliged not to participate in specific party matters for the duration of my ethics obligations."), *with* Wehrum recusal at 2 n.1 (acknowledging the existence of two "confidential clients" without offering the same assurances).

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- **May 22, 2018**, to discuss an unknown topic alone with his former client;
- **May 23, 2018**, to discuss fuel economy standards alone with his former client; and
- **July 16, 2018**, with one other entity, to discuss a model year 2020 fuel economy testing extension related to fuel without ethanol.

Because all of these meeting were either solely with his former client and its representatives, or with just one other entity, they were not "open to all interested parties" and thus violated the Trump Ethics Pledge. The Pledge prohibits Wehrum and Harlow from having any meetings or communications relating to the performance of their official duties with Hunton or their former clients, or from "participating in any particular matter involving" Hunton or their former clients.[145]

Depending on the subject matter discussed at these meetings, which is unknown, the meetings may also have violated Ethics in Government Act regulations.

d. Wehrum and possibly Harlow appear to have artificially – and perhaps improperly – limited their list of former clients from which they are recused.

As noted above, UARG was not incorporated, appears to hold no legal status, and was founded by Hunton. The organization appears to have existed only on paper as part of a coordinated effort by its members to influence EPA through legal services provided by Hunton.

As lawyers admitted to practice in the District of Columbia, Wehrum and Harlow are subject to attorney ethics rules that define who constitutes their clients. Under those rules, "It is well established that neither a written agreement nor the payment of fees is necessary to create an attorney-client relationship."[146] But emails obtained under FOIA reveal that when Wehrum developed his list of former clients, he merely asked Hunton for "a list of all clients to whom I *billed time* for the past 24 months," and then used that Hunton-provided list as the basis for his recusal obligations.[147]

By limiting his recusal list to only those "clients to whom [he] billed time," Wehrum's recusal statement may not include all entities with which he formed an attorney-client relationship. Particularly given Wehrum's management role as co-chairman of Hunton's environmental practice and leader of its administrative law group, he may have provided legal services to numerous additional "clients" who he did not bill directly.

Though Wehrum and Harlow recused themselves from certain meetings with representatives of "UARG," their recusal statements impose no limits on their involvement with the individual corporate members of UARG. Accordingly, the list of former clients from which they should be recused may

[145] Wehrum recusal at 2; Harlow recusal at 2.

[146] *In re Lieber*, 442 A.2d 153, 156 (D.C. 1982).

[147] *See* Maxine Joselow, *Air chief worried about conflicts of interest — emails*, E&E NEWS (Feb. 12, 2019) (emphasis added).

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be significantly under-inclusive, particularly since UARG is not incorporated and does not appear to have any other legal status.

This investigation determined that UARG and Hunton have repeatedly argued in court – successfully – that there is "an attorney-client privilege between *UARG members* and UARG's counsel, Hunton & Williams."[148] Their primary argument has been that Hunton and UARG enjoy an attorney-client relationship, and that information shared with UARG members as part of that relationship should be similarly protected from discovery under the "common interest" privilege. But in making those arguments, Hunton and UARG have repeatedly revealed that UARG was a mechanism for individual UARG-member entities to obtain legal advice useful in their day-to-day operations.

UARG has argued, for example, that it "was formed to advance the common legal interests of its members,"[149] that Hunton "provid[ed] legal services to UARG *and its members*,"[150] and that this work exposed Hunton to "confidential information from UARG *and its members*," who are constantly anticipating litigation" under the Clean Air Act.[151]

Similarly, Hunton has argued that a document it shared with UARG members "clearly falls within the attorney-client privilege" because it was about a court case with "ramifications for every *utility company* in the industry," and the document was akin to "advising [] clients about the prospects with respect to *their own potential liability*."[152] UARG, as an abstract group, has no Clean Air Act liability itself – only its individual, dues-paying members do.

An ethics opinion of the D.C. Bar states that although it is permissible for "individual subscribers" to pay a fee to an intermediary entity that entitles the subscriber to contact a law firm regarding legal matters, "the firm's client in each instance would be the subscriber and not [the intermediary]."[153]

Hunton has similarly argued that its work for UARG was not merely providing "general information and legal advice," but that UARG essentially operated as a vehicle for the UARG members to seek and receive legal advice about specific issues of concern to them.[154] In one enforcement case, for example, Hunton lawyers described various documents as containing conversations in which "UARG members" and Hunton lawyers "'agreed' to pursue certain legal strategies"; others describing

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[148] *See United States v. Duke Energy*, 2003 WL 25509097 (M.D.N.C. July 7, 2003) (emphasis added) (listing cases in which Hunton and UARG have successfully made that argument to withhold Hunton-UARG documents from discovery).

[149] UARG Opposition to Motion to Compel UARG to Comply with a Subpoena, *United States v. Duke Energy*, 1:02-mc-00480, at *2 (D.D.C.) (filed Dec. 18, 2002).

[150] *Id.* at *28 (emphasis added).

[151] *Id.* at *3 (emphases added)

[152] Def. Duke Energy Corp.'s Reply, *United States et al. v. Duke Energy Corp.*, 2003 WL 25509066 (M.D.N.C. Feb. 13, 2003) (emphasis added) (citing *Diaz v. Delchamps, Inc.*, 1997 WL 680602 (E.D. La. Oct. 31, 1997).

[153] D.C. Bar, *Ethics Opinion 225, Prepaid Legal Services* (Jan. 1992).

[154] *See, e.g.*, Def. Duke Energy's Reply in Support of its Mot. for Reconsideration, *United States v. Duke Energy*, 2003 WL 25509088 (M.D.N.C. June 6, 2003) (quoting excerpts from an internal UARG documents).

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"confidential and privileged discussions" with counsel present in which "UARG members" raised various "problems that arise"; and still other communications in which "UARG members" requested legal advice from Hunton via the UARG organization, and Hunton lawyers "respond[ed] to that request" with written legal opinions.[155]

At least three federal courts have protected UARG documents from discovery in enforcement matters involving UARG members.[156] In a 2003 enforcement case involving Ohio Edison, a subsidiary of former UARG member FirstEnergy, a federal court considered whether certain documents in Ohio Edison's possession were created by Hunton "in response to a request of legal advice from UARG *or any of its members*."[157] The court explained that there "is no dispute that Hunton & Williams is legal counsel to UARG and may be consulted *by UARG members* for legal advice on issues which are common to some or all of the members," including on "issues relating to *whether UARG members are in compliance with federal environmental regulations* and whether those regulations apply to *specific projects being considered by the members* . . . "[158] The court concluded that Hunton "clearly generated these memoranda in response to an ongoing relationship involving the rendition of legal advice *at the request of UARG's members*," and that those communications "would at least arguably reveal client confidences, including the types of subjects about which *the UARG members sought legal advice*."[159] The court upheld Hunton and UARG's claims of privilege.

Hunton has maintained a similar position as late as 2012,[160] as Hunton and continued to characterize its UARG work as "providing legal services to UARG *and its members*," and should thus be considered attorney-client privileged from discovery in Clean Air Act enforcement matters against UARG members – in that case, Duke Energy.[161]

Substantial public evidence indicates that UARG members paid their hefty dues in part to receive individualized legal advice and communications from Hunton attorneys, possibly including Wehrum and Harlow. For example, media obtained a copy of the most recent UARG "membership agreement" for the Tennessee Valley Authority (TVA).[162] That 2015 agreement[163] states that Hunton

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[155] *Id.*

[156] *Id.* n.1 (listing *United States v. Ohio Edison Co., et al.,* Case No. C2-99-1181 (S.D. Ohio Jan. 6, 2003) (denying motion to compel UARG documents) (J. Kemp); *United States v. Illinois Power,* Civil Action No. 99-CV-833-MJR (S.D. Ill. April 24, 2003) (J. Proud) (denying motion to compel UARG documents); and *United States v. Illinois Power,* Civil Action No. 99-CV-833-MJR (S.D. Ill. May 19, 2003) (J. Reagan denying Government's motion for reconsideration)).

[157] *See* Opinion and Order, *United States v. Ohio Edison Co.*, No. C2–99–1181 at *3–4 (S.D.Ohio Jan. 6, 2003) (J. Kemp).

[158] *Id.* at *3–4 (emphasis added).

[159] *Id.* at *7 (emphasis added).

[160] *See United States v. Duke Energy Corp.*, No. 1-cv-1262, 2012 WL 1565228, at *12 (M.D.N.C. Apr. 30, 2012).

[161] Defendant Duke Energy's Reply to the United States Opposition to Duke Energy's Cross-Motion for Protective Order Regarding UARG, 2003 WL 25509066 (M.D.N.C. Feb. 12, 2003).

[162] *See* Sean Reilly, *TVA defends its role in trade group*, E&E News, May 7, 2019.

[163] TVA-UARG contract, Mar. 10, 2015 (emphasis added).

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"serves as counsel to UARG *and its members*" on CAA matters, that Hunton would "provide necessary legal advice to UARG *and its members, including TVA*," and that the information exchanged "among UARG members and its counsel . . . are developed in anticipation of litigation [i.e., attorney work product] and/or constitute attorney-client communications for the purpose of obtaining advice from UARG counsel."[164] The agreement further contemplates that, "as a member of UARG," TVA "may have communications" with Hunton that are "privileged and confidential."[165]

And even in 2017, mere months before Wehrum left Hunton to join EPA, some of UARG's designated "legal" costs went to Hunton to pay for "communications with UARG members"[166] and "responding to members' questions"[167] – questions and communications that Hunton would argue in court are subject to attorney-client privilege.

Further evidence indicates that Hunton and individual UARG members even discussed the matter of payment. An internal UARG document proposes that Hunton would be paid for "[c]ommunications *with individual UARG members* concerning their membership plans for 2018 and the likely level of members' dues for 2018."[168] Although the Hunton may not have "billed time" directly to UARG members, when UARG members then paid those "dues" discussed with Hunton, 97.7% of the total "dues" went to Hunton for legal services.

In the UARG membership agreement documents, the collection of fees from UARG's member entities, and in court filings, Hunton has maintained that both UARG and its individual members create various privileged relationships with the law firm, including in some cases an attorney-client privilege. Under these circumstances, Wehrum's and Harlow's former clients included not only UARG, which has no apparent legal status, but also its individual members. By omitting the full list of UARG members from their list of former clients, Wehrum and Harlow appear to be frustrating – or violating – their ethical obligations.

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[164] *Id.* at 1.

[165] *Id.* at 3.

[166] *See, e.g.*, Leaked UARG Policy Committee document at 13 (request to pay Hunton for "communications with UARG members" regarding potential EPA changes to greenhouse gas rules for new and existing coal-fired power plants).

[167] *See, e.g.*, *id.* at 20 (request to pay Hunton for "responding to members' questions" regarding regional haze requirements).

1. [168] Leaked UARG Policy Committee document at 26 ("PLANNING/GENEAL COORDINATION").

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e. Wehrum has repeatedly met with clients he would worked with in private practice – actions that appear to have violated the intent of the Trump Ethics Pledge and Wehrum's own ethics agreement.

Shortly after Bill Wehrum assumed control of the EPA air office, his former law partner, Makram B. Jaber, emailed to invite him "to speak to our group regarding air regulations and regulatory outlook."[169] Nominally, the presentation to "our group" would be on "behalf" of five entities – UARG, plus four UARG members: American Electric Power, Southern Company, Duke Energy, and Dominion Energy. Of those five, Wehrum's recusal statement (which he only agreed to sign ten months later) makes clear that he was recused from individual meetings or communications relating to his EPA work with three of them: UARG, Duke Energy, and Dominion Energy.[170] Wehrum eventually gave that invitation-only briefing on December 7, 2017, less than three weeks after assuming his new role at EPA.

The fact that Hunton partner Makram B. Jaber stated that the meeting was on behalf of five entities is notable. Although Wehrum and Harlow are forbidden by the Trump Ethics Pledge – and by their recusal statements incorporating the Pledge – from meeting in private with any *single* former employer or client, there is a limited exception for events "open to all interested parties," a phrase that means "*five or more* stakeholders," representing a diversity of viewpoints "even if *one* of the stakeholders is a former employer or former client."[171]

With respect to the December 7, 2017 meeting at Hunton, circumstantial evidence indicates that Jaber's characterization of the entities attending may have been a pretense for Wehrum to maintain that the meeting was "open to all interested parties" because there were *exactly five* entities invited, and thus he could argue that his recusal obligations did not apply. Indeed, when confronted about this meeting, Wehrum appeared to believe that it was immaterial that the event would be hosted at and by Hunton, his former employer, and believed it immaterial that the event was being held on behalf of his former clients UARG and four companies that were *also UARG members* – including two, Duke Energy and Dominion, that were former Wehrum clients in their own right. Indeed, Wehrum has stated that it would have been permissible for him to discuss EPA matters behind closed doors with *just his former clients present* – provided there were at least five former clients.[172]

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[169] Email from Jaber Makram to Bill Wehrum, "Invitation to speak," Nov. 21, 2017 (6:21 AM). Mr. Jaber was subsequently named co-leader of Hunton's environmental team.

[170] Wehrum recusal at 2.

[171] Memorandum from Robert I. Cusick, Dir. of U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, DO-09-011, at 1–2 (Mar. 26, 2009) (explaining the meaning of the phrase "open to all interested parties"); Legal Advisory from David J. Apol, General Counsel of U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, LA-17-02, at 1 (Feb. 6, 2017) ("With respect to [President Trump's] Executive Order 13770, ethics officials and employees may continue to rely on OGE's prior guidance regarding [President Obama's] Executive Order 13490 to the extent that such guidance addresses language common to both orders").

[172] Juliet Eilperin, *EPA regulator skirts the line between former clients and current job*, WASH. POST, Feb. 25 ("[Wehrum] said he has concluded that his meetings comply as long as five entities participate. And, he said, it does not matter how many of those entities are former clients.").

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Such an argument represents an absurd interpretation of these ethics rules. The "open to all interested parties exception" applies to events that "do not raise concerns about special access."[173] A closed-door meeting at Wehrum's former employer, where the only invitees are Wehrum's former clients and those represented by Wehrum's former employer, is perhaps a paradigmatic example of a case of "special access."

Second, evidence does not substantiate that five stakeholders were actually present. Rather, evidence suggests this December "meeting" was a pre-planned meeting of UARG, in which case under Wehrum's view of "UARG" as his single client, all members present should have been treated as "UARG" – not a collection of independent companies. Internal UARG documents obtained by Politico reference a planned "December 2017 UARG Policy Committee meeting," at which UARG would recommend and vote upon a 2018 budget.[174] That document was itself prepared in advance of a two-day UARG Policy Committee meeting in June 2017, and the meeting that Makram Jaber invited Wehrum to speak at also spanned two days – December 7 and 8.[175] Notably, this double-counting of UARG members as distinct from "UARG" conflicts with Wehrum and Harlow's treatment of UARG members for purposes of defining their former clients: The UARG members are treated as distinct from UARG for purposes of determining whether a meeting is "open to all interested parties," but the companies are indistinguishably lumped together as "UARG" for purposes of escaping individual designation as former clients (see Section 2.d of this report). Wehrum and Harlow cannot have it both ways: Either UARG is a collection of companies, in which case they should have been recused from meeting with them all, or UARG is a single group, in which case this was a meeting with a single client that violated the Trump Ethics Pledge.

Regardless, Wehrum stated that he did not consult with agency ethics personnel about the propriety of the meeting,[176] *despite his schedule showing that he met with ethics officials from 2:00–2:30pm that day, immediately before leaving EPA for Hunton at 2:30pm.*
Wehrum's briefing, obtained via FOIA, was titled, "Clean Air Act: Update on Stationary Source Regulations."[177] Among other issues, Wehrum discussed with his former clients and law partners:

- EPA's proposal to repeal the Clean Power Plan, and his intention to seek information from the public about a replacement that accords with legal interpretations advocated by Hunton;[178]
- EPA's ongoing review of greenhouse gas standards for new coal-fired power plants;[179]

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[173] Memorandum from Robert I. Cusick, Dir. of U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, DO-09-011 (Mar. 26, 2009).

[174] Leaked UARG Policy Committee document at 4.

[175] Email from Jaber Makram to Bill Wehrum, "Invitation to speak," Nov. 21, 2017 (6:21 AM).

[176] Juliet Eilperin, *EPA regulator skirts the line between former clients and current job*, Wash. Post (Feb. 25, 2019).

[177] Wehrum presentation at Hunton at slide 1.

[178] *See id.* at slide 4.

[179] *Id.*

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- Legal challenges to the Mercury and Air Toxics Standards (MATS) Rule, including the ongoing *Murray Energy v. EPA* case being litigated by Hunton;[180]

- EPA's ongoing work to determine which areas of the country are meeting the 2015 National Ambient Air Quality Standards (NAAQS) for ozone;[181]

- EPA's progress reviewing state regional haze plans, and state haze plans currently subject to ongoing litigation[182] – at least some of which was litigation by Hunton attorneys on behalf of UARG;[183]

- Various "Permitting Actions Underway" with implications for major sources of air pollution such as power plants.[184]

Immediately afterwards, Wehrum did a "Q&A" session with his former clients and other participants.[185] There is no public record of what questions Wehrum's former clients and law partners asked him, nor what his answers were.

In addition to the December 7, 2017 meeting at UARG's office, a review of Wehrum's calendar information shows that he has continued to meet in an official capacity with UARG members, including in at least eight meetings open to fewer than five entities. For those meetings held as of September 29, 2018, Wehrum had not received any waiver from EPA's ethics officials.[186] It is unknown whether he obtained waivers before any of the subsequent meetings.

In all, at least 10 different UARG members who arguably should have been included on Wehrum's list of recused former clients were able to gain private access to him when he served at EPA: American Electric Power; Dominion Energy; Duke Energy; Minnesota Power; Otter Tail Power; Southern Company; the American Coalition for Clean Coal Electricity; the Edison Electric Institute; the National Mining Association; and the National Rural Electric Cooperative Association.

A review of Wehrum's November 2017 through May 2019 calendar information – culled from FOIA productions and EPA's website – indicates the following meetings:

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[180] *Id.* at slide 5.

[181] *Id.* at slide 6.

[182] *Id.* at slides 12–13 (noting states with ongoing litigation).

[183] *See, e.g., Texas et. al v. EPA*, 829 F.3d 405 (5th Cir. 2016) (Hunton attorneys Norman W. Fichthorn and Aaron M. Flynn representing UARG).

[184] Wehrum presentation at Hunton at slide 15.

[185] *Id.* at slide 16 ("Q&A"); Makram Jaber, "Event Information Form" at 1 (showing there would be time for "Q&A" moderated by Andrea Field, a Hunton partner).

[186] Letter from Kevin S. Minoli, Designated EPA Ethics Official, to Sen. Sheldon Whitehouse, at 1 (Sept. 29, 2016) ("To date, Mr. Wehrum has not received any waivers or authorizations issued pursuant to Executive Order 13770, 18 U.S.C. § 207(b)(1), or 5 C.F.R. § 2635.502(d).").

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- **Dec. 7, 2017:** Wehrum met at the offices of his former employer Hunton, for a private speech before his former client "UARG," as well as four UARG members: American Electric Power, Duke Energy, Dominion, and Southern Company.

- **Jan. 10, 2018:** Wehrum met alone with UARG member the American Coalition for Clean Coal Electricity.

- **Jan. 12, 2018:** Wehrum met alone with UARG member the National Mining Association and its attorneys to discuss the Clean Power Plan, New Source Review, and Ozone Transport – all regulations that UARG proposed weakening.

- **Jan. 24, 2018:** Wehrum met with UARG member the Edison Electric Institute (EEI) to discuss the Mercury and Air Toxics Standards. In attendance on behalf of EEI was John McManus, an American Electric Power employee who chaired UARG's "Policy and Steering Audit" Committee in 2017, as well as representatives from UARG members Duke (from which Wehrum is recused), Ameren, FirstEnergy, and Southern Company. Also in attendance was a representative from Berkshire Hathaway Energy, a member of Hunton's CCS Alliance.

- **March 30, 2018:** Wehrum met alone with UARG member the National Rural Electric Cooperative Association.

- **May 30, 2018:** Wehrum met alone with UARG member the Edison Electric Institute to discuss the Clean Power Plan, Mercury and Air Toxics Standards, Regional Haze, and other matters.

- **July 9, 2018:** Wehrum met alone with UARG member the American Coalition for Clean Coal Electricity.

- **Nov. 28, 2018:** Wehrum met with the "Lignite Energy Council," including representatives from UARG members Otter Tail Power Co. and Minnesota Power.

- **Dec. 11, 2018:** Wehrum met alone with UARG member the National Rural Electric Cooperative Association.

The Trump EPA has not released any information about Harlow's schedule, and this investigation was thus unable to determine whether he met with any former clients or UARG members.

In addition, Wehrum also appears to have held meetings in apparent violation of ethical rules with former clients who he acknowledged the existence of and agreed not to meet with.

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Specifically, as Senator Whitehouse noted[187] in letters to President Trump and Andrew Wheeler, Wehrum held two closed-door meetings with his former client General Electric (which is also a member of the Air Permitting Forum) in early 2018 that were not "open to all interested parties," thus violating the prohibition on participating in "any meetings or communications relating to the performance of [his] official duties," even regarding matters of general applicability.

The first meeting, on January 23, 2018, had only one additional entity present (Boeing), and thus did not satisfy the exception for being "open to all interested parties." The second meeting, on January 26, 2018 was with General Electric alone. The purpose of these small meetings with his former client is unknown. Depending on the subject matter discussed at these meetings, which is unknown, the meetings may also have violated Ethics in Government Act regulations.

Wehrum had additional meetings with General Electric representatives that appear to have included representatives of more than five other entities, on November 27, 2017 (with various members of the Association of Home Appliance Manufacturers) and on April 10, 2018 (with various members of the Gas Turbine Association).

[187] https://www.whitehouse.senate.gov/news/release/whitehouse-calls-out-wehrum-for-flaunting-trump-ethics-pledge

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APPENDICES

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APPENDIX 1: Utility Air Regulatory Group

Topic	Sub-topic	UARG's position	Trump EPA's position
Air Toxics	**MATS 2016 Supplemental Finding that it is "appropriate and necessary" to regulate mercury and other toxic air pollution from power plants under CAA section 112.**	**2011: Harlow** writes nearly 300 pages of comments opposing the MATS proposal, including that "Regulation of [power plants] Under § 112(n)(1)(A) Is Neither 'Appropriate' Nor 'Necessary'" **2016:** Argued the Obama EPA should not have found that it is "appropriate and necessary" to regulate toxic air pollution from power plants under CAA section 112.[188] "UARG" asked its members to pay money to finance Hunton's legal challenge to this Obama EPA finding.[189]	**2017:** At a closed-door session held for UARG's benefit, Wehrum discussed MATS legal challenges, including the case Hunton itself was litigating against EPA.[190] **2019:** Wehrum signed proposal to reverse the Obama EPA finding, concluding instead that "it is not appropriate and necessary" to regulate toxic air pollution from power plants under CAA section 112.[191]
Air Toxics	**MATS 2016 Supplemental Finding's treatment of co-benefits**	**2016:** While at Hunton, Wehrum stated that, "[If] you look at the benefits generated by the hazardous air pollutant reductions [the MATS] rule would achieve, the costs vastly outweigh the benefits. So from our perspective, it's a regulation that made no sense and wasn't justified."[192] UARG argued in court that, when determining whether it is "appropriate and necessary" to regulate toxic air pollution from power plants under CAA section 112, the Obama EPA should not have considered co-benefits of reducing particulate matter (PM) because PM is "addressed under . . . the § 109 NAAQS program."[193] Wrote that reductions in co-benefits constitute the "overwhelming majority" of the MATS rule benefits.[194]	**2019:** Wehrum signed proposal to "reconsider" Obama EPA finding in part on the basis that co-pollutants are "already addressed" by the NAAQS program.[195] Focused in proposal on the fact that "these projected [PM] co-benefits comprised the overwhelming majority (approximately 99.9 percent" of the monetized benefits of MATS . . . ."[196]

[188] UARG brief challenging the 2016 MATS Supplemental Finding.
[189] Leaked UARG Policy Committee document at p. 19.
[190] Wehrum presentation at Hunton at 5.
[191] 84 Fed. Reg. 2670, 2674 (Feb. 7, 2019).
[192] Juan Carlos Rodriguez, *Environmental Group Of The Year: Hunton & Williams*, LAW360, Jan. 5, 2016 (5:57 PM EST).
[193] UARG brief challenging the 2016 MATS Supplemental Finding at 47.
[194] UARG brief challenging the 2016 MATS Supplemental Finding at 21.
[195] 84 Fed. Reg. at 2677.
[196] 84 Fed. Reg. at 2676.

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Topic	Sub-topic	UARG's position	Trump EPA's position
Air Toxics	**MATS Residual Risk & Technology Review to determine whether to require additional health- or environmental-based controls on power plants**	**2011:** "HAP emissions from coal-fired EGUs pose insignificant risks to human health and ecological resources," and on that basis should be de-listed.[197] **2017:** UARG seeks dues from its members to pay Hunton to "Coordinate with EPRI regarding eventual residual risk and technology review (RTR) of MATS rule," which could have imposed additional controls on power plants beyond the MATS rule's MACT standards.[198] In the past, UARG had used EPRI analyses in August 2011 to argue that coal-fired power plants do not pose a legally significant cancer risk, and would not hurt the environment.[199]	**2019 (Wehrum's signed proposal):** "Considering all of the health risk information and [relevant] factors . . . Including the uncertainties . . . the EPA proposes that the risks are acceptable" for HAP emissions from coal- and oil-fired power plants.[200] No additional health- or environmental-based controls should be required: "we are proposing that the current MATS requirements provide an ample margin of safety to protect public health," and "it is not necessary to set a more stringent standard to prevent . . . an adverse environmental effect."[201]

[197] UARG comments at 18. Although this comment urged that power plants be entirely removed from regulation under CAA section 112, the scientific arguments advanced are similar to those in a residual risk and technology review.
[198] Leaked UARG Policy Committee document at p. 19.
[199] UARG comments at 5-14.
[200] 84 Fed. Reg. at 2700.
[201] 84 Fed. Reg. at 2700.

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Topic	Sub-topic	UARG's position	Trump EPA's position
Air Toxics	**Withdrawal of "Once In, Always In" (OIAI) policy requiring major sources to continue meeting stringent limits**	**2007:** "EPA's 'once-in-always-in' policy adds a temporal condition to source classification that is not found in the CAA or in EPA's § 112 regulations."[202] Withdrawal of the OIAI policy would be "consistent with language [sic] and structure of the CAA and should be adopted."[203] Withdrawal of the OIAI policy "must be addressed by rulemaking, not by issuance of a guidance memorandum."[204] **2019:** UARG – joined by APG, AIF and NEDACAP (four Hunton lawyers total) – intervene in lawsuit defending Wehrum's withdrawal of the OIAI policy.[205] Made same 3-part argument that EPA does: (1) "The Wehrum Memo is not subject to judicial review at this time," and (2) alternatively, "The Wehrum Memo implements the CAA's plain language," but (3) asked for "remand should the Court find statutory ambiguity."[206]	**2018 (Wehrum memo):** "Congress placed no temporal limitations on the determination of whether a source emits or has the [potential to emit air toxics] in sufficient quantity to qualify as a source. To the extent the OIAI policy imposed such a temporal limitation . . ., EPA had no authority to do so under the plain language of the statute."[207] "Nothing in the structure of the CAA counsels against the plain language reading" advanced by Wehrum.[208] **2019:** EPA files brief arguing that, (1) "The 2018 Guidance is neither a legislative rule nor final agency action," and thus cannot be directly challenged, (2) alternatively, "EPA's plain language reading of the statute should be upheld," but if it's not clear from the plain text then (3) "EPA must be given the first opportunity to consider how best to resolve that ambiguity."[209] **June 2019:** EPA proposes rule to codify the Wehrum memo. "We are proposing to make clear in this rulemaking [such sources] will not be subject to the CAA section 112 requirements applicable to the source as a major source . . . ."[210]

[202] UARG comment on OIAI proposal at 2.
[203] *Id.* at 3.
[204] *Id.* at 1.
[205] California Communities Against Toxics v. EPA, 18-1085 (D.C. Cir.) (briefs for Hunton-aligned groups filed in January 2019 in Feb. 2019).
[206] UARG OIAI brief, 2019 WL 858013.
[207] Wehrum OIAI memo at 3.
[208] *Id.* at 4.
[209] EPA OIAI brief, 2019 WL 858006.
[210] https://www.epa.gov/sites/production/files/2019-06/documents/frn_mm2a_proposal_and_reg_text_6_25_19.pdf

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Topic	Sub-topic	UARG's position	Trump EPA's position
Climate	**GHG NSPS for new power plants; decision to base the "best system of emission reduction" (BSER) for power plants in part on what can be achieved using partial carbon capture and storage (CCS) technology**	**2012 (Wehrum):** "There is no doubt that CCS [carbon capture and storage] cannot possibly be considered to be the BSER [best system of emission reduction] at the present time . . . ."[211] **2014:** "CCS has not been shown to meet the CAA's criteria for determining whether technology has been adequately demonstrated."[212] **2015:** "[O]perational experience to date at Boundary Dam does not support finding that CCS is adequately demonstrated or that it is the BSER for coal-fired EGUs."[213] **2017:** UARG files briefs in lawsuit challenging the Obama EPA rule. UARG sought dues from its members for "preparation of a possible replacement" of the Obama EPA rule.[214] **2019:** "UARG supports EPA's proposed finding that neither 'full' nor 'partial' CCS constitutes the BSER for new coal-fired EGUs."[215]	**2017:** "EPA . . . is reviewing the [2015 Rule] and, if appropriate, will as soon as practicable and consistent with law, initiate reconsideration proceedings to suspend, revise or rescind the rule."[216] **2018:** "EPA is proposing to revise its [2015] analysis and determine that CCS is not adequately demonstrated . . . ."[217] "[T]he EPA proposes to revise to the BSER . . . . The primary reason for this proposed revision is the high costs and limited geographic availability of CCS."[218] "While the carbon capture technology at the Boundary Dam is currently operating, that project experienced multiple issues with [the CCS technology] during its first year of operation . . . . EPA solicits comment on whether Boundary Dam's first-year operational problems cast doubt on the technical feasibility of fully integrated CCS."[219] ***Wehrum*:** "Today's actions reflect our approach of defining new, clean coal standards by data and the latest technological information, not wishful thinking."[220]

[211] Comments of Bill Wehrum et al. for UARG, Docket Id. No. EPA-HQ-OAR-2011-0660-9995, at 77 (June 25, 2012).
[212] UARG Comments, Docket Id. No. EPA-HQ-OAR-2013-0495-9666, at 41–42 (May 9, 2014).
[213] UARG petition for reconsideration, Docket Id. No. EPA-HQ-OAR-2013-0495-11894, at 5 (Dec. 22, 2015).
[214] Leaked UARG Policy Committee document at 13.
[215] UARG comments, Docket Id. No. EPA-HQ-OAR-2013-0495-12621, at 14 (Mar. 18, 2019).
[216] 82 Fed. Reg. 16330 (Apr. 4, 2017).
[217] 83 Fed. Reg. at 65441 (Dec. 20, 2018).
[218] *Id.* at 65426.
[219] *Id.* at 65444.
[220] https://www.epa.gov/newsreleases/epa-proposes-111b-revisions-advance-clean-energy-technology

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Topic	Sub-topic	UARG's position	Trump EPA's position
Climate	**Clean Power Plan; determination of the "best system of emission reduction" (BSER) for reducing GHGs from power plants**	**2014:** "A standard of performance under section 111 must be achievable for individual sources based on measures the source's owner can integrate into the design or production process of the source itself."[221] "[T]he plain text of section 111 of the CAA establishes a program that is focused on reducing the rate of emissions . . . through the application of systems that can be integrated into the design or operation of the source itself."[222] "Likewise, the CAA's other similar programs . . . are limited to measures incorporated into the design or production processes of individual sources."[223] **2017:** "Any replacement or revision to the Clean Power Plan under CAA § 11(d) must . . . be based on a 'best system of emission reduction' that can be applied at the individual [sources] subject to the rule . . . "[224]	**2017:** "[T]he Agency proposes to return to a reading of CAA section 111(a)(1) (and its constituent term, 'best system of emission reduction') as being limited to emission reduction measures that can be *applied to or at* an individual stationary source. That is, such measures must be based on a physical or operational change to a building, structure, facility, or installation at that source, rather than measures that the source's owner or operator *can implement on behalf of* the source at another location."[225] This "source-specific approach" includes measures "integrated into its design or operation."[226] **2019:** The word "system" is "limited to lower-emitting processes, practices, designs, and add-on controls that are applied at the level of the individual facility."[227]

[221] UARG CPP comments, Docket Id. No. EPA-HQ-OAR-2013-0602-22768, at 17 (Dec. 1, 2014).
[222] *Id.* at 28.
[223] *Id.* at 36.
[224] UARG comments, Docket Id. No. EPA-HQ-OA-2017-0190-40140, at 5 (May 12, 2017).
[225] 82 Fed. Reg. 48035, 48309 (Oct. 16, 2017).
[226] *See* 82 Fed. Reg. at 48037.
[227] Repeal of Clean Power Plan at 99 (July 19, 2019) (pre-publication).

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Topic	Sub-topic	UARG's position	Trump EPA's position
Climate / permitting	**Clean Power Plan; exemption from New Source Review (NSR) permitting requirements**	**2007:** "UARG members strongly support EPA's proposal to adopt an hourly emissions increase test as a threshold requirement for what is a 'modification' under the NSR program . . . ."[228] **2014:** "EPA's failure to account for the potential cost of NSR—and NSR uncertainty" in the Clean Power Plan is unlawful.[229] **2018:** "Adopting a maximum hourly emission rate increase threshold test for major modifications will promote the safe, reliable, and efficient operation of [power plants]. * * * UARG supports the proposed scope of EPA's revisions to the NSR applicability test . . . ."[230]	**2017:** "We are interested in actions that be taken to harmonize and streamline the NSR applicability and/or the NSR permitting process with a potential new rule. * * * What rule or policy changes or flexibilities can EPA provide as part of the NSR program that would enable [power plants] to . . . not trigger major NSR permitting while maintaining environmental protections? * * * What other approaches would minimize the impact of the NSR program on the implementation of [greenhouse gas standards for power plants]?"[231] **2018:** "EPA is proposing to amend the NSR regulations to include an hourly emissions increase test for [power plants]."[232] "EPA has historically not considered the costs of complying with other CAA programs, like NSR, when determining BSER for a source category under section 111. * * * However, due to the nature of the electric utility industry and the types of candidate control measures being considered in this proposal, it may be appropriate to consider NSR compliance costs in this instance."[233]

[228] UARG NSR comments, Docket Id. No. EPA-HQ-OAR-2005-0163-0319, at 3 (Aug. 8, 2007).
[229] UARG CPP comments, Docket Id. No. EPA-HQ-OAR-2013-0602-22768, at 177 (Dec. 1, 2014).
[230] UARG ACE comments, Docket Id. No. EPA-HQ-OAR-2017-0355-24421, at 99 (Oct. 31, 2018).
[231] 82 Fed. Reg. 61507, 61519 (Dec. 28, 2019) (ANPR).
[232] 83 Fed. Reg. 44746, 44780 (Aug. 31, 2018) (proposal).
[233] *Id.* at 44777.

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Topic	Sub-topic	UARG's position	Trump EPA's position
Climate	**Emission guidelines for methane from existing landfills, and EPA's authority to revise such guidelines**	**2015:** Opposes updates to landfill emission guidelines because EPA "lacks authority under the CAA to revise the emission guidelines to make them more stringent."[234]	**2017:** Pruitt delays effective date of the rules, but this is struck down in court. **2018:** EPA asks court to hold litigation challenging the landfill rule "in indefinite abeyance" while the agency reconsiders the rule.[235]
NAAQS	**Primary (health-based) SO2 NAAQS, and Trump EPA's decision not to strengthen it**	"UARG supports EPA's proposal to retain the primary SO_2 NAAQS without change."[236] "[T]he current NAAQS is more protective than was recognized when it was adopted. This means that the margin of safety is greater than was previously considered adequate."[237]	"[T]he Administrator has concluded that the current primary SO_2 standard is requisite to protect public health, with an adequate margin of safety, from effects of SO_X in ambient air and should be retained, without revision."[238] **Wehrum:** "[W]e have concluded that the existing standard continues to provide adequate health protection to our most vulnerable populations."[239]
NAAQS	**Primary (health-based) NO2 NAAQS, and Trump EPA's decision not to strengthen it**	"UARG supports the proposal to retain the primary NO_2 NAAQS . . . ."[240] "In fact, the present standards are even more protective than the Administrator recognizes."[241]	"EPA is retaining the current primary NO_2 standards, without revision."[242]

[234] UARG Comments, Docket Id. No. EPA-HQ-OAR-2014-0451-0198, at 1 (Oct. 26, 2015).
[235] Joint Motion to Govern Further Proceedings, *Nat'l Waste & Recycling Ass'n v. EPA*, No. 16-1372 (D.C. Cir. Apr. 3, 2018).
[236] UARG Comments, Docket Id. No. EPA-HQ-OAR-2013-0566-0207, at 2 (Aug. 9, 2018).
[237] UARG Comments, Docket Id. No. EPA-HQ-OAR-2013-0566-0207 at 10 (Aug. 9, 2018).
[238] 84 Fed. Reg. 9866, 9867 (Mar. 18, 2019).
[239] https://www.epa.gov/newsreleases/epa-retains-national-ambient-air-quality-standards-sulfur-dioxide
[240] UARG Comment, Docket. ID No. EPA-HQ-OAR-2013-0146-0150, at 1 (Sept. 25, 2017).
[241] *Id.* at 10.
[242] 83 Fed. Reg. 17226, 17227 (Apr. 18, 2018)

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Topic	Sub-topic	UARG's position	Trump EPA's position
NAAQS	**Review of ozone NAAQS, sidelining of independent science**	**May 2011**: "Recent research on morbidity effects" of ozone exposure "is inconsistent and unremarkable,"[243] and "recent research on mortality effects is inconsistent and inconclusive."[244] **Dec. 2011:** "EPA staff continues in [the draft Integrated Science Assessment] to present new research in a manner that suggests that the new science changes what was known previously about the effects of ozone exposure on public health. . . . This biased approach is highly inappropriate, contrary to the purpose of the NAAQS review process," and illegal.[245] **Aug. 2012:** "Unfortunately, EPA staff takes the same . . . biased approach" in the Third Draft ISA, again "present[ing] the recent research in a manner that suggested that the new science changes what was known" in 2008.[246] **Oct. 2012:** EPA's draft Health Risk and Exposure Assessment (HREA) for ozone pollution is "overly complex and inaccessible . . . 533 pages long and well over one-inch thick when printed double-sided."[247]	**April 2018:** Wehrum publicly advocates a faster NAAQS review process by "reducing some scientific advisory input and accepting data that is 'close enough' to justify a review rather than 'perfect,' . . . ."[248] **Oct. 2018:** EPA eliminates plans for an Ozone Review Panel, which would have provided expert scientific advice for purposes of considering whether to update the NAAQS.[249]

[243] UARG comment on draft Integrated Science Assessment, Docket Id. No. EPA-HQ-ORD-2011-0050-0009, at 6 (May 5, 2011).
[244] *Id.* at 21.
[245] UARG comment on Second External Review of the draft ISA, Docket Id. No. EPA-HQ-ORD-2011-0050-0031, at 6, (Dec. 30, 2011).
[246] UARG Comment on Third External Review of the draft ISA, Docket Id. No. EPA-HQ-ORD-2011-0050-0046, at 3 (Aug. 20, 2012).
[247] UARG comment, Docket Id. No. EPA-HQ-OAR-2008-0699-0096, at 8 (Oct. 12, 2012).
[248] *EPA Air Chief Plans To Speed NAAQS Reviews Using 'Close Enough' Data*, INSIDEEPA (Apr. 19, 2018).
[249] *See* Dino Grandoni & Juliet Eilperin, *EPA scraps pair of air pollution science panels*, WASH. POST (Oct. 13, 2018).

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Topic	Sub-topic	UARG's position	Trump EPA's position
NAAQS	**Startup, Shutdown, and Malfunction (SSM) Rule**[250]	**2013:** "UARG members have a significant, direct interest in EPA's proposal and the CAA interpretations on which it is based. * * * UARG disagrees that EPA has demonstrated that the identified SIP provisions are 'substantially inadequate.' * * * UARG also disagrees with many of the CAA interpretations that EPA suggests justify the proposed result."[251] **2016**: "EPA has not met its burden to justify a SIP call."[252] **2017:** "EPA should convene a proceeding to withdraw the SSM SIP calls by applying a SIP call standard that is consistent with its limited authority under the CAA and obligation to consider the impacts of its exercise of that authority."[253]	**Oct. 2018:** "Region 6 has received concurrence from the relevant office in EPA's Office of Air and Radiation to convene a proceeding for reconsideration of the Texas SIP call, the outcome of which may potentially entail Region 6 proposing an action inconsistent with EPA's interpretation in the 2015 SSM SIP Action when acting pursuant to the reconsideration of the Texas SIP call. * * * EPA will conduct notice-and-comment proceedings as part of that reconsideration process if the Agency proposes to change the Texas SIP call."[254] **Apr. 2019:** "[EPA Region 6] is considering an alternative interpretation regarding affirmative defense provisions in [SIPs] . . . that departs from the EPA's 2015 policy on this subject. * * * EPA Region 6 proposes to withdraw the 2015 determination that the Texas SIP is substantially inadequate . . . ."[255] **June 2019:** "[EPA] Region 4 is considering changing the finding . . . that certain SIP provisions in the North Carolina SIP are substantially inadequate to meet CAA requirements."[256]
NSR	**DTE "second-guessing"**	**2012:** "[T]he causation standard is whether the 'change' was the 'predominant cause' of the increase."[257]	**2017:** "Because increased emissions may be caused by multiple factors . . . the source must exercise judgment to exclude increases for which the project is not the 'predominant cause.'"[258]

[250] https://eelp.law.harvard.edu/2017/09/power-plant-startup-shutdown-and-malfunction-rule/
[251] UARG comments, Docket Id. No. EPA-HQ-OAR-2012-0322-0556, at 4 (May 13, 2013).
[252] Brief of UARG and other industry petitioners, *Walter Coke, Inc. v. EPA*, No. 15-1166, at 23 (D.C. Cir. Oct. 31, 2016).
[253] UARG comments, Docket Id. No. EPA-HQ-OA-2017-0190-40140, at 25 (May 12, 2017).
[254] Letter from Anne Idsall, Reg'l Admin'r, to Jon Niermann and Janis Hudson, at 2 (Oct. 16, 2018).
[255] 84 Fed. Reg. 17986, 17987 (Apr. 29, 2019).
[256] 84 Fed. Reg. 26031, 26036 (June 5, 2019).
[257] UARG brief at 20 (Feb. 27, 2015); UARG brief at 15 & n.8 (May 1, 2012).
[258] Memorandum from EPA Admin'r Scott Pruitt to Reg'l Administrators, *New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected Actual Applicability Test in Determining Major Modification Applicability*, at 7 (Dec. 7, 2017)..

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Topic	Sub-topic	UARG's position	Trump EPA's position
NSR	**Source aggregation**	**June 2010:** "[T]he final Aggregation Rule is a step in the right direction and should not be revoked."[259]	**Nov. 2018:** "On April 15, 2010, the EPA proposed to revoke the 2009 NSR Aggregation Action. After a review of the public comments . . . the EPA has now decided not to revoke the 2009 Aggregation Action."[260]
Interstate pollution	**Rejection of "section 126" petitions from downwind states**	**July 2018:** "UARG and UARG members have a strong, direct interest in supporting EPA's proposed denial of the section 126 petitions at issue in this proceeding."[261] "[E]ach of the petitions is insufficient to support a section 126(b) finding."[262] "Although the Administrator could, in his discretion, choose to undertake a separate analysis . . . section 126(b) does not obligate or direct the Administrator to conduct such an analysis."[263]	**Oct. 2018:** "Delaware's petition provides insufficient evidence of a requisite air quality problem with respect to the 2008 ozone NAAQS within the state."[264] "The EPA has no obligation to prepare an analysis to supplement a petition that fails, on its face, to include an initial technical demonstration. Such a petition, or a petition that fails to identify the specific finding requested, can be denied as insufficient." [265]
Interstate pollution	**CSAPR close-out**	**2018:** "EPA reasonably and properly concluded" that it would evaluate downwind conditions based on projected air quality in 2023, rather than a sooner date.[266]	**2018:** "EPA is finalizing a determination that 2023 is an appropriate future analytic year to evaluate remaining good neighbor obligations."[267]

[259] UARG Aggregation Rule comments, Docket Id. No. EPA-HQ-OAR-2003-0064-0157, at 2 (June 16, 2010).
[260] 83 Fed. Reg. 57324, 57324 (Nov. 15, 2018).
[261] UARG 126 comments, Docket Id. No. EPA-HQ-OAR-2018-0295-0077, at 3 (July 23, 2018).
[262] *Id.* at 11.
[263] *Id.* at 7.
[264] 83 Fed. Reg. 50444, 50456 (Oct. 5, 2018).
[265] 83 Fed. Reg. 50444, 50452 (Oct. 5, 2018).
[266] *See* UARG CSAPR Close-Out comments, Docket Id. No. EPA-HQ-OAR-2018-0225-0319, at 8 (Aug. 31, 2018).
[267] 83 Fed. Reg. 65878 (Dec. 21, 2018).

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Topic	Sub-topic	UARG's position	Trump EPA's position
Visibility	**Changes to weaken the Regional Haze Rule**	**Mar. 2017:** "UARG requests that EPA reconsider provisions of the [Regional Haze] Rule," including "Revisions to the 'reasonably attributable visibility impairment'. . . ."[268] **May 2017:** "EPA should reconsider and modify . . . provisions concerning the 'uniform rate of progress' and provisions addressing states' consultation processes . . . with federal land management agencies."[269] **June 2017:** UARG sought additional money from its members to pay Hunton for "[p]articipation as necessary . . . proceedings regarding implementation of the regional haze rules," and "[m]onitoring and reporting on EPA activities and guidance concerning regional haze requirements . . . ."[270]	**Jan. 2018**: "We intend to commence a notice-and-comment rulemaking in which we will address portions of the [Regional Haze] rule, including but not limited to the Reasonably Attributable Visibility Impairment provisions, the provisions regarding Federal Land Manager consultation and any other elements of the rule we may identify for additional consideration," which "will provide UARG and the public an opportunity to comment on the issues . . . ."[271] **Dec. 2018:** "This guidance document includes EPA's final recommendations on . . . methods for accounting for total international impacts to adjust the uniform rate of progress . . ."[272]
NAAQS	**Manipulating data from days with bad air quality, even *without* an "exceptional event" like wildfires or volcanoes**[273]	**2016:** "UARG recommends that EPA consider making the [Exceptional Events] Rule applicable to more circumstances than the Agency has proposed."[274]	**2019:** "[This] document identifies other determinations, actions, and analyses that are not covered by the scope of the Exceptional Events Rule, but for which the exclusion, selection, or adjustment of monitoring data may be appropriate and allowable under other sections of the Clean Air Act . . . and EPA rules or guidance."[275]

[268] UARG petition for reconsideration, Docket Id. No. EPA-HQ-OAR-2015-0531-0642, at 1 (Mar. 13, 2017).
[269] UARG comments, Docket Id. No. EPA-HQ-OA-2017-0190-40140, at 11–12 (May 12, 2017).
[270] Leaked UARG Policy Committee document at 20.
[271] Letter from Scott Pruitt, Admin'r, to Hunton counsel for UARG, Jan. 17, 2018.
[272] Memorandum from Richard Wayland to Reg'l Air Division Dirs., *Technical Guidance on Tracking Visibility Progress for the Second Implementation Period of the Regional Haze Program*, at 1 (Dec. 20, 2018).
[273] *See EPA Expands Air Data Waivers For 'Exceptional' Events, Sparking Criticism*, INSIDEEPA, Apr. 11, 2019.
[274] UARG comments, Docket Id. No. EPA-HQ-OAR-2013-0572-0161, at 1 (Feb. 3, 2016).
[275] U.S. EPA, Additional Methods, Determinations, and Analyses to Modify Air Quality Data Beyond Exceptional Events, EPA-457/B-19-002, at 1 (Apr. 2019).

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APPENDIX 2: The Air Permitting Forum and its sub-coalition, the Auto Industry Forum

Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
Climate	**Hydro-fluorocarbons (HFCs); opposition to rules restricting refrigerant substitutes, and extension of compliance deadline**	***Filed with Auto Industry Forum*** Jan. 2017: "[E]xpanding the rule to include chemicals that have a high global warming potential, but no or limited impact on stratospheric ozone, is inconsistent with the intent of section 608 of the CAA."[276] "That Congress did not provide any explicit grant of authority for EPA to establish a regulatory program for substitutes indicates that no such authority exists . . . ."[277] Nov. 2018: "Like the Agency, the Forum believes the 2016 interpretation led to EPA exceeding its authority in extending . . . requirements to substitutes."[278] "The Forum recommends a twelve month extension [of the compliance date] . . . * * * EPA should issue a separate final rule that specifically extends the compliance date."[279]	Aug. 2017: "The EPA is planning to issue a proposed rule to revisit aspects of the 2016 rule's extension of . . . refrigerant management requirements to non-exempt substitutes. We are also aware of your concerns regarding the feasibility of meeting the January 1, 2018, compliance dates and will consider options for relief if we receive adequate information from you to substantiate the basis for such relief."[280] Oct. 2018: "Based on feedback from some in the regulated community, the Agency reviewed the 2016 Rule, focusing in particular on whether the Agency had statutory authority to extend the full set of . . . regulations to non-exempt substitute refrigerants, such as HFCs and HFOs. * * * [T]he Agency is now proposing to withdraw the recent extension of the appliance maintenance and leak repair provisions . . . ."[281] "EPA is proposing to take final action to extend the compliance date . . . . EPA anticipates the extension would be between six to twelve months . . . . If needed, EPA intends to take final action on the proposed extension of the compliance date separate from, and before, taking action on other proposals in this document."[282]

[276] APF HFC petition for reconsideration, Docket Id. No. EPA-HQ-OAR-2017-0629-0006, at 1 (Jan. 17, 2017).
[277] *Id.* at 4.
[278] APF HFC rollback comments, Docket Id. No. EPA-HQ-OAR-2017-0629-0295, at 4 (Oct. 1, 2018).
[279] *Id.* at 12.
[280] Letters from Scott Pruitt, EPA Admin'r, to Hunton counsel for the Air Permitting Forum, Aug. 10, 2017.
[281] 83 Fed. Reg. 49332, 49333 (Oct. 1, 2018).
[282] *Id.* at 49341.

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Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
NAAQS	**Narrowing the meaning of "ambient air"**	***Filed with Auto Industry Forum*** **2019:** "The Draft Revised Policy would appropriately recognize that modern measures, such as surveillance technology, should be on the same footing as fences or physical barriers in determining ambient air exclusions"[283]	**2018:** "[S]takeholders have argued that the application of the ambient air policy is overly restrictive and that . . . the restrictive language from the 1980 letter that solely focuses on the use of a 'fence or other physical barriers' to preclude public access should be updated to provide for consideration of additional types of measures that are effective in deterring or precluding access to the land by the general public . . . . "[284] "The EPA's [draft] revised ambient air policy replaces 'a fence or other physical barriers' with 'measures, which may include physical barriers, that are effective in deterring or precluding access to the land by the general public.'"[285]

[283] APF ambient air comments at 5 (Jan. 11, 2019), https://insideepa.com/sites/insideepa.com/files/documents/2019/feb/epa2019_0278b.pdf
[284] U.S. EPA, DRAFT REVISED POLICY ON EXCLUSIONS FROM "AMBIENT AIR" at 2 (Nov. 2018), https://www.epa.gov/sites/production/files/2018-11/documents/draft_ambient_air_guidance_110818.pdf
[285] *Id.* at 5.

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Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
NAAQS	**Co-benefits**	**May 2017:** "EPA's reliance on $PM_{2.5}$ co-benefits in issuing regulations has had a profound effect in not only justifying EPA regulations but in supporting the overall value of the government's regulatory enterprise. * * * [O]ver 99 percent of the projected benefits from [the Mercury and Air Toxics Standards (MATS) rule] are based on reductions in $PM_{2.5}$ exposures projected to occur in areas where the $PM_{2.5}$ levels are already below the $PM_{2.5}$ NAAQS. "The Forum recommends that EPA undertake a review of the use of co-benefits including co-benefits that derived from reductions in exposures that are well below the levels deemed safe by EPA [*i.e.*, the NAAQS]."[286]	**Oct. 2017:** Under one approach to estimating the health consequences of repealing the "Forgone $PM_{2.5}$ co-benefits fall to zero in areas whose model-predicted air quality is at or below the annual average $PM_{2.5}$ NAAQS of 12 [micrograms per cubic meter of air]."[287] **May 2019:** "A longstanding and important question is how much benefit is derived by further reducing ambient levels [of pollution] below the national standards. We are considering changes to how such benefits are calculated."[288] **May 2019 (Wehrum):** "How in the world can you get $30 or $40 billion of benefit to public health [from the MATS rule] when most of that is attributable to reductions in areas that already meet a health-based standard . . . . That doesn't make any sense."[289] **June 2019:** "EPA invites the public to nominate scientific experts to be considered as peer reviewers for the EPA-drafted report titled, 'Potential Approaches for Characterizing the Estimated Benefits of Reducing PM2.5 at Low Concentrations.'"[290]
NSR	**Reduce EPA oversight of state programs**	**May 2017:** "EPA . . . has repeatedly second-guessed the purpose, content, and timing of state permit decisions. * * * The Forum . . . recommends that EPA respect decisions made by its state partners as Congress originally intended and reduce, if not eliminate, federal second-guessing."[291]	**Oct. 2018:** Wheeler issues memorandum, "Principles and Best Practices for Oversight of Federal Environmental Programs."[292] Among other things, the memo calls for, "General Deference to States and Tribes Implementing Federally Delegated Programs."[293]

[286] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 29 (May 15, 2017)
[287] 82 Fed. Reg. at 48044 (Oct. 16, 2017).
[288] https://insideepa.com/daily-news/epa-said-cut-pm-benefits-final-ace-rule-reduce-premature-deaths
[289] Lisa Friedman, *E.P.A. Plans to Get Thousands of Pollution Deaths Off the Books by Changing Its Math*, N.Y. TIMES, May 20, 2019.
[290] https://insideepa.com/sites/insideepa.com/files/documents/2019/jun/epa2019_1027a.pdf
[291] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 7 (May 15, 2017)
[292] https://www.acwa-us.org/wp-content/uploads/2018/11/State-Oversight-Memo.pdf
[293] *Id.* at 3.

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Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
NSR	**Weaken or eliminate the independent EPA enforcement office**	**May 2017:** "Implement structural changes within the Agency for how enforcement is initiated and managed . . . . [T]he essence of a successful reorganization will be that those involved in enforcement are more connected to the standards they enforce, and those that set the standards are more connected to the enforcement of the standards they established."[294]	InsideEPA: Trump EPA Weighs Shuttering Enforcement Office By Prospects Unclear[295] *"A source familiar with the plan says Trump EPA officials intend to 'disassemble the enforcement office. They are going to take it, break it up and move it back into the program offices.'"*
NSR	**Demand-growth exclusion; DTE "second-guessing"**	**May 2017:** "The Forum recommends that EPA clarify its position on the Demand Growth Exclusion/causation requirement . . . ."[296] "While historically EPA has recognized that a source must exercise judgment to exclude increases for which the project is not the 'predominant cause,' more recent EPA actions reflect the view that all emission increases are presumed to be caused by the change."[297]	**Dec. 2017:** "We believe this memorandum is necessary to provide greater clarity for sources and states implementing the NSR regulations."[298] "Because increased emissions may be caused by multiple factors, the EPA has recognized that the source must exercise judgment to exclude increases for which the project is not the 'predominant cause.'"[299]

[294] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 9 (May 15, 2017)
[295] https://insideepa.com/daily-news/trump-epa-weighs-shuttering-enforcement-office-prospects-unclear
[296] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 13 (May 15, 2017).
[297] *Id.* at 12.
[298] Memorandum from EPA Admin'r Scott Pruitt to Reg'l Administrators, "New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected Actual Applicability Test in Determining Major Modification Applicability," at 2 (Dec. 7, 2017), *available at* https://www.epa.gov/sites/production/files/2017-12/documents/nsr_policy_memo.12.7.17.pdf.
[299] Memorandum from EPA Admin'r Scott Pruitt to Reg'l Administrators, "New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected Actual Applicability Test in Determining Major Modification Applicability," at 7 (Dec. 7, 2017), *available at* https://www.epa.gov/sites/production/files/2017-12/documents/nsr_policy_memo.12.7.17.pdf.

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Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
NSR	**Expansion of "netting" to allow old sources to avoid CAA controls when they upgrade equipment**	**May 2017:** "EPA should clearly state that emission decreases are allowed in determining project emissions changes without triggering full netting of all contemporaneous projects."[300]	**Mar. 2018:** "Based on reconsideration of some previous conclusions and an examination of the regulations as a whole, the EPA now interprets [certain NSR rules] as providing that any emissions *decreases* that may result from a given proposed project are to be considered when calculating at Step 1 whether the proposed project will result in a significant emissions increase."[301] **Mar. 2019 (InsideEPA):** "EPA has sent for [OMB] review its proposal to revise Clean Air Act new source review (NSR) permit 'project emissions accounting,' or 'netting,' one of several piecemeal NSR reforms that critics say will make it easier for companies to avoid strict air permits."[302]
NSR	**Aggregation; reinstatement of rule finalized in last week of George W. Bush Administration but never made effective by the Obama Administration**	**May 2017:** "Aggregating projects that independent, for the purposes of determining NSR applicability, increases the likelihood of triggering the cumbersome NSR process beyond what was originally intended. * * * EPA guidance has expanded the 'aggregation' criteria well beyond what is needed . . . . Had it not been put on hold, the 2009 final rule would have brought needed clarity and simplified administration of the program. EPA should remove the stay of the final [2009] rule . . . ."	**Nov. 2018:** "The Environmental Protection Agency (EPA) is concluding the reconsideration of an earlier action that the EPA published on January 15, 2009, titled 'Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation and Project Netting.' The 2009 action . . .clarified implementation of the [NSR] permitting program under the [CAA] with respect to treating related physical or operational changes as a single 'modification' for the purpose of determining NSR applicability at a stationary source. . . . [T]he EPA has now decided to not revoke the 2009 NSR Aggregation Action."
NSR	**Debottlenecking**	**May 2017:** EPA should "issue a rule to clearly state that only emission increases related to units actually being modified should be analyzed," rather than considering "upstream and downstream units (referred to as debottlenecked units) [that] have previously obtained [NSR] permits . . . ."[303]	**Oct. 2017:** Pruitt report noted that commenters recommended "reviewing the debottlenecking rule and re-proposing it to address NSR requirements for modifying sources," and that he would be convening an "NSR Reform Task Force" to "address these important areas and achieve meaningful NSR Reform . . . ."[304]

[300] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 14 (May 15, 2017)
[301] Memorandum from Scott Pruitt, Admin'r, to Reg'l Admin'rs, *Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program* (Mar. 13, 2018), at 6, https://www.epa.gov/sites/production/files/2018-03/documents/pea_nsr_memo_03-13-2018.pdf
[302] https://insideepa.com/daily-feed/epa-sends-nsr-air-permit-%E2%80%98netting%E2%80%99-proposal-omb-review
[303] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 16 (May 15, 2017).
[304] https://www.epa.gov/sites/production/files/2017-10/documents/eo-13783-final-report-10-25-2017.pdf

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Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
NSR	**Expansion of "routine maintenance" exception**	**May 2017:** "EPA continues to inappropriately interpret [the routine maintenance, repair, and replacement (RMRR)] exclusion narrowly. * * * EPA should clarify that replacements and repairs that are routine in the industry, even if they may occur only once or twice during the life of a plant . . . are considered 'routine' within the meaning of the RMRR exclusion."[305]	**Apr. 2018:** "EPA believes there is uncertainty regarding the interpretation of the Routine Maintenance, Repair and Replacement (RMRR) provisions in the New Source Review Program. * * * EPA is evaluating the need to clarify the interpretation and appropriate application of the RMRR provision . . . ."[306]
NSR	**Significant Emissions Rate (SER) for greenhouse gases**	**May 2017:** "In October 2016, EPA proposed a rule to establish a significant emission rate [SER] for GHGs of 75,000 tons per year (tpy) of carbon dioxide equivalent . . . . The Forum submitted comments on the proposed rule recommending that EPA finalize a SER value much higher than 75,000 tpy . . . ."[307]	The Obama Administration proposed a rule establishing an SER of 75,000 tons per year of CO2-equivalent emissions.[308] As of April 2019, the Trump Administration has not taken action on that proposal.[309]
NSR	**Control technology determination process; "presumptive BACT"**	**May 2017:** "[T]he Forum recommends that EPA undertake administrative changes to the NSR program to reduce uncertainty, by adopting approaches like 'presumptive BACT' and giving states the flexibility to make expeditious permitting decisions without second-guessing by EPA."[310] **Dec. 2017:** Reporting indicates that "industry officials are stepping up their push" for "presumptive BACT guidance."[311]	Unknown

[305] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 18 (May 15, 2017).
[306] Presentation by Anna Marie Wood, Dir. Air Quality Policy Div., *NAAQS and Other Implementation Updates* (Apr. 5, 2018), slide 33, https://insideepa.com/sites/insideepa.com/files/documents/2018/apr/epa2018_0631.pdf.
[307] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 18 (May 15, 2017).
[308] 81 Fed. Reg. 68110, 68113 (Oct. 3, 2016).
[309] https://www.epa.gov/nsr/prevention-significant-deterioration-and-title-v-permitting-regulations-greenhouse-gases-ghg-and (last visited Apr. 26, 2019).
[310] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 20 (May 15, 2017)
[311] https://insideepa.com/daily-news/industry-seeks-presumptive-bact-guide-bid-extend-epas-nsr-relief

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Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
Title V	**Limit review of preconstruction permits**	**May 2017:** "ENGO [environmental organizations] have filed numerous petitions for objection to Title V permits based on their disagreement with the underlying construction permit . . . ."[312] The Forum's "highest-priority Title V item" is for EPA to "make clear that challenges to the construction of a new project or new plant must be resolved at the construction permit stage and a Title V permit does not offer protestants a second bite at the apple . . . ."[313] **Jan. 2019:** "EPA's [October 2017] interpretation of the proper scope of Title V review was eminently reasonable, if not compelled by statute and regulation."[314]	**Oct. 2017:** "[P]reconstruction permit terms and conditions should be incorporated [in Title V permits] without further review . . . ."[315] "[T]itle V permitting is not intended to second-guess the results of state preconstruction permit programs . . . ."[316] "The [Sierra Club] is now, in essence, asking for a 'second bite at the apple' through EPA oversight in title V. The availability of notice, opportunity to comment, and ability to seek judicial review of the underlying preconstruction permit . . . weighs heavily against an interpretation of title V as being an appropriate avenue to reevaluate these previous permitting authority decisions . . . ."[317]
Regional consistency rule	**N/A**	**Nov. 2015:** "The Forum questions the need for this rulemaking and believes that fairness and uniformity are best served by the continued application of existing rules. * * * The proposed rule is inconsistent with . . . the CAA and is not legally plausible on its face." [318] **May 2017:** "The Forum is currently litigating EPA's recently issued rule allowing for inconsistent policy and practice . . . . As stated in our [November 2015] comments on this final rule, inconsistency on fundamental issues like this violates the CAA."[319]	**Nov. 2017:** EPA is defending the Obama Admin's rule in court,[320] against a brief filed by Wehrum (on behalf of American Petroleum Institute) with two other Hunton lawyers (on behalf of the Air Permitting Forum).

[312] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 33 (May 15, 2017)
[313] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 32 (May 15, 2017)
[314] APF amicus brief supporting EPA, *Sierra Club v. EPA*, No. 18-1038, at 4 (D.C. Cir. Jan. 16, 2019).
[315] In the Matter of PacificCorp Energy Hunter Power Plant, Order on Petition No. VIII-2016-4 (Oct. 16, 2017), at 13, https://www.epa.gov/sites/production/files/2017-10/documents/pacificorp_hunter_order_denying_title_v_petition.pdf
[316] *Id.* at 14.
[317] *Id.* at 17.
[318] APF regional consistency comments, Docket Id. No. EPA-HQ-OAR-2014-0616-0016, at 1–2 (Nov. 3, 2015).
[319] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 34 (May 15, 2017).
[320] Proof Response Brief for EPA, *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, No. 16-1344 (D.C. Cir. Nov. 20, 2017).

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APPENDIX 3: The NAAQS Implementation Coalition

Topic	Sub-topic	"NAAQS Implementation Coalition" position	Trump EPA's position
NAAQS	**Narrowing the meaning of "ambient air"**[321]	**May 2017:** "Long-standing EPA policy . . . unrealistically requires evaluation of ambient air impacts at locations where individuals would not reasonably be allowed access, much less be exposed to emissions (*e.g.*, on a waterway, roadway, railway, or within a posted/patrolled property boundary) for the duration or averaging time . . . and frequency . . . of the current probabilistic NAAQS. * * * Modeling should not be required if human exposure at a site is unrealistic for the period addressed by a NAAQS."[322] **2019:** "[W]e support EPA's review of its ambient air policy."[323]	**May 2018:** "We are evaluating several key terms associated with the definition [of 'ambient air'] including 'general public,' 'access,' and 'building' to determine where additional flexibility may be appropriate."[324] **Nov. 2018:** "[S]takeholders have argued that the application of the ambient air policy is overly restrictive and that . . . the restrictive language from the 1980 letter that solely focuses on the use of a 'fence or other physical barriers' to preclude public access should be updated to provide for consideration of additional types of measures that are effective in deterring or precluding access to the land by the general public . . . ."[325] "The EPA's [draft] revised ambient air policy replaces 'a fence or other physical barriers' with 'measures, which may include physical barriers, that are effective in deterring or precluding access to the land by the general public.'"[326]

[321] *See, e.g.*, Sean Reilly, *Wehrum's old clients back 'ambient air' plan — documents*, GREENWIRE, Mar. 7, 2019, https://www.eenews.net/stories/1060123437
[322] Coalition comments, EPA-HQ-OA-2017-0190-36049, at A-4 to A-5 (May 15, 2017).
[323] NIC ambient air comments at 5 (Jan. 10, 2019), *available at* https://www.eenews.net/assets/2019/03/06/document_pm_01.pdf.
[324] Presentation by Anna Marie Wood, *NAAQS and Other Implementation Updates*, at slide 30 (Apr. 5, 2018).
[325] U.S. EPA, DRAFT REVISED POLICY ON EXCLUSIONS FROM "AMBIENT AIR" at 2 (Nov. 2018).
[326] U.S. EPA, DRAFT REVISED POLICY ON EXCLUSIONS FROM "AMBIENT AIR" at 5 (Nov. 2018).

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Topic	Sub-topic	"NAAQS Implementation Coalition" position	Trump EPA's position
NAAQS	**International emissions under CAA section 179B ("International border areas")**	**Feb. 2017:** "[EPA] requests comment on whether it is appropriate to limit CAA § 179B demonstrations to nonattainment areas adjoining international borders. We believe it is not."[327] **May 2017:** "EPA should not constrain 179B to border regions."[328]	**Presidential Memorandum, Apr. 2018:** "[W]ith respect to section 179B demonstrations or petitions, the Administrator shall ensure that EPA does not limit its consideration to emissions emanating from Mexico or Canada, but rather considers, where appropriate, emissions that may emanate from any location outside the United States . . . ."[329] **Dec. 2018:** "[A] demonstration prepared under CAA section 179B could consider emissions emanating from North America or intercontinental sources and is not restricted to areas adjoining international border areas . . . ."[330]
NAAQS	**CASAC composition**	**May 2017:** "CASAC has in recent years been imbalanced, being composed of members with generally similar backgrounds in terms of geography, background, and research interests. * * * There should be a better balance of representation on CASAC between academia, environmental and non-governmental organizations, states, and industry. * * * Consideration should be given to rotating terms . . . ."[331]	**Oct. 2017:** "[Federal Advisory Committee] membership should be balanced with persons from different parts of the country to create geographic diversity. * * * [M]embership should be rotated regularly."[332]
NASAC	**CASAC, removing academic researchers**	**May 2017:** "EPA should review and revise CASAC's 'conflict of interest' standards, particularly those relating to receiving EPA funding, in order to promote increased transparency in CASAC's review process."[333]	**Oct. 2017:** "[I]n addition to EPA's existing policies and legal requirements preventing conflicts of interest . . . it shall be the policy of the Agency that no member of an EPA federal advisory committee currently receive EPA grants . . . or in a position that otherwise would reap substantial direct benefit from an EPA grant."[334]

[327] Comments of NAAQS Implementation Coal., Docket Id. No. EPA-HQ-OAR-2016-0202, at 9 (Feb. 12, 2017).
[328] Coalition comments, EPA-HQ-OA-2017-0190-36049, at A-7 (May 15, 2017).
[329] Presidential Memorandum for the Administrator of the Environmental Protection Agency (Apr. 12, 2018).
[330] 83 Fed. Reg. at 63010 (Dec. 6, 2018).
[331] Coalition comments, EPA-HQ-OA-2017-0190-36049, at A-13 (May 15, 2017).
[332] Memorandum from Scott Pruitt, *Strengthening and Improving Membership on EPA Federal Advisory Committees*, at 2 (Oct. 31, 2017).
[333] Coalition comments, EPA-HQ-OA-2017-0190-36049, at A-13 to A-14 (May 15, 2017).
[334] Memorandum from Scott Pruitt, *Strengthening and Improving Membership on EPA Federal Advisory Committees*, at 3 (Oct. 31, 2017).

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Topic	Sub-topic	"NAAQS Implementation Coalition" position	Trump EPA's position
NAAQS	**CASAC; encouragement of fringe views**	May 2017: "[I]n recent years, the process has been to drive CASAC members towards consensus on a single response. This has served to hide the full range of interpretation that can be supported by the scientific evidence. * * * EPA should encourage CASAC letters that reflect the full range of viewpoints by CASAC members, including reporting minority views and the reasoning behind them."[335]	May 2018: "CASAC and EPA should, consistent with CASAC's charter, seek to find consensus, but should allow for individual CASAC members to share their own individual opinions when they fall outside committee consensus."[336]
NAAQS	**Primary (health-based) NO2 NAAQS, and Trump EPA's decision not to strengthen it**	Sept. 2017: "We support EPA's decision in the NO_2 Proposal to retain the current NO_2 NAAQS."[337]	"EPA is retaining the current primary NO_2 standards, without revision."[338]

[335] Coalition comments, EPA-HQ-OA-2017-0190-36049, at A-14 (May 15, 2017).
[336] Memorandum from Scott Pruitt to Asst. Admin'rs, *Back-to-Basics Process for Reviewing National Ambient Air Quality Standards*, at 10 (May 9, 2018).
[337] NIC comment, Docket Id. No. EPA-HQ-OAR-2013-0146-0145, at 1 (Sept. 25, 2017).
[338] 83 Fed. Reg. 17226, 17227 (Apr. 18, 2018)

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APPENDIX 4: The CCS Alliance

Topic	Sub-topic	"CCS Alliance" position	Trump EPA's position
Climate	**GHG NSPS for new power plants; decision to base the "best system of emission reduction" (BSER) for power plants in part on what can be achieved using partial carbon capture and storage (CCS) technology**	**May 2011:** "[C]arbon capture and sequestration (CCS) is not yet adequately demonstrated."[339] **June 2012:** "EPA's proposed GHG emission limits [based on CCS] will deter CCS rather than promote it."[340] **May 2014:** "There is not nearly enough experience with carbon capture to reasonably determine that it is adequately demonstrated. * * * EPA should withdraw the proposed rule. * * * Only in depleted oil and gas formations is there the variety of experience to show that large amounts of CO2 can be stored safely over the long term. Those formations do not exist in sufficient geographic dispersion throughout the United States to be considered broadly available."[341] **Nov. 2014:** "The Boundary Dam facility . . . has been operating only since October of this year. Thus, it offers very little evidence of reliability or efficiency on which to legally base a new rule."[342]	**2017:** "EPA . . . is reviewing the [2015 Rule] and, if appropriate, will as soon as practicable and consistent with law, initiate reconsideration proceedings to suspend, revise or rescind the rule."[343] **2018:** "EPA is proposing to revise its [2015] analysis and determine that CCS is not adequately demonstrated . . . ."[344] "[T]he EPA proposes to revise to the BSER . . . . The primary reason for this proposed revision is the high costs and limited geographic availability of CCS."[345] "While the carbon capture technology at the Boundary Dam is currently operating, that project experienced multiple issues with [the CCS technology] during its first year of operation . . . . EPA solicits comment on whether Boundary Dam's first-year operational problems cast doubt on the technical feasibility of fully integrated CCS."[346] **Wehrum:** "Today's actions reflect our approach of defining new, clean coal standards by data and the latest technological information, not wishful thinking."[347]

[339] Alliance comments, Docket Id. No. EPA-HQ-OAR-2011-0090-3120, at 1 (Mar. 18, 2011).
[340] Alliance comments, Docket Id. No. EPA-HQ-OAR-2011-0660-10070, at 1 (June 25, 2012).
[341] Alliance comments, Docket Id. No. EPA-HQ-OAR-2013-0495-9683, at 1–2, 6 (May 9, 2014).
[342] Alliance comments, Docket Id. No. EPA-HQ-OAR-2013-0602-23551, at 3 (Nov. 26, 2014).
[343] 82 Fed. Reg. 16330 (Apr. 4, 2017).
[344] 83 Fed. Reg. at 65441 (Dec. 20, 2018).
[345] *Id.* at 65426 (Dec. 20, 2018).
[346] *Id.* at 65444 (Dec. 20, 2018).
[347] https://www.epa.gov/newsreleases/epa-proposes-111b-revisions-advance-clean-energy-technology

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May 29, 2019

Acting Inspector General Charles J. Sheehan
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2410T)
Washington, DC 20460

Re: Request for Investigation of EPA Assistant Administrator William Wehrum's Apparent Violation of His Ethics Agreement and Ethics Pledge

Dear Acting Inspector General Sheehan:

Citizens for Responsibility and Ethics in Washington ("CREW") respectfully requests that the Environmental Protection Agency ("EPA") Office of Inspector General ("OIG") investigate whether EPA's Assistant Administrator for the Office of Air and Radiation ("OAR"), William Wehrum, violated his ethics agreement and the Ethics Pledge he signed as a condition of his appointment through his contacts with his former employer and former legal clients.

Mr. Wehrum signed an ethics agreement and an Ethics Pledge requiring him to recuse from party matters in which any of several former clients or his former law firm was a party or represented a party. The Ethics Pledge also required recusal from any communication or meeting with these entities. Mr. Wehrum appears to have violated these recusal obligations in December 2017 by: (1) granting his former law firm's request that he deliver a presentation in its Washington, D.C., office; (2) meeting with the law firm and three former clients to deliver the presentation; and (3) participating in the preparation of a memorandum used in litigation in which the firm represented a party.

Factual Background

On November 9, 2017, the Senate confirmed Mr. Wehrum to serve as President Trump's Assistant Administrator leading OAR,[1] which "develops national programs, policies, and regulations for controlling air pollution and radiation exposure."[2] This work includes addressing pollution prevention and energy efficiency, industrial air pollution, acid rain, climate change, and indoor and outdoor air quality, among other issues.[3] Prior to joining the Trump administration, Mr. Wehrum was a partner and head of the Administrative Law Group at the law firm of Hunton & Williams LLP ("Hunton"),[4] "where his practice focused on air quality issues."[5]

[1] U.S. Senate, Roll Call Vote 115th Congress - 1st Session, Vote No. 268, Nov. 9, 2017, https://bit.ly/2IyFkOg.
[2] EPA, About the Office of Air and Radiation (OAR), https://bit.ly/2Gt1fkp (last viewed May 7, 2019).
[3] *Id.*
[4] The firm later changed its name to Hunton Andrews Kurth, LLP. We refer to it as "Hunton" to avoid confusion.
[5] EPA, About the Assistant Administrator of EPA's Office of Air and Radiation, https://bit.ly/2viYLlz (last viewed May 7, 2019).

Released via FOIA EPA-2019-008216

A. The Hunton Presentation

Less than a month after his appointment to serve as an EPA Assistant Administrator, Mr. Wehrum granted a request from his former law firm to deliver a presentation at a meeting in its Washington, D.C., office on December 7, 2017.[6] The request form indicated he was invited to speak about "regulatory developments" for approximately one hour including "rules affecting electric generating companies and other stationary sources."[7] In addition to Hunton, the meeting included American Electric Power, Dominion Energy, Duke Energy, Southern Company, and Utility Air Regulatory Group ("UARG").[8] Duke Energy and UARG are both former clients of Mr. Wehrum.[9] For purposes of the ethics rules, Dominion Energy is also deemed a former client of Mr. Wehrum because one of its subsidiaries was his client.[10]

All meeting participants were tied to UARG. Hunton was UARG's legal counsel, and the other participants were UARG members.[11] UARG is a membership association that describes itself as an unincorporated, not-for-profit association of individual electric generating companies and national trade associations.[12] Though UARG reportedly has no staff or physical location,[13] Mr. Wehrum explained to *Politico* that UARG is a legal entity: "'UARG is an entity. It's a legal entity,' he said, explaining that his clients were 'not the individual members' of UARG."[14]

This December 7, 2017, meeting was similar to an earlier meeting between UARG and EPA in June 2017, with the primary difference being that Mr. Wehrum switched sides. For the June 2017 meeting, Mr. Wehrum had represented UARG in asking an EPA official to make a presentation on regulatory issues: "Topics of interest include the Clean Power Plan, the Mercury and Air Toxics Standard, regional transport, regional haze, and NAAQS/NAAQS

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[6] Juliet Eilperin, EPA regulator skirts the line between former clients and current job, *Washington Post*, Feb. 25, 2019, https://wapo.st/2P3f8M9.

[7] *See* Invite form for William Wehrum, from his former law firm, *Washington Post*, published Jan. 29, 2019 (document titled "Event Information Form") ("Invite Form"), https://wapo.st/2T7zkC4.

[8] *See* EPA's William Wehrum and the Effort to Move Industry's Agenda, *New York Times* ("*New York Times* Documents"), at 183, 187-201 (documents showing Mr. Wehrum's calendar for Dec. 7, 2017 and his Hunton presentation), https://bit.ly/2BV3spp.

[9] Memorandum from William Wehrum, Assistant Administrator, to Andrew R. Wheeler, Acting Administrator, Recusal Statement, Sept. 17, 2018, https://bit.ly/2HyxNPf ("Wehrum Recusal Statement").

[10] The ethics rules treat a corporation and the subsidiaries it controls as the same legal person. 5 C.F.R. § 2635.102(k). Mr. Wehrum's former client was Dominion Resources Services, Inc., which is now called Dominion Energy Services, Inc., and is a subsidiary of Dominion Energy. Wehrum Recusal Statement, at 2; Company Overview of Dominion Energy Services, Inc., *Bloomberg*, https://bloom.bg/2vZsgcs (last viewed May 14, 2019).

[11] Dave Anderson, EPA's Clean Power Plan Opponents Led By Just A Few Power Companies, *Energy & Policy Institute*, Sept. 27, 2016, https://bit.ly/2U2IY8E; Regulations.gov, Comment submitted by Lucinda Minton Langworthy, Hunton for UARG, https://www.regulations.gov/document?D=EPA-HQ-OAR-2001-0017-1629; 2017 Utility Air Regulatory Participation, Summary of Receipts, As of June 20, 2017, UARG organizational documents published by *Politico*, at 6, https://bit.ly/2IE5JeC (last viewed May 13, 2019).

[12] Opening Brief of Petitioners on Core Legal Issues, *State of West Va., et al., v. Env. Prot. Agency, et al.*, D.C. Cir. No. 15-1363, at xxviii (Oct. 23, 2015), https://bit.ly/2H69rej ("Petitioners' Brief").

[13] Letter from Sen. Sheldon Whitehouse, *et al.* to Charles J. Sheehan, Acting Inspector General, Environmental Protection Agency, at 4 n.6, Feb. 21, 2019, https://bit.ly/2Wuw55b ("Senators' OIG Letter").

[14] Zack Colman and Alex Guillén, Documents detail multimillion-dollar ties involving EPA official, secretive industry group, *Politico*, Feb. 20, 2019, https://politi.co/2GBPJrx.

implementation. . . . We are interested in discussing only possible future regulatory action."[15] The *New York Times* indicated that, in the December 2017 meeting, Mr. Wehrum covered the same subject: "The topic was an overview of efforts at the E.P.A. to roll back some of the rules Mr. Wehrum and his former law firm had helped [UARG] fight, including the Clean Power Plan, the email records show."[16] The location of the two meetings, the subject and the parties remained substantially the same – the difference was that Mr. Wehrum represented UARG to EPA in June and EPA to UARG in December. [17]

Politico recently reported that UARG, which it described as a "secretive utility industry coalition," is dissolving "amid investigations into whether its members received special treatment from the Trump administration."[18] UARG, which has operated on behalf of its members for four decades, announced its dissolution just one month after the House Energy and Commerce Committee requested documents from Hunton regarding UARG's legal structure and interactions with EPA.[19] Referencing litigation involving DTE Energy, the committee's letter to Hunton explained, "We are concerned that two former employees of your firm — William Wehrum and David Harlow — may have violated federal ethics rules by helping reverse EPA's position in ongoing litigation against DTE Energy, a Hunton client."[20]

B. The EPA Memorandum Supporting Hunton's Litigation

According to the *Washington Post*, shortly after his confirmation, Mr. Wehrum "weighed in on a policy shift that could have influenced litigation" in which Hunton was representing DTE Energy ("DTE").[21] This "policy shift" was announced in a memorandum that EPA issued on the same day as Mr. Wehrum's presentation, just before a Supreme Court litigation deadline in the DTE case.[22] The memorandum addressed the Clean Air Act's New Source Review ("NSR") program at issue in that lawsuit.[23]

EPA officials moved quickly to ensure that the memorandum ("NSR memorandum") was finished before the litigation deadline. As one official stated in an email circulating the

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[15] *Id.*
[16] Eric Lipton, As Trump Dismantles Clean Air Rules, an Industry Lawyer Delivers for Ex-Clients, *New York Times* Aug. 19, 2019, https://nyti.ms/2PpNFnR; *see also New York Times* Documents, at 182-87 (documents related to the Dec. 7, 2017 meeting).
[17] Mr. Wehrum also represented UARG at a similar meeting with EPA in July 2017. Email from William Wehrum to Mandy Gunasekara, July 20, 2017 (*New York Times* Documents, at 74).
[18] Zack Colman, Industry group tied to EPA air chief dissolves, *Politico*, May 10, 2019, https://politi.co/2HsZwhJ.
[19] Sean Reilly, Embattled trade group tied to EPA air chief to dissolve, *E&E News*, May 13, 2019, https://bit.ly/2JjJZnR. A Hunton attorney speaking anonymously denied that the investigation caused UARG's dissolution. *Id.*
[20] Letter to Wendell L. Taylor, Managing Partner, Hunton Andrews Kurth LLP, from House Energy and Commerce Committee Chairman Frank Pallone, Jr., *et al.*, at 1, Apr. 11, 2019, https://bit.ly/2Jj4hh7.
[21] Eilperin, *Washington Post*, Feb. 25, 2019.
[22] *Id.*
[23] Memorandum from E. Scott Pruitt, Administrator, Environmental Protection Agency, to Regional Administrators, New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability, at 1-2, Dec. 7, 2017 ("NSR Memo"), https://bit.ly/2jUCLJF.

memorandum: "Attached is the latest version of the NSR Memo pertaining to the issues at issue in the DTE case. I thought we may have more time, but know now that the cert hearing is planned for Wednesday [December 6, 2017]. This memo needs to go out before."[24] While the official was wrong about the deadline – the Supreme Court held its certiorari conference for the DTE case on December 8, 2017 – EPA succeeded in issuing the NSR memorandum before the certiorari conference, late on December 7, 2017.[25] Notably, though the Justice Department represented EPA in the DTE case, it was Hunton, EPA's putative opposing counsel, that filed the memorandum with the court.[26] As the *Washington Post* reported: "Hours before the justices conferred on the case, Hunton hand-delivered [EPA Administrator Scott] Pruitt's memo to the Supreme Court."[27]

After the conference, the Supreme Court denied certiorari.[28] One of the other parties to the litigation described this denial as a positive outcome undermined by an EPA memorandum that "tries to adopt DTE's rejected litigation position as the agency's new approach to NSR nationwide."[29] The *Washington Post* reported that, "[a]fter the high court declined to take up the case, the matter entered settlement talks, and DTE's hand has been strengthened."[30]

Mr. Wehrum's Recusal Obligations

Mr. Wehrum is subject to related but distinct recusal obligations arising separately from his ethics agreement and his Ethics Pledge, which "both overlap and diverge."[31]

A. The Ethics Agreement

Mr. Wehrum signed an ethics agreement on August 28, 2017 that bars him from participating personally and substantially in any *particular matter involving specific parties* ("party matter") in which Hunton is a party or represents a party for one year after his resignation from the firm.[32] It also bars him from any party matter in which a former client of his is a party or represents a party for one year from the date of his last service to the client.[33]

The language of Mr. Wehrum's ethics agreement as to these recusal obligations generally tracks OGE's impartiality regulation but differs from the regulation in one important respect. Under the regulation, recusal is necessary only if the employee or an ethics official determines

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[24] Email from Mandy Gunasekara to Susan Bodine, Dec. 4, 2017 (Senators' OIG Letter, at 93).
[25] *Id.* at 1.
[26] Letter from Hunton & Williams to Clerk of the Supreme Court, Dec. 8, 2017 (transmitting NSR Memo) (*New York Times* Documents, at 212).
[27] Eilperin, *Washington Post*, Feb. 25, 2019.
[28] *DTE Energy Co. v. United States*, 138 S. Ct. 555 (2017) (denying petition for writ of certiorari).
[29] Sierra Club, Press Release, U.S. Supreme Court Declines Review of DTE Energy Air Pollution Case, Dec. 11, 2017, https://bit.ly/2JEyGrg.
[30] Eilperin, *Washington Post*, Feb. 25, 2019.
[31] Office of Gov't Ethics, DO-09-11, at 6, Mar. 26, 2009 (discussing the ethics pledge and the impartiality regulation on which ethics agreements are based), https://bit.ly/2LpJoyZ ("OGE DO-09-11").
[32] Ethics Agreement of William Wehrum, Aug. 28, 2017, https://bit.ly/2BW9SVw ("Ethics Agreement").
[33] *Id.* at 1; *see also* 5 C.F.R. § 2635.502(b)(iv).

that a "reasonable person" would question the employee's impartiality in a party matter involving a former employer or client.[34] Mr. Wehrum's ethics agreement omits this "reasonable person" standard.[35] OGE's ethics agreement guide explains that this omission was the result of a decision to make recusal mandatory in all such party matters for top officials, rather than letting them decide for themselves what a reasonable person might think.[36]

Mr. Wehrum's ethics agreement permits him to participate in a party matter from which he would otherwise be barred if ethics officials review the circumstances in advance and authorize him to participate, using a procedure prescribed under OGE's impartiality regulation.[37] On December 7, 2017, he filed a form attesting that he had not received such an authorization.[38] On September 29, 2018, EPA notified a Senator that Mr. Wehrum still had not received an authorization.[39]

B. The Ethics Pledge

Mr. Wehrum also signed President Trump's Ethics Pledge for political appointees pursuant to Executive Order No. 13770.[40] The Ethics Pledge bars him from participating personally and substantially, for two years from the date of his appointment, in any party matter in which either his former law firm or any client he served in the two-year period preceding his appointment is a party or represents a party.[41]

Mr. Wehrum's Ethics Pledge also bars him, for two years from the date of his appointment, from any *communication or meeting* with either the law firm or a client he served in the two-year period preceding his appointment.[42] This obligation applies whether or not the meeting or communication focuses on a party matter. A limited exception permits delivery of a speech unless the speech would have a financial effect on a former employer or client.[43]Another

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[34] 5 C.F.R. § 2635.502(a), (c).
[35] *Compare* Ethics Agreement at 1 *with* 5 C.F.R. § 2635.502(a).
[36] Office of Gov't Ethics, Guide to Drafting Ethics Agreements for PAS Nominees, 2014 version, at 33 ("Most of these samples do not incorporate the 'reasonable person' standard contained in 5 C.F.R. § 2635.502. . . . Inasmuch as [nominees will be] the most senior leaders in the Federal executive branch, their ethics agreements often prospectively address the potential for appearance issues. This approach protects a [nominee] from the types of questions that would arise if the [nominee] were to self-regulate on a case-by-case basis."), https://bit.ly/2EneGTX.
[37] Ethics Agreement at 1; *see also* 5 C.F.R. § 2635.502(d).
[38] William Wehrum, Certification of Ethics Agreement Compliance, Item 9, Dec. 7, 2017, https://bit.ly/2T2wgXP ("Compliance Certification").
[39] Letter from Kevin Minoli to Sen. Sheldon Whitehouse, Sept. 29, 2018, (attached to Senators' OIG Letter, at 85).
[40] William Wehrum, Ethics Pledge, Nov. 14, 2017 (*New York Times* Documents, at 159) ("Wehrum Ethics Pledge"); Executive Order No. 13770, Ethics Commitments by Executive Branch Appointees, § 1(6) Jan. 28, 2017, https://bit.ly/2QaZzSk.
[41] *Id.*
[42] *Id.*, § 2(s).
[43] Office of Gov't Ethics, DO-09-020, at 2, May 26, 2009, https://bit.ly/2Suybzf ("OGE DO-09-020"); Office of Gov't Ethics, OGE LA-17-03, Mar. 20, 2017, (applying DO-09-020 to Executive Order No. 13770), https://bit.ly/2FZRhv0.

exception permits participation in a meeting or communication that does not involve a party matter and is "open to all interested parties."[44]

As with the recusals under the ethics agreement, these recusals are not subject to a "reasonable person" standard. Mr. Wehrum must recuse from any covered party matter, communication or meeting unless he first receives an Ethics Pledge waiver.[45] On December 7, 2017, he indicated he had not received such a waiver.[46] A review of the Ethics Pledge waivers listed on OGE's website confirms that he has not received a waiver since then.[47]

Potential Violations

Mr. Wehrum's ethics agreement and Ethics Pledge required him to recuse from party matters in which any of several former clients or his former law firm was a party or represented a party, and his Ethics Pledge further required him to recuse from any communication or meeting with these entities. He appears to have violated these recusal obligations in December 2017 by: (1) granting the law firm's request that he deliver a presentation in its Washington, D.C., office; (2) meeting with the law firm and three former clients to deliver the presentation; and (3) participating in the preparation of a memorandum for the litigation in which Hunton was representing DTE.

A seasoned attorney, Mr. Wehrum seems to have attempted to articulate defenses to these suspected violations. Regarding the presentation, Mr. Wehrum appears to rely on exceptions to the Ethics Pledge for speeches and meetings "open to all interested parties." As explained below, however, his defense misconstrues the Ethics Pledge exceptions and partly fails to address the possible violation of his ethics agreement. Regarding EPA's issuance of a litigation memorandum, he appears to suggest that he did not participate "personally and substantially" in that effort, but his participation in EPA's development of the NSR memorandum was, in fact, personal and substantial. Mr. Wehrum also appears to suggest that development of the memorandum was not a party matter, but EPA developed the memorandum primarily for a court case, which is the quintessential example of a party matter.

A. The Decision to Grant Hunton's Request

Hunton's request that Mr. Wehrum give a presentation to its clients was a party matter in which Hunton, as the presentation's sponsor, was a party. OGE has explained that it "generally has viewed the decision to give an official speech as a particular matter involving the event sponsor as a specific party" triggering recusal obligations.[48] Therefore, by granting Hunton's

[44] *Id.*; OGE Inv. Adv. Op. 06 x 09 (2006) (differentiating party matters from other matters), https://bit.ly/2ASzf9k.
[45] Executive Order No. 13770, §§ 1(6), 2(s).
[46] Compliance Certification.
[47] Office of Gov't Ethics, Agency Ethics Pledge Waivers, https://bit.ly/2VFJnuO (last viewed May 14, 2019).
[48] OGE DO-09-020, at 2.

request, Mr. Wehrum violated his ethics agreement and Ethics Pledge because he participated personally and substantially in a party matter in which Hunton was a party.[49]

OGE has established an interpretive exception to the Ethics Pledge permitting an appointee to give a speech to a former employer.[50] This exception, however, is not absolute. The exception does not apply if the speech would have a demonstrable financial effect on the former employer.[51] In fleshing out this concept of a "financial effect," OGE has explained that the exception is unavailable when a former employer organizes an event as "some kind of business development activity (such as a *seminar for current or prospective clients*)."[52]

A "seminar for current or prospective clients" aptly describes Mr. Wehrum's presentation. Hunton invited him to deliver a presentation in the firm's conference room exclusively for members of UARG, a firm client Mr. Werhum had represented before entering government.[53] It is not known if Hunton billed for its time, but the presentation's subject—EPA's regulatory activity—appears to be a central focus of Hunton's representation of UARG.[54] In short, the presentation was unmistakably a business development activity that could not qualify for the speech exception.

Even if the speech exception had applied to the presentation, it would have covered only the *Ethics Pledge* recusal and not the *ethics agreement* recusal. Mr. Wehrum had not received an authorization excusing him from compliance with the ethics agreement recusal.[55] In fact, he admits that he did not consult EPA's ethics officials in advance of this decision.[56] Therefore, he likely also violated his ethics agreement when he granted Hunton's request.

B. Mr. Wehrum's Presentation to Hunton and his Former Clients

In addition to Mr. Wehrum's consideration and granting of Hunton's request for a presentation, his delivery of the presentation itself was problematic. The presentation was a prohibited communication or meeting with Hunton and three of his former clients – UARG, Duke Energy, and Dominion Energy. As discussed in the preceding section, the exception for speeches sponsored by a former employer was unavailable. By delivering this presentation

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[49] Hunton identifies the clients as the sponsors in the invitation form, but Hunton was the sponsor because it extended the invitation and hosted the event in its offices. Invite Form, at 1. In any event, the analysis would be the same if the clients had sponsored the event because UARG, Duke Energy and Dominion Energy were Mr. Wehrum's former clients.
[50] OGE DO-09-020, at 1.
[51] *Id.*, at 2-3. The same analysis would apply to a speech that had a demonstrable financial effect on a client.
[52] *Id.*, at 2 (emphasis added).
[53] Invite Form.
[54] Technical Consultant and Legal Support Funding Requests for the Period June 23 to Early September 2017, *Politico* (UARG organizational documents), https://bit.ly/2IE5JeC; Colman and Guillén, *Politico*, Feb. 20, 2019 ("The nation's biggest coal-burning power companies paid a top lobbying firm millions of dollars to fight a wide range of Obama-era environmental rules… shortly before one of the firm's partners became President Donald Trump's top air pollution regulator.").
[55] Compliance Certification, Item 7.
[56] Eilperin, *Washington Post*, Feb. 25, 2019.

without first obtaining a waiver, Mr. Wehrum violated his Ethics Pledge.[57] Depending on whether the discussion during or after the presentation addressed a party matter in which Hunton, UARG, or Duke Energy was a party or represented a party, he may also have violated his ethics agreement.

In an interview with the *Washington Post*, Mr. Wehrum offered a defense as to the Ethics Pledge violation but does not appear to have addressed the possible ethics agreement violation:

> Wehrum said he is still unclear about exactly what sort of meetings are permissible under the Trump pledge. However, he said he has concluded that his meetings comply as long as five entities participate. And, he said, it does not matter how many of those entities are former clients.[58]

Mr. Wehrum seems to be arguing that, under the Ethics Pledge, he cannot meet with any former client but can meet with any five of them. If that were true, the rule would serve no purpose.

His mention of "five entities" likely was a reference to the Ethics Pledge exception for meetings that do not focus on party matters and are "open to all interested parties."[59] OGE has articulated a rule of thumb that five parties can satisfy the multiplicity requirement, but this interpretive gloss on the "open to all interested parties" requirement does not apply if the circumstances raise concerns about special access. OGE's guidance states:

> Because meeting spaces are typically limited, and time and other practical considerations also may constrain the size of meetings, common sense demands that reasonable limits be placed on what it means to be "open to all interested parties." Such meetings do not have to be open to every comer, but should include a multiplicity of parties. For example, if an agency is holding a meeting with five or more stakeholders regarding a given policy or piece of legislation, an appointee could attend such a meeting even if *one* of the stakeholders is a former employer or former client; such circumstances do not raise the *concerns about special access* at which the Executive Order is directed. . . . In any event, agency ethics officials will have to exercise judgment in determining whether a specific forum qualifies as a meeting or other event that is "open to all interested parties," and OGE is prepared to assist with this analysis.[60]

There is a threshold problem to Mr. Wehrum relying on the five-party rule of thumb: *only one party attended the meeting*. As discussed above, UARG is an "ad hoc unincorporated association" of members acting "collectively."[61] The available evidence suggests that member

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[57] Wehrum Ethics Pledge, ¶ 6.
[58] Eilperin, *Washington Post*, Feb. 25, 2019.
[59] Executive Order No. 13770, §§ 1(6), 2(s).
[60] OGE DO-09-11, at 2 (emphasis added).
[61] Brief for Intervenor-Petitioners National Federation of Independent Business and Utility Air Regulatory Group, *Murray Energy Corporation, v. Env. Prot. Agency, et al.*, D.C. Cir. No. 14-1112 and 14-1151, at v (Dec. 30, 2015), https://bit.ly/2YmvliQ.

companies participated in this meeting collectively as representatives of UARG. For example, when Mr. Wehrum arranged a similar meeting with EPA in July 2017 while serving as counsel for UARG, he explained that UARG would be represented by its counsel and members. In an email sent before that meeting, Mr. Wehrum, as UARG counsel, wrote:

> UARG will be represented by Makram Jabar ([Hunton]), Andrew Knudsen ([Hunton]), Mikes [sic] Gears (Duke Energy) and Justin Walters (Southern Co.). Makram and Andrew are counsel to the UARG HAPs committee. Mike and Justin are co-chairs of the UARG HAPs Committee."[62]

He also characterized an earlier June 2017 meeting with EPA as a UARG meeting: "UARG is holding a meeting here at Hunton's offices in DC on the afternoon of June 22 and the morning of June 23."[63] In this context, his December 2017 presentation is best characterized as having been attended by only UARG and its counsel. The meeting, thus, fails the multiplicity requirement.

There is an even more fundamental problem with Mr. Wehrum relying on the five-party rule of thumb. Underlying the rule of thumb is the legal standard that a meeting must be "open to all interested parties" to alleviate concerns about special access.[64] OGE has explained that the purpose of the Ethics Pledge is "to address concerns that former employers and clients may appear to have privileged access, which they may exploit to influence an appointee out of the public view."[65] Consistent with this purpose, EPA has acknowledged that "the term 'open to all interested parties' means that the meeting should include a multiplicity of parties representing a diversity of viewpoints."[66] Rather than being open to a diversity of viewpoints, the audience in this instance was an exclusive group of similarly-situated energy companies that had hired Hunton to advocate against EPA's attempts to regulate their industry. It appears Hunton acted as a gatekeeper, excluding everyone but its own clients from the meeting. In fact, Hunton admitted

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[62] Email from William Wehrum to Mandy Gunasekara, July 20, 2017 (*New York Times* Documents, at 74).
[63] Email from William Wehrum to Mandy Gunasekara, May 23, 2017 (*New York Times* Documents, at 31).
[64] Executive Order No. 13770, § 2(s).
[65] OGE DO-09-11, at 2.
[66] The quoted language comes from the recusal statement EPA's Administrator Andrew Wheeler signed when he was Deputy Administrator. Recusal Statement of Andrew R. Wheeler, May 24, 2018, https://bit.ly/2KTqyng. Mr. Wehrum, however, omitted this requirement from his recusal statement, which he refused to sign until September 2018. Wehrum Recusal Statement. Some recusal statements filed by EPA officials in 2017, like Mr. Wehrum's recusal statement, did not mention the "diversity of viewpoints" requirement. American Oversight, EPA Political Appointee Ethics Records, Resumes, and SF-50s, at 101, 114, Oct. 30, 2018 (Recusal Statement of Tate Bennett, Nov. 1, 2017; Recusal Statement of Erik Baptist, Oct. 12, 2017), https://bit.ly/2DtWSHp. But by 2018, when Mr. Wehrum filed his recusal statement, EPA had expanded its discussion of the Ethics Pledge in recusal statements to elaborate on that requirement. There are numerous examples of senior EPA officials discussing the "diversity of viewpoints" or "diversity of interests" requirement in recusal statements they filed in 2018 before and after Mr. Wehrum filed his. *See, e.g.*, Recusal Statement of Steven Cook, Apr. 20, 2018, https://bit.ly/2W3XTNl; Recusal Statement of Michael Stoker, June 4, 2018, https://bit.ly/2DtWSHp; Recusal Statement of Peter Wright, July 24, 2018, http://src.bna.com/ABQ; Recusal Statement of Anne Idsal, July 24, 2018, https://bit.ly/2UUzRbl; Recusal Statement of David Dunlop, Dec. 19, 2019, https://bit.ly/2GHLJ6H. Therefore, by the time Mr. Wehrum had signed his recusal statement, EPA's ethics office had firmly established that the five-party rule of thumb only applies when the parties represent a diversity of viewpoints. Mr. Wehrum cannot simply point to the language in his recusal statement to avoid that limitation. If he attempts to do so, OIG should ascertain what advice EPA's ethics officials would have given Mr. Wehrum had he consulted them before agreeing to deliver the Hunton presentation.

only a select group of clients who were dues-paying members of UARG, Mr. Wehrum's former client. It would be impossible to argue that this closed-door UARG meeting met the standard of being "open to all interested parties." To the contrary, this meeting delivered precisely the sort of *special access* for UARG that the Ethics Pledge is designed to prevent. Therefore, the exception was inapplicable, and Mr. Wehrum violated his Ethics Pledge.

In addition to violating his Ethics Pledge, Mr. Wehrum may have violated his ethics agreement. A violation occurred if he discussed any party matter, such as litigation, involving Hunton, UARG, or Duke Energy as a party or a representative. Meeting materials show that Mr. Wehrum discussed "NSR" (new source review) in his presentation.[67] Notably, late on the same day as his presentation, EPA issued a memorandum on NSR in connection with a case involving Hunton as a representative.[68] As discussed in more detail in the next section, Mr. Wehrum participated in development of that NSR memorandum, and it was Hunton's attorneys who delivered it to the Supreme Court one day after his presentation. Under these circumstances, an investigation is warranted to ascertain whether Mr. Wehrum discussed the NSR memorandum with Hunton or any other party matter involving a meeting participant.

C. Mr. Wehrum's Involvement in Developing the EPA Memorandum Used by Hunton

Mr. Wehrum also apparently violated his recusal obligations under his ethics agreement and Ethics Pledge by assisting in the development of the NSR memorandum, which was tied to litigation in which his former employer, Hunton, was representing DTE Energy ("DTE"). EPA recognized the need for his recusal from the NSR memorandum due to its connection to the DTE litigation. On December 7, 2017, Mr. Wehrum's deputy, Mandy Gunasekara, emailed the final NSR memorandum to EPA's Chief of Staff, Ryan Jackson, explaining that "Bill [Wehrum] is recused."[69] Similarly, when Ms. Gunasekara sent Mr. Wehrum a redacted draft on December 5, 2017, she wrote: "I have redacted the potentially offending language given your recusal issues."[70] Later that week, *The Hill* reported on December 8, 2017, that EPA "said Wehrum was not involved in Thursday's memo, having recused himself because his former law firm, Hunton & Williams, represents DTE in the litigation."[71]

EPA's claim that Mr. Wehrum "was not involved" was later revealed to be untrue. As the *Washington Post* reported, Mr. Wehrum participated personally and substantially in EPA's development of the NSR memorandum:

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[67] William Wehrum, Clean Air Act: Update on Stationary Source Regulations, Dec. 7, 2017, (presentation at meeting) (*New York Times* Documents, at 200).
[68] Eilperin, *Washington Post*, Feb. 25, 2019.
[69] Email from Mandy Gunasekara to Ryan Jackson, Dec. 7, 2017 (Senators' OIG Letter, at 115).
[70] Email from Mandy Gunasekara to William Wehrum and David Harlow, Dec. 5, 2017 (Senators' OIG Letter, at 103). It is not clear why Ms. Gunasekara would have thought redaction of only part of the NSR memorandum was sufficient.
[71] Timothy Cama, EPA works to ease air pollution permitting process, *The Hill*, Dec. 8, 2017, https://bit.ly/2VwgoK8.

> "I looked at that [redacted] document, and then I sat in one meeting where we talked about the meaning of the 2002 rules," Wehrum said. "That was it. That was my involvement."
>
> However, two people familiar with the meeting, speaking on the condition of anonymity to discuss internal deliberations, said the discussion ranged beyond the 2002 rules, covering topics such as the memo's potential impact on future EPA enforcement activities and the need to issue it before the Supreme Court [certiorari] conference on the DTE case.[72]

Mr. Wehrum's acknowledgment that he reviewed the redacted document and sat in on a meeting establishes that he participated personally and substantially in development of the NSR memorandum, as does the account of the two sources who indicate that his participation was greater than he has acknowledged.

This information is corroborated by other reporting and a documentary record of his personal and substantial participation in the NSR memorandum's development in early December 2017. The *New York Times* reported that "[d]uring a morning meeting on Dec. 5th, according to E.P.A. officials interviewed by The New York Times, the DTE/New Source Review memo was discussed, even though Mr. Wehrum had at times asserted he was recusing himself from this topic." [73] A heavily redacted email from an attorney in EPA's Office of General Counsel on December 5, 2017 also announced a "late-breaking meeting today with Bill Wehrum at 1 p.m. on New Source Review,"[74] and an entry in Mr. Wehrum's calendar for 1:00 p.m. that day is titled "NSR Discussion."[75] At 1:06 p.m. on December 5, Ms. Gunasekara sent the previously discussed draft of the NSR memorandum to Mr. Wehrum, which was attached to an email in which she indicated she was sending the draft in preparation for "tomorrow's NSR discussion," suggesting that Mr. Wehrum may have participated in another meeting on December 6, 2017.[76] Mr. Wehrum also received two more emails regarding the NSR memorandum on December 7, 2017, and one on December 8, 2017.[77] In addition, Mr. Wehrum was listed as a required participant in a calendar entry for a scheduled conference call regarding the memorandum on December 11, 2017.[78]

Regardless of whether Mr. Wehrum's views were incorporated in the final NSR memorandum, his participation in deliberations regarding its development constituted personal

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[72] Eilperin, *Washington Post*, Feb. 25, 2019 (the insertion of "[redacted]" appears in the original text of the article).
[73] Annotation to Wehrum calendar for Dec. 5, 2017 added by the *New York Times* (*New York Times* Documents, at 178).
[74] Email from Brian Doster to Justin Schwab and Marcella Burke, Dec. 5, 2017 (Senators' OIG Letter, at 105).
[75] Wehrum calendar for Dec. 5, 2017 (*New York Times* Documents, at 179).
[76] Email from Mandy Gunasekara to William Wehrum and David Harlow, Dec. 5, 207 (Senators' OIG Letter, at 103).
[77] Email chain between Susan Bodine and Mandy Gunasekara, Dec. 7, 2017 (cc:ing Mr. Wehrum) (*New York Times* Documents, at 202); Email from Susan Bodine to William Wehrum, Dec. 8, 2017 (*New York Times* Documents, at 228).
[78] Wehrum calendar for Dec. 11, 2017 (Senators' OIG Letter, at 113).

and substantial participation.[79] OGE's regulations explain that participation "may be substantial even though it is not determinative of the outcome of a particular matter."[80] Moreover, redaction of some language in a draft did not negate his participation in the NSR memorandum's development, for both his Ethics Pledge and his ethics agreement establish the duty to recuse from a "particular matter involving specific parties" and not merely parts of the matter.[81]

The focus on the "2002 rules" in Mr. Wehrum's above-quoted explanation seems, at least implicitly, to challenge the notion that development of the NSR memorandum was part of a party matter—a necessary predicate to finding a violation of his recusal obligations. The record makes clear, however, that EPA drafted and timed the memorandum for the DTE litigation, which was undeniably a party matter.[82] In an email transmitting a draft of the memorandum to colleagues, one EPA official wrote: "Attached is the latest version of the NSR Memo pertaining to the issues at issue in the DTE case. I thought we may have more time, but know now that the [Supreme Court's] cert hearing is planned for Wednesday."[83] A second official wrote: "Attached for review are the current drafts of two memos regarding the issues in the DTE NSR litigation."[84] A third emailed a copy of the memorandum to colleagues along with a second attachment that he described as "an analysis of options for addressing NSR issues raised by DTE."[85] A fourth referred to the memorandum as the "NSR DTE memo."[86] A fifth even discussed distributing the memorandum to the media only after the Supreme Court's certiorari hearing concluded.[87]

The content of the NSR memorandum itself resolves any doubt about its function. Its first paragraph alluded to the pending litigation involving Mr. Wehrum's former law firm.[88] EPA declared that the memorandum "is not final agency action" and has no legally operative effect: "This memorandum does not change or substitute for any law, regulation or other legally binding requirement and *is not legally enforceable*."[89] Instead, it claimed to seek only to address "uncertainty" arising directly from the DTE litigation—one day before the Supreme Court was scheduled to decide whether to address that uncertainty by granting certiorari.[90]

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[79] *See, e.g.*, Office of Gov't Ethics, DO-04-12, June 1, 2004 ("Involvement in preliminary discussions, in interim evaluations, in review or approval at intermediate levels, or in supervision of subordinates working on a matter also amounts to personal and substantial participation."), https://bit.ly/2T3IH5D.
[80] 5 C.F.R. § 2635.401(b)(4).
[81] Ethics Agreement at 1; Wehrum Ethics Pledge.
[82] 5 C.F.R. § 2641.201(h)(1) (establishing that a "court case" is a particular matter involving specific parties).
[83] Email from Mandy Gunasekara to Susan Bodine and Patrick Taylor, Dec. 4, 2017 (Senators' OIG Letter, at 93).
[84] Email from Brian Doster to Justin Schwab, et al., Oct. 4, 2017 (Senators' OIG Letter, at 131).
[85] Email from Josh Lewis to Mandy Gunasekara (Senators' OIG Letter, at 117).
[86] Attachment to email from Peter South to Mike Koerber, Oct. 3, 2017 (Senators' OIG Letter, at 128-29).
[87] Email from Liz Bowman to Jahan Wilcox, Dec. 7, 2017 ("Can you please help us get this to a few people who might be interested, after the Hearing concludes?") (Senators' OIG Letter, at 155).
[88] NSR Memo, at 1.
[89] *Id.* at 2 (emphasis added).
[90] *Id.* at 1 ("I understand that two recent appellate court decisions in the pending enforcement proceeding against DTE Energy have created uncertainty…").

The NSR memorandum recounts in detail the history and effect of the DTE litigation.[91] It even acknowledges its specific connection to the upcoming certiorari hearing the next day, stating:

> The matters at issue in the DTE litigation are complex, and the appellate court decisions have left ambiguity regarding the scope of the applicable regulations and what sources must do to comply. Further, the Supreme Court has been asked to review the second appellate court opinion. Considering this uncertainty, the EPA believes it would be helpful to explain to stakeholders how the EPA plans to proceed in implementing and exercising its authority under those regulations pending further review of these issues by the EPA.[92]

EPA issued the NSR memorandum late on December 7, 2017, and Hunton delivered it to the Supreme Court the next morning in time for the certiorari conference.[93] Hunton explained in a cover letter that the NSR memorandum was a product of a review that EPA had advised the Court it was undertaking in a pleading filed by the Justice Department on its behalf.[94] In this context, it seems unusual that Hunton delivered the NSR memorandum to the Supreme Court instead of the Justice Department. These circumstances further highlight that the NSR memorandum was a document that EPA created for the benefit of Hunton's client in a specific litigation. In other words, the NSR memorandum was part of a party matter. Investigation by OIG could reveal whether or not EPA officials improperly coordinated with Hunton regarding the creation and delivery of this document.

For these reasons, it seems clear that the NSR memorandum was a litigation document prepared for a case in which Hunton was representing a party. Mr. Wehrum's personal and substantial participation in the development of that memorandum violated the recusal obligations in both his ethics agreement and his Ethics Pledge.

Conclusion

When William Wehrum joined EPA after years fighting on behalf of industry clients, he promised to distance himself from both his law firm and his former clients. He signed an ethics agreement and a separate Ethics Pledge that created related but distinct recusal obligations not to participate personally and substantially in any party matter, communication, or meeting involving either the firm or a recent former client as a party or representative.

After less than a month as an EPA Assistant Administrator, Mr. Wehrum broke this promise. He accepted an invitation to present on EPA's regulatory activity in a December 2017 meeting at the firm's office with a coalition of energy companies that he had represented before entering government. Earlier that same year, while working for the firm, he had represented the

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[91] NSR Memo, at 5-6, 8.
[92] *Id.* at 6 (emphasis added).
[93] Letter from Hunton & Williams to Clerk of the Supreme Court, Dec. 8, 2017 (*New York Times* Documents, at 212).
[94] *Id.*

same coalition in two meetings in the same office with an EPA official who discussed the same subject. Contemporaneously with his December 2017 presentation, Mr. Wehrum also helped develop a memorandum for a case involving his former law firm as a representative.

To allay concerns that he may have violated his recusal obligations, Mr. Wehrum has offered a legalistic explanation that misconstrues the requirements of the Ethics Pledge and fails to address the distinct recusal obligations under his ethics agreement. He also admits that he did not consult EPA's ethics officials prior to engaging in the conduct at issue here. Mr. Wehrum seems not to appreciate that his recusal is intended to protect against representatives of special interests trading on their relationships with him to gain special access to the levers of power that affect all Americans. As such, despite his explanations, his conduct appears to violate the recusal requirements in his ethics agreement and Ethics Pledge. Therefore, we respectfully request that OIG investigate this matter and take appropriate action.

Sincerely,

Noah Bookbinder
Executive Director

cc: Director Emory A. Rounds, U.S. Office of Government Ethics

August 7, 2019

VIA ELECTRONIC SUBMISSION

Andrew R. Wheeler
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attn: Docket No. NHTSA-2018-0067
Docket No. NHTSA-2017-0069
Docket No. EPA-HQ-OAR-2018-0283

Re: EPA's Unlawful Failure to Disclose Meetings Between Agency Officials and Industry Regarding the Proposed Rule, "The Safer Affordable Fuel-Efficient ('SAFE') Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks," 83 Fed. Reg. 42,986 (Aug. 24, 2018)

Dear Administrator Wheeler:

It has come to the attention of the Environmental Defense Fund (EDF) via a recently released congressional report that the Environmental Protection Agency (EPA) failed to disclose multiple meetings between senior agency officials and industry representatives related to its proposed rule, "The Safer Affordable Fuel-Efficient ('SAFE') Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks," 83 Fed. Reg. 42,986 (Aug. 24, 2018), which is a joint rulemaking with the National Highway Traffic Safety Administration (NHTSA). In particular, former EPA Assistant Administrator William Wehrum participated in meetings with the Alliance of Automobile Manufacturers—his former client—during the time that EPA was finalizing its Revised Final Determination for the Mid-Term Evaluation of the Clean Car Standards, and preparing its Proposed Rule to significantly weaken the Clean Car Standards.

EDF calls on EPA to immediately publicly disclose the details of all meetings between Mr. Wehrum and the Alliance and to add those records to the docket for the Proposed Rule. Furthermore, EDF calls on EPA to release any documents or other records that were exchanged during, or created as a result of, those meetings. As you stated in your e-mail to all EPA employees on August 2, 2018:

> Finally, it is essential to ensure that the public receives timely notice, as far as practicable, of information or views that have influenced the EPA's decisions. This means that EPA employees must summarize in writing and place in the rulemaking docket any oral communication during a meeting or telephone discussion – with a

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member of the public or an interested group – that contains significant new factual information regarding a proposed rule.[1]

Senator Carper, ranking member of the Environment and Public Works Committee, and Senator Whitehouse, ranking member of the Clean Air and Nuclear Safety Subcommittee, recently published a report, *Redefining Air: Industry's Pipeline to Power at EPA's Office of Air and Radiation*, analyzing the close connection between Mr. Wehrum and his former clients from the law firm of Hunton Andrews Kurth LLP.[2] The report identifies numerous unethical practices by Mr. Wehrum and others and, combined with EDF's review of available records, reveals that the existence of and crucial information about meetings relating to EPA's Proposed Rule have been withheld from the public.

The Carper-Whitehouse Report details *seven* meetings between Mr. Wehrum and the Alliance, only one of which is (possibly) disclosed in the rulemaking docket for the Proposed Rule.[3] None of these meetings were announced, documented, or open to the public. The meetings took place as EPA was in the midst of preparing its rollback of the Clean Car Standards:

- *Aug. 21, 2017* – EPA publishes Request for Comment on Reconsideration of the Final Determination of the Mid-Term Evaluation, 82 Fed. Reg. 39,551.
- *Oct. 5, 2017* – Comment period closes on Reconsideration of the MTE Final Determination
- *Nov. 27, 2017* – **Undisclosed Meeting:** Mr. Wehrum met with the Alliance and one other entity, to discuss fuel economy and greenhouse gas standards.
- *Dec. 27, 2017* – **Undisclosed Meeting:** Mr. Wehrum met with "some of the Auto Alliance Board members."
- *Feb. 21, 2018* – **Undisclosed Meeting**: Mr. Wehrum met with some of the Alliance lawyers and lobbyists, to discuss fuel economy and greenhouse gas testing.
- *Apr. 13, 2018* – EPA publishes its Revised Final Determination, Mid-Term Evaluation of GHG Emissions Standards for Model Year 2022-2025 Light-Duty Vehicles, 83 Fed. Reg. 16,077.

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[1] Message from the Acting Administrator Andrew R. Wheeler, https://www.epa.gov/sites/production/files/2018-08/documents/wheeler-messageontransparency-august022018.pdf. Your message employed the same strong language on transparency as Administrator Lisa Jackson employed in her April 23, 2009, message to agency staff ("Transparency in EPA's Operations" at page 3, https://www.epa.gov/sites/production/files/2014-02/documents/transparency_in_epas_operations.pdf). Both your communication and Administrator Jackson's referenced Administrator Ruckelshaus' pledge, in his landmark May 19, 1983 memorandum, that EPA operations would be "in a fishbowl".

[2] Senators Thomas Carper & Sheldon Whitehouse, *Redefining Air: Industry's Pipeline to Power at EPA's Office of Air and Radiation* at 32-33 (July 2019) ("Report"), https://www.epw.senate.gov/public/_cache/files/2/d/2d7a4d97-5260-4be1-92bf-152ac5d7cd21/020F44F63FF7BAC62FBDC77C0C55D82F.epw-report-carper-whitehouse-redefining-air-wehrum-7-2019.pdf (Attachment A hereto).

[3] Report at 33-34.

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- *Apr. 16, 2018* – **Possibly Partly Disclosed Meeting**: Mr. Wehrum met with the Alliance. EPA Environmental Engineer Christopher Lieske reported a meeting with the Alliance on the same day, April 16, in a memorandum to the docket.[4]
- *May 22, 2018* – **Undisclosed Meeting**: Mr. Wehrum met with the Alliance to discuss an unknown topic alone with his former client.
- *May 23, 2018* – **Undisclosed Meeting**: Mr. Wehrum met with the Alliance to discuss fuel economy standards.
- *May 25, 2018* – Auto Alliance files a Motion to Intervene in support of Respondent EPA in the litigation where a group of public interest petitioners (including EDF) and states challenge EPA's Revised Final Determination.[5]
- *July 16, 2018* – **Undisclosed Meeting**: Mr. Wehrum met with the Alliance and one other entity, to discuss a model year 2020 fuel economy testing extension related to fuel without ethanol.
- *Aug. 24, 2018* – EPA publishes its Proposed Rule, "The Safer Affordable Fuel-Efficient ('SAFE') Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks," 83 Fed. Reg. 42,986.

The Report concludes that Mr. Wehrum's actions appear to have violated governing ethics requirements, including the Trump Administration's Ethics Pledge.[6] In addition to the secret meetings, Mr. Wehrum failed to disclose his prior relationship with the Auto Alliance—one of his former clients at Hunton—in his recusal statement.[7] The Carper-Whitehouse Report concludes that: "Wehrum's failure to disclose his recent former clients frustrates the 'screening arrangement' in his recusal statement, which stated that his subordinates would 'assist in screening EPA matters' involving the entities he listed to ensure his compliance with ethical rules."[8]

EPA must immediately publicly disclose the complete details of these improperly undisclosed meetings between Mr. Wehrum (and any other agency officials) and the Alliance, and EPA must add those records to the docket for the Proposed Rule, and must identify (and publish the details of) any other such meetings beyond those enumerated in the Report. Furthermore, EDF calls on EPA to publicly release any documents or other records that were exchanged during, or created as a result of, those meetings.

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[4] Memorandum from Mr. Christopher Lieske to Docket EPA-HQ-OAR-2018-0283 (July 11, 2018), Docket ID No. EPA-HQ-OAR-2018-0283-0022 (detailing an April 16, 2018, meeting between EPA and the Alliance, as well as a meeting with the Association of Global Automakers the following day). The memorandum does not list the individual participants, so it is unclear if this describes the same meeting that Mr. Wehrum attended. The memorandum also fails to disclose either the subject matter of the meeting, or any details of what was discussed, and so is deficient in any case.

[5] Motion of the Alliance of Automobile Manufacturers to Intervene in Support of Respondents, *California v. EPA*, Case No. 18-1114 (D.C. Cir., filed May 25, 2018), Document # 1732890.

[6] *See* Report at 33; *see also* Exec. Order No. 13770, Ethics Commitments by Executive Branch Appointees, § 1(6) (Jan. 28, 2017), https://www.federalregister.gov/documents/2017/02/03/2017-02450/ethics-commitments-by-executive-branch-appointees.

[7] *See* Report at 8 n.27 (citing Mem. of Law in Support of Mot. For Partial Summary Judgment, Doc. 47 at *27, *Minn. Trucking Ass'n et al. v. Stine et al.*, No. 15-cv-2045-JRT-KMM (D. Minn. Sept. 29, 2016) (listing Wehrum as one of the attorneys representing the Auto Alliance)).

[8] Report at 9.

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EPA must also add the details and materials of the meetings into the relevant public rulemaking docket, and thus into the administrative record, for the relevant agency actions. EPA's failure to publicly disclose the complete records and documents of these meetings between Mr. Wehrum and the Alliance is in contravention of the requirements of the Clean Air Act and the Administrative Procedure Act.[9] The meetings documented in the Carper-Whitehouse Report took place before the Proposed Rule was published in the Federal Register, provided information and other data on which the proposed rule relied, and thus was required to be included in the rulemaking docket at the publication of the proposal.[10] Based on the information currently available, the content of the meetings between Mr. Wehrum and his former client, the Auto Alliance, are "of central relevance" to the rulemaking and were a source of information on which the proposed rule relied, and therefore must be placed in the docket immediately.[11]

Copies of this letter are being submitted to the NHTSA dockets and the EPA Inspector General, which currently has before it a complaint concerning Mr. Wehrum's contacts with his former law firm and its clients.[12]

Please contact Alice Henderson, ahenderson@edf.org, (303) 447-7205, if you have any questions concerning the concerns raised in this letter.

Sincerely,

Alice Henderson
Environmental Defense Fund
2060 Broadway, Suite 300
Boulder, CO 80302

cc: Acting Inspector General Charles J. Sheehan
EPA Office of Inspector General
1200 Pennsylvania Avenue, NW
Washington, DC 20460

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[9] 42 U.S.C. § 7607(d)(3); 5 U.S.C. § 553(b).

[10] 42 U.S.C. § 7607(d)(3). The preamble to the proposed rule cites comments from the Alliance 83 times, far more than comments from any other entity, and includes numerous citations to pre-proposal Alliance comments (see, e.g. proposed rule at footnotes 8, 70, 114, 142, and 204). It would appear extremely likely that in-person meetings between the Alliance or its board members and a top agency official concerning the rulemaking produced information relied on in the proposal.

[11] *Id.*; *see also* 42 U.S.C. § 7607(d)(4)(B)(i).

[12] Letter from Noah Bookbinder, Executive Director, Citizens for Responsibility and Ethics in Washington, to Acting Inspector General Charles J. Sheehan, Environmental Protection Agency, Re: Request for Investigation of EPA Assistant Administrator William Wehrum's Apparent Violation of His Ethics Agreement and Ethics Pledge, (May 29, 2019) (Attachment B hereto).

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Message

From: Lagda, Jeffrey [Lagda.Jeffrey@epa.gov]
Sent: 5/6/2019 3:40:27 PM
To: OIG Leadership Committee Ex. 6 Personal Privacy (PP) @epa.gov]; OIG Deputy Assistant Inspectors General Ex. 6 Personal Privacy (PP) epa.gov]; Barvenik, Susan [Barvenik.Susan@epa.gov]; Mears, Gilbert [Mears.Gilbert@epa.gov]; Elbaum, Kentia [elbaum.kentia@epa.gov]
Subject: Another Press Release from Senators Carper and Whitehouse

FYI...Senators Carper and Whitehouse just issued another press release about the allegations regarding Wehrum and Harlow.

Jeffrey A. Lagda
Congressional and Media Liaison
Office of Congressional and Public Affairs - Office of Inspector General
U.S. Environmental and Protection Agency
1301 Constitution Ave. NW, Rm 3102
Washington, DC 20460
202-566-2584
Lagda.Jeffrey@epa.gov

FOR RELEASE: May 6, 2019
CONTACT:
Jill Farquharson (Carper) 202-224-8832
Rich Davidson (Whitehouse) 202-228-6291

Carper, Whitehouse Discover Verbatim Text Pulled from Second Industry Hunton Client in EPA's 'DTE Memo'

Senators continue urging the EPA Inspector General to initiate an ethics investigation of Bill Wehrum and David Harlow's potential conflicts of interest with their former Hunton Andrews Kurth clients

WASHINGTON, D.C. – Today, U.S. Senators Tom Carper (D-Del.), top Democrat on the Senate Environment and Public Works (EPW) Committee, and Sheldon Whitehouse (D-R.I.), top Democrat on the EPW Subcommittee on Clean Air and Nuclear Safety, again urged the Environmental Protection Agency (EPA) Inspector General (IG) to open an ethics investigation of EPA Assistant Administrator for Air and Radiation Bill Wehrum and his deputy chief, David Harlow, after uncovering more evidence of potential conflicts of interest and questionable industry influence. This time, the conflicts involve the Air Permitting Forum, a second industry coalition housed at Hunton Andrews Kurth that is comprised of several companies for which Wehrum and Harlow have signed ethics recusals.

Both Wehrum and Harlow were previously lawyers at Hunton Andrews Kurth, and since arriving at EPA, both have signed recusals to avoid potential conflicts of interest related to former clients. Members of Congress recently raised concerns about their involvement with the Utility Air Regulatory Group (UARG), a coalition of some of the country's largest coal-fired utility companies that is represented by Hunton Andrews Kurth and has advocated for countless Clean Air Act positions that would weaken or eliminate regulations for power plant emissions—dismissing everything from the threat of climate change to the harm posed by power plant mercury emissions.

The senators uncovered more evidence of potential conflicts of interest involving yet another organization represented by Hunton Andrews Kurth, the Air Permitting Forum ("the Forum"). Like UARG, the Forum consists of individual companies – and while Wehrum and his chief deputy David Harlow are recused from

work associated with some of the companies that identified in 2015 as members of the Forum, neither Wehrum nor Harlow recused themselves from work related to the Forum itself.

In conducting congressional oversight, Senators Carper and Whitehouse discovered language submitted to EPA by the Forum that was subsequently used verbatim, without citation, as part of EPA's novel argument justifying the "DTE Memo" – a memorandum issued by former EPA Administrator Scott Pruitt that disavowed EPA's position in litigation against DTE Energy Company and undercut EPA's enforcement of air pollution requirements under its New Source Review program.

"**While it's promising that so many utilities are abandoning UARG as EPA's ethically questionable practices have come to light, clearly there is a systemic issue at the EPA Office of Air and Radiation. There appears to be no end to the sham associations housed at Bill Wehrum and David Harlow's former law firm that now have a direct line to power,"** said the senators. **"These groups are just another avenue for industry to surreptitiously exert its influence over EPA. We reiterate our call for the EPA Inspector General to thoroughly investigate whether Wehrum and Harlow violated ethics rules in their dealings with former clients**."

Background

The Ever-Elusive "Air Permitting Forum"

The Air Permitting Forum is an unincorporated "coalition" housed at Hunton Andrews Kurth LLP [Hunton] since 2016. In public comments submitted to an EPA Clean Air Act docket in 2016, the Forum described itself as, "a coalition of manufacturing companies focused on stationary source implementation issues under the Clean Air Act." In its 2018 comments on the Clean Power Plan repeal, it describes its members as entities that "are subject to numerous CAA regulatory requirements . . . ."

Like UARG, the Forum does not have any apparent physical address, or even a public website. In the headers for the Forum's public comments, the organization has listed individuals serving in various roles for the Forum, such as an "Executive Director," "Director," "Counsel," and "Manager"—but each of these individuals are lawyers employed by Hunton, and their contact information directs to a Hunton email address.

While no formal list of the Forum's members appears to be readily available, in May 2015, several individuals associated with the Forum met with EPA staff about Clean Air Act rulemakings. As required, EPA staff docketed summaries of those in the meeting, including a list of attendees representing the Forum. In attendance were three attorneys (all of whom would later join Hunton), employees of four companies from which Wehrum or Harlow are recused (Chevron, ExxonMobil, Georgia-Pacific, General Electric) and employees of five additional companies that are not former clients of Wehrum or Harlow (Fiat Chrysler, Ford, General Motors, Toyota, Shell, International Paper). Significantly, Wehrum and Harlow do not appear recused from matters involving the Forum itself.

Concerns of Senators Carper and Whitehouse About Language submitted by the Air Permitting Forum found in EPA's "DTE Memo"

As was noted in a supplemental letter to the Inspector General last month, EPA's plainly inaccurate reading of a 1992 Federal Register notice in the DTE memo is not one that EPA appears to have ever enunciated or recognized prior to the DTE memo. EPA reversed its long-standing New Source Review policy in part based on a unique interpretation of a decades-old EPA preamble to a Clean Air Act rule, which Wehrum and Harlow's law firm previously deployed in litigation against the EPA. It is now clear from the senators' oversight efforts that EPA did not merely adopt the legal posture of Wehrum and Harlow's former clients – EPA adopted their exact words.

In April 2017, former EPA Administrator Scott Pruitt requested public "input on regulations that may be appropriate for repeal, replacement, or modification." In response to that request, the Air Permitting Forum submitted comments stating:

> "While historically EPA has recognized that a source must exercise judgment to exclude increases for which the project is not the 'predominant cause,' more recent EPA actions reflect the view that all emission increases are presumed to be caused by the change." (p. 12)

Nearly identical language appears in EPA's December 7, 2017 memo entitled "New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability," the memo that disavowed EPA's position in litigation against DTE Energy Company, another client of Hunton, and of Mr. Harlow's himself:

> "Because increased emissions may be caused by multiple factors, the EPA has recognized that the source must exercise judgment to exclude increases for which the project is not the 'predominant cause." (p. 7)

This is not the first time Bill Wehrum appears to have cut and pasted text verbatim from documents provided by his former clients. In 2004, while Wehrum was serving as chief counsel in the Bush Administration's Office of Air and Radiation, EPA proposed mercury emissions rules that also used verbatim text from clients of Wehrum's former law firm.

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Message

From: Elbaum, Kentia [elbaum.kentia@epa.gov]
Sent: 5/29/2019 5:48:56 PM
To: OIG Leadership Committee Ex. 6 Personal Privacy (PP) @epa.gov]; OIG Deputy Assistant Inspectors General Ex. 6 Personal Privacy (PP) @epa.gov]; OIG-HQ-OCPA Ex. 6 Personal Privacy (PP) @epa.gov]; Mears, Gilbert [Mears.Gilbert@epa.gov]
Subject: FW: CREW Files Ethics Complaint Against EPA's William Wehrum
Attachments: CREWcomplaint.pdf; ATT00001.htm

FYI. An E&E News reporter forwarded the attached complaint from CREW regarding Mr. Wehrum.

Tia

From: Sean Reilly <sreilly@eenews.net>
Sent: Wednesday, May 29, 2019 1:41 PM
To: Lagda, Jeffrey <Lagda.Jeffrey@epa.gov>
Cc: Kaplan, Jennifer <Kaplan.Jennifer@epa.gov>; Elbaum, Kentia <elbaum.kentia@epa.gov>
Subject: Fwd: CREW Files Ethics Complaint Against EPA's William Wehrum

Hi Jeff:

Just want to confirm that OIG has received this complaint and see whether you have any further comment. Also, has any decision been made
on the previous request for an investigation into Mr. Wehrum's activities from Sen. Whitehouse et. al.?

My deadline is 3 p.m. today.

Thanks,
Sean

Sean Reilly
Reporter
E&E News
Ph: 202 Ex. 6 Personal Privacy (PP) (Cell)
Ph: 202-446-0433 (Desk)
Email: sreilly@eenews.net

CREW | citizens for responsibility and ethics in washington

FOR IMMEDIATE RELEASE
May 29, 2019

CONTACT
Aaron Rodriguez
202-408-5565 | arodriguez@citizensforethics.org

CREW Files Ethics Complaint Against EPA's William Wehrum

WASHINGTON — Environmental Protection Agency Assistant Administrator for the Office of Air and Radiation William Wehrum appears to have violated both his ethics agreement and the Trump Administration's ethics pledge by holding private meetings with his previous clients and by failing to recuse himself from issues involving his former law firm and recent clients, according to a complaint filed today by Citizens for Responsibility and Ethics in Washington (CREW) with the Office of Inspector General at the EPA.

As a condition of his appointment, Wehrum signed both an ethics agreement and an ethics pledge barring him from working on issues involving his former employer or any recent former client. The ethics pledge also barred him from meeting with them, regardless of the subject of the meeting. Less than one month after being named assistant administrator, Wehrum delivered a presentation on EPA's regulatory activities at a meeting hosted by his former law firm and attended by three former clients. In that same month, Wehrum also participated in EPA's development of a memorandum adopting his former law firm's arguments just before a critical litigation deadline in a lawsuit EPA had previously brought against one of the firm's clients.

"Almost from the moment he began his job as a top environmental regulator, William Wehrum appears to have been working to advance the outside interests of his former law firm and clients inside EPA," said CREW Executive Director Noah Bookbinder. "In less than one month in his role, Wehrum managed to reverse EPA policy to adopt his former law firm's legal position in pending litigation and deliver a private presentation to three former clients. Wehrum's apparent failure to abide by ethics obligations is a worst case scenario for the revolving door that undermines EPA's integrity and weakens public confidence in our government, and it must be investigated."

CREW previously called on the Inspector General to investigate the inadequate handling of the many outrageous ethical issues that came to light under former Administrator Scott Pruitt's tenure. Wehrum's apparent ethics violations are further proof that systemic failures of the EPA's ethics program have continued under the leadership of Administrator Andrew Wheeler. CREW filed two ethics complaints against Wheeler for also failing to recuse himself from issues he previously lobbied on and holding meetings with his former clients.

Click here to read the complaint.

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Citizens for Responsibility and Ethics in Washington (CREW) is a nonprofit legal watchdog group dedicated to holding public officials accountable for their actions. For more information, please visit www.citizensforethics.org or contact Jordan Libowitz at 202-408-5565 or jlibowitz@citizensforethics.org.

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May 29, 2019

Acting Inspector General Charles J. Sheehan
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2410T)
Washington, DC 20460

Re: Request for Investigation of EPA Assistant Administrator William Wehrum's Apparent Violation of His Ethics Agreement and Ethics Pledge

Dear Acting Inspector General Sheehan:

Citizens for Responsibility and Ethics in Washington ("CREW") respectfully requests that the Environmental Protection Agency ("EPA") Office of Inspector General ("OIG") investigate whether EPA's Assistant Administrator for the Office of Air and Radiation ("OAR"), William Wehrum, violated his ethics agreement and the Ethics Pledge he signed as a condition of his appointment through his contacts with his former employer and former legal clients.

Mr. Wehrum signed an ethics agreement and an Ethics Pledge requiring him to recuse from party matters in which any of several former clients or his former law firm was a party or represented a party. The Ethics Pledge also required recusal from any communication or meeting with these entities. Mr. Wehrum appears to have violated these recusal obligations in December 2017 by: (1) granting his former law firm's request that he deliver a presentation in its Washington, D.C., office; (2) meeting with the law firm and three former clients to deliver the presentation; and (3) participating in the preparation of a memorandum used in litigation in which the firm represented a party.

Factual Background

On November 9, 2017, the Senate confirmed Mr. Wehrum to serve as President Trump's Assistant Administrator leading OAR,[1] which "develops national programs, policies, and regulations for controlling air pollution and radiation exposure."[2] This work includes addressing pollution prevention and energy efficiency, industrial air pollution, acid rain, climate change, and indoor and outdoor air quality, among other issues.[3] Prior to joining the Trump administration, Mr. Wehrum was a partner and head of the Administrative Law Group at the law firm of Hunton & Williams LLP ("Hunton"),[4] "where his practice focused on air quality issues."[5]

[1] U.S. Senate, Roll Call Vote 115th Congress - 1st Session, Vote No. 268, Nov. 9, 2017, https://bit.ly/2IyFkOg.
[2] EPA, About the Office of Air and Radiation (OAR), https://bit.ly/2Gt1fkp (last viewed May 7, 2019).
[3] *Id.*
[4] The firm later changed its name to Hunton Andrews Kurth, LLP. We refer to it as "Hunton" to avoid confusion.
[5] EPA, About the Assistant Administrator of EPA's Office of Air and Radiation, https://bit.ly/2viYLlz (last viewed May 7, 2019).

Released via FOIA EPA-2019-008216

A. The Hunton Presentation

Less than a month after his appointment to serve as an EPA Assistant Administrator, Mr. Wehrum granted a request from his former law firm to deliver a presentation at a meeting in its Washington, D.C., office on December 7, 2017.[6] The request form indicated he was invited to speak about "regulatory developments" for approximately one hour including "rules affecting electric generating companies and other stationary sources."[7] In addition to Hunton, the meeting included American Electric Power, Dominion Energy, Duke Energy, Southern Company, and Utility Air Regulatory Group ("UARG").[8] Duke Energy and UARG are both former clients of Mr. Wehrum.[9] For purposes of the ethics rules, Dominion Energy is also deemed a former client of Mr. Wehrum because one of its subsidiaries was his client.[10]

All meeting participants were tied to UARG. Hunton was UARG's legal counsel, and the other participants were UARG members.[11] UARG is a membership association that describes itself as an unincorporated, not-for-profit association of individual electric generating companies and national trade associations.[12] Though UARG reportedly has no staff or physical location,[13] Mr. Wehrum explained to *Politico* that UARG is a legal entity: "'UARG is an entity. It's a legal entity,' he said, explaining that his clients were 'not the individual members' of UARG."[14]

This December 7, 2017, meeting was similar to an earlier meeting between UARG and EPA in June 2017, with the primary difference being that Mr. Wehrum switched sides. For the June 2017 meeting, Mr. Wehrum had represented UARG in asking an EPA official to make a presentation on regulatory issues: "Topics of interest include the Clean Power Plan, the Mercury and Air Toxics Standard, regional transport, regional haze, and NAAQS/NAAQS

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[6] Juliet Eilperin, EPA regulator skirts the line between former clients and current job, *Washington Post*, Feb. 25, 2019, https://wapo.st/2P3f8M9.

[7] *See* Invite form for William Wehrum, from his former law firm, *Washington Post*, published Jan. 29, 2019 (document titled "Event Information Form") ("Invite Form"), https://wapo.st/2T7zkC4.

[8] *See* EPA's William Wehrum and the Effort to Move Industry's Agenda, *New York Times* ("*New York Times* Documents"), at 183, 187-201 (documents showing Mr. Wehrum's calendar for Dec. 7, 2017 and his Hunton presentation), https://bit.ly/2BV3spp.

[9] Memorandum from William Wehrum, Assistant Administrator, to Andrew R. Wheeler, Acting Administrator, Recusal Statement, Sept. 17, 2018, https://bit.ly/2HyxNPf ("Wehrum Recusal Statement").

[10] The ethics rules treat a corporation and the subsidiaries it controls as the same legal person. 5 C.F.R. § 2635.102(k). Mr. Wehrum's former client was Dominion Resources Services, Inc., which is now called Dominion Energy Services, Inc., and is a subsidiary of Dominion Energy. Wehrum Recusal Statement, at 2; Company Overview of Dominion Energy Services, Inc., *Bloomberg*, https://bloom.bg/2vZsgcs (last viewed May 14, 2019).

[11] Dave Anderson, EPA's Clean Power Plan Opponents Led By Just A Few Power Companies, *Energy & Policy Institute*, Sept. 27, 2016, https://bit.ly/2U2IY8E; Regulations.gov, Comment submitted by Lucinda Minton Langworthy, Hunton for UARG, https://www.regulations.gov/document?D=EPA-HQ-OAR-2001-0017-1629; 2017 Utility Air Regulatory Participation, Summary of Receipts, As of June 20, 2017, UARG organizational documents published by *Politico*, at 6, https://bit.ly/2IE5JeC (last viewed May 13, 2019).

[12] Opening Brief of Petitioners on Core Legal Issues, *State of West Va., et al., v. Env. Prot. Agency, et al.*, D.C. Cir. No. 15-1363, at xxviii (Oct. 23, 2015), https://bit.ly/2H69rej ("Petitioners' Brief").

[13] Letter from Sen. Sheldon Whitehouse, *et al.* to Charles J. Sheehan, Acting Inspector General, Environmental Protection Agency, at 4 n.6, Feb. 21, 2019, https://bit.ly/2Wuw55b ("Senators' OIG Letter").

[14] Zack Colman and Alex Guillén, Documents detail multimillion-dollar ties involving EPA official, secretive industry group, *Politico*, Feb. 20, 2019, https://politi.co/2GBPJrx.

implementation. . . . We are interested in discussing only possible future regulatory action."[15] The *New York Times* indicated that, in the December 2017 meeting, Mr. Wehrum covered the same subject: "The topic was an overview of efforts at the E.P.A. to roll back some of the rules Mr. Wehrum and his former law firm had helped [UARG] fight, including the Clean Power Plan, the email records show."[16] The location of the two meetings, the subject and the parties remained substantially the same – the difference was that Mr. Wehrum represented UARG to EPA in June and EPA to UARG in December. [17]

Politico recently reported that UARG, which it described as a "secretive utility industry coalition," is dissolving "amid investigations into whether its members received special treatment from the Trump administration."[18] UARG, which has operated on behalf of its members for four decades, announced its dissolution just one month after the House Energy and Commerce Committee requested documents from Hunton regarding UARG's legal structure and interactions with EPA.[19] Referencing litigation involving DTE Energy, the committee's letter to Hunton explained, "We are concerned that two former employees of your firm — William Wehrum and David Harlow — may have violated federal ethics rules by helping reverse EPA's position in ongoing litigation against DTE Energy, a Hunton client."[20]

B. The EPA Memorandum Supporting Hunton's Litigation

According to the *Washington Post*, shortly after his confirmation, Mr. Wehrum "weighed in on a policy shift that could have influenced litigation" in which Hunton was representing DTE Energy ("DTE").[21] This "policy shift" was announced in a memorandum that EPA issued on the same day as Mr. Wehrum's presentation, just before a Supreme Court litigation deadline in the DTE case.[22] The memorandum addressed the Clean Air Act's New Source Review ("NSR") program at issue in that lawsuit.[23]

EPA officials moved quickly to ensure that the memorandum ("NSR memorandum") was finished before the litigation deadline. As one official stated in an email circulating the

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[15] *Id.*
[16] Eric Lipton, As Trump Dismantles Clean Air Rules, an Industry Lawyer Delivers for Ex-Clients, *New York Times* Aug. 19, 2019, https://nyti.ms/2PpNFnR; *see also New York Times* Documents, at 182-87 (documents related to the Dec. 7, 2017 meeting).
[17] Mr. Wehrum also represented UARG at a similar meeting with EPA in July 2017. Email from William Wehrum to Mandy Gunasekara, July 20, 2017 (*New York Times* Documents, at 74).
[18] Zack Colman, Industry group tied to EPA air chief dissolves, *Politico*, May 10, 2019, https://politi.co/2HsZwhJ.
[19] Sean Reilly, Embattled trade group tied to EPA air chief to dissolve, *E&E News*, May 13, 2019, https://bit.ly/2JjJZnR. A Hunton attorney speaking anonymously denied that the investigation caused UARG's dissolution. *Id.*
[20] Letter to Wendell L. Taylor, Managing Partner, Hunton Andrews Kurth LLP, from House Energy and Commerce Committee Chairman Frank Pallone, Jr., *et al.*, at 1, Apr. 11, 2019, https://bit.ly/2Jj4hh7.
[21] Eilperin, *Washington Post*, Feb. 25, 2019.
[22] *Id.*
[23] Memorandum from E. Scott Pruitt, Administrator, Environmental Protection Agency, to Regional Administrators, New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability, at 1-2, Dec. 7, 2017 ("NSR Memo"), https://bit.ly/2jUCLJF.

memorandum: "Attached is the latest version of the NSR Memo pertaining to the issues at issue in the DTE case. I thought we may have more time, but know now that the cert hearing is planned for Wednesday [December 6, 2017]. This memo needs to go out before."[24] While the official was wrong about the deadline – the Supreme Court held its certiorari conference for the DTE case on December 8, 2017 – EPA succeeded in issuing the NSR memorandum before the certiorari conference, late on December 7, 2017.[25] Notably, though the Justice Department represented EPA in the DTE case, it was Hunton, EPA's putative opposing counsel, that filed the memorandum with the court.[26] As the *Washington Post* reported: "Hours before the justices conferred on the case, Hunton hand-delivered [EPA Administrator Scott] Pruitt's memo to the Supreme Court."[27]

After the conference, the Supreme Court denied certiorari.[28] One of the other parties to the litigation described this denial as a positive outcome undermined by an EPA memorandum that "tries to adopt DTE's rejected litigation position as the agency's new approach to NSR nationwide."[29] The *Washington Post* reported that, "[a]fter the high court declined to take up the case, the matter entered settlement talks, and DTE's hand has been strengthened."[30]

Mr. Wehrum's Recusal Obligations

Mr. Wehrum is subject to related but distinct recusal obligations arising separately from his ethics agreement and his Ethics Pledge, which "both overlap and diverge."[31]

A. The Ethics Agreement

Mr. Wehrum signed an ethics agreement on August 28, 2017 that bars him from participating personally and substantially in any *particular matter involving specific parties* ("party matter") in which Hunton is a party or represents a party for one year after his resignation from the firm.[32] It also bars him from any party matter in which a former client of his is a party or represents a party for one year from the date of his last service to the client.[33]

The language of Mr. Wehrum's ethics agreement as to these recusal obligations generally tracks OGE's impartiality regulation but differs from the regulation in one important respect. Under the regulation, recusal is necessary only if the employee or an ethics official determines

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[24] Email from Mandy Gunasekara to Susan Bodine, Dec. 4, 2017 (Senators' OIG Letter, at 93).
[25] *Id.* at 1.
[26] Letter from Hunton & Williams to Clerk of the Supreme Court, Dec. 8, 2017 (transmitting NSR Memo) (*New York Times* Documents, at 212).
[27] Eilperin, *Washington Post*, Feb. 25, 2019.
[28] *DTE Energy Co. v. United States*, 138 S. Ct. 555 (2017) (denying petition for writ of certiorari).
[29] Sierra Club, Press Release, U.S. Supreme Court Declines Review of DTE Energy Air Pollution Case, Dec. 11, 2017, https://bit.ly/2JEyGrg.
[30] Eilperin, *Washington Post*, Feb. 25, 2019.
[31] Office of Gov't Ethics, DO-09-11, at 6, Mar. 26, 2009 (discussing the ethics pledge and the impartiality regulation on which ethics agreements are based), https://bit.ly/2LpJoyZ ("OGE DO-09-11").
[32] Ethics Agreement of William Wehrum, Aug. 28, 2017, https://bit.ly/2BW9SVw ("Ethics Agreement").
[33] *Id.* at 1; *see also* 5 C.F.R. § 2635.502(b)(iv).

that a "reasonable person" would question the employee's impartiality in a party matter involving a former employer or client.[34] Mr. Wehrum's ethics agreement omits this "reasonable person" standard.[35] OGE's ethics agreement guide explains that this omission was the result of a decision to make recusal mandatory in all such party matters for top officials, rather than letting them decide for themselves what a reasonable person might think.[36]

Mr. Wehrum's ethics agreement permits him to participate in a party matter from which he would otherwise be barred if ethics officials review the circumstances in advance and authorize him to participate, using a procedure prescribed under OGE's impartiality regulation.[37] On December 7, 2017, he filed a form attesting that he had not received such an authorization.[38] On September 29, 2018, EPA notified a Senator that Mr. Wehrum still had not received an authorization.[39]

B. The Ethics Pledge

Mr. Wehrum also signed President Trump's Ethics Pledge for political appointees pursuant to Executive Order No. 13770.[40] The Ethics Pledge bars him from participating personally and substantially, for two years from the date of his appointment, in any party matter in which either his former law firm or any client he served in the two-year period preceding his appointment is a party or represents a party.[41]

Mr. Wehrum's Ethics Pledge also bars him, for two years from the date of his appointment, from any *communication or meeting* with either the law firm or a client he served in the two-year period preceding his appointment.[42] This obligation applies whether or not the meeting or communication focuses on a party matter. A limited exception permits delivery of a speech unless the speech would have a financial effect on a former employer or client.[43]Another

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[34] 5 C.F.R. § 2635.502(a), (c).
[35] *Compare* Ethics Agreement at 1 *with* 5 C.F.R. § 2635.502(a).
[36] Office of Gov't Ethics, Guide to Drafting Ethics Agreements for PAS Nominees, 2014 version, at 33 ("Most of these samples do not incorporate the 'reasonable person' standard contained in 5 C.F.R. § 2635.502. . . . Inasmuch as [nominees will be] the most senior leaders in the Federal executive branch, their ethics agreements often prospectively address the potential for appearance issues. This approach protects a [nominee] from the types of questions that would arise if the [nominee] were to self-regulate on a case-by-case basis."), https://bit.ly/2EneGTX.
[37] Ethics Agreement at 1; *see also* 5 C.F.R. § 2635.502(d).
[38] William Wehrum, Certification of Ethics Agreement Compliance, Item 9, Dec. 7, 2017, https://bit.ly/2T2wgXP ("Compliance Certification").
[39] Letter from Kevin Minoli to Sen. Sheldon Whitehouse, Sept. 29, 2018, (attached to Senators' OIG Letter, at 85).
[40] William Wehrum, Ethics Pledge, Nov. 14, 2017 (*New York Times* Documents, at 159) ("Wehrum Ethics Pledge"); Executive Order No. 13770, Ethics Commitments by Executive Branch Appointees, § 1(6) Jan. 28, 2017, https://bit.ly/2QaZzSk.
[41] *Id.*
[42] *Id.*, § 2(s).
[43] Office of Gov't Ethics, DO-09-020, at 2, May 26, 2009, https://bit.ly/2Suybzf ("OGE DO-09-020"); Office of Gov't Ethics, OGE LA-17-03, Mar. 20, 2017, (applying DO-09-020 to Executive Order No. 13770), https://bit.ly/2FZRhv0.

exception permits participation in a meeting or communication that does not involve a party matter and is "open to all interested parties."[44]

As with the recusals under the ethics agreement, these recusals are not subject to a "reasonable person" standard. Mr. Wehrum must recuse from any covered party matter, communication or meeting unless he first receives an Ethics Pledge waiver.[45] On December 7, 2017, he indicated he had not received such a waiver.[46] A review of the Ethics Pledge waivers listed on OGE's website confirms that he has not received a waiver since then.[47]

Potential Violations

Mr. Wehrum's ethics agreement and Ethics Pledge required him to recuse from party matters in which any of several former clients or his former law firm was a party or represented a party, and his Ethics Pledge further required him to recuse from any communication or meeting with these entities. He appears to have violated these recusal obligations in December 2017 by: (1) granting the law firm's request that he deliver a presentation in its Washington, D.C., office; (2) meeting with the law firm and three former clients to deliver the presentation; and (3) participating in the preparation of a memorandum for the litigation in which Hunton was representing DTE.

A seasoned attorney, Mr. Wehrum seems to have attempted to articulate defenses to these suspected violations. Regarding the presentation, Mr. Wehrum appears to rely on exceptions to the Ethics Pledge for speeches and meetings "open to all interested parties." As explained below, however, his defense misconstrues the Ethics Pledge exceptions and partly fails to address the possible violation of his ethics agreement. Regarding EPA's issuance of a litigation memorandum, he appears to suggest that he did not participate "personally and substantially" in that effort, but his participation in EPA's development of the NSR memorandum was, in fact, personal and substantial. Mr. Wehrum also appears to suggest that development of the memorandum was not a party matter, but EPA developed the memorandum primarily for a court case, which is the quintessential example of a party matter.

A. The Decision to Grant Hunton's Request

Hunton's request that Mr. Wehrum give a presentation to its clients was a party matter in which Hunton, as the presentation's sponsor, was a party. OGE has explained that it "generally has viewed the decision to give an official speech as a particular matter involving the event sponsor as a specific party" triggering recusal obligations.[48] Therefore, by granting Hunton's

[44] *Id.*; OGE Inv. Adv. Op. 06 x 09 (2006) (differentiating party matters from other matters), https://bit.ly/2ASzf9k.
[45] Executive Order No. 13770, §§ 1(6), 2(s).
[46] Compliance Certification.
[47] Office of Gov't Ethics, Agency Ethics Pledge Waivers, https://bit.ly/2VFJnuO (last viewed May 14, 2019).
[48] OGE DO-09-020, at 2.

request, Mr. Wehrum violated his ethics agreement and Ethics Pledge because he participated personally and substantially in a party matter in which Hunton was a party.[49]

OGE has established an interpretive exception to the Ethics Pledge permitting an appointee to give a speech to a former employer.[50] This exception, however, is not absolute. The exception does not apply if the speech would have a demonstrable financial effect on the former employer.[51] In fleshing out this concept of a "financial effect," OGE has explained that the exception is unavailable when a former employer organizes an event as "some kind of business development activity (such as a *seminar for current or prospective clients*)."[52]

A "seminar for current or prospective clients" aptly describes Mr. Wehrum's presentation. Hunton invited him to deliver a presentation in the firm's conference room exclusively for members of UARG, a firm client Mr. Werhum had represented before entering government.[53] It is not known if Hunton billed for its time, but the presentation's subject—EPA's regulatory activity—appears to be a central focus of Hunton's representation of UARG.[54] In short, the presentation was unmistakably a business development activity that could not qualify for the speech exception.

Even if the speech exception had applied to the presentation, it would have covered only the *Ethics Pledge* recusal and not the *ethics agreement* recusal. Mr. Wehrum had not received an authorization excusing him from compliance with the ethics agreement recusal.[55] In fact, he admits that he did not consult EPA's ethics officials in advance of this decision.[56] Therefore, he likely also violated his ethics agreement when he granted Hunton's request.

B. Mr. Wehrum's Presentation to Hunton and his Former Clients

In addition to Mr. Wehrum's consideration and granting of Hunton's request for a presentation, his delivery of the presentation itself was problematic. The presentation was a prohibited communication or meeting with Hunton and three of his former clients – UARG, Duke Energy, and Dominion Energy. As discussed in the preceding section, the exception for speeches sponsored by a former employer was unavailable. By delivering this presentation

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[49] Hunton identifies the clients as the sponsors in the invitation form, but Hunton was the sponsor because it extended the invitation and hosted the event in its offices. Invite Form, at 1. In any event, the analysis would be the same if the clients had sponsored the event because UARG, Duke Energy and Dominion Energy were Mr. Wehrum's former clients.
[50] OGE DO-09-020, at 1.
[51] *Id.*, at 2-3. The same analysis would apply to a speech that had a demonstrable financial effect on a client.
[52] *Id.*, at 2 (emphasis added).
[53] Invite Form.
[54] Technical Consultant and Legal Support Funding Requests for the Period June 23 to Early September 2017, *Politico* (UARG organizational documents), https://bit.ly/2IE5JeC; Colman and Guillén, *Politico*, Feb. 20, 2019 ("The nation's biggest coal-burning power companies paid a top lobbying firm millions of dollars to fight a wide range of Obama-era environmental rules… shortly before one of the firm's partners became President Donald Trump's top air pollution regulator.").
[55] Compliance Certification, Item 7.
[56] Eilperin, *Washington Post*, Feb. 25, 2019.

without first obtaining a waiver, Mr. Wehrum violated his Ethics Pledge.[57] Depending on whether the discussion during or after the presentation addressed a party matter in which Hunton, UARG, or Duke Energy was a party or represented a party, he may also have violated his ethics agreement.

In an interview with the *Washington Post*, Mr. Wehrum offered a defense as to the Ethics Pledge violation but does not appear to have addressed the possible ethics agreement violation:

> Wehrum said he is still unclear about exactly what sort of meetings are permissible under the Trump pledge. However, he said he has concluded that his meetings comply as long as five entities participate. And, he said, it does not matter how many of those entities are former clients.[58]

Mr. Wehrum seems to be arguing that, under the Ethics Pledge, he cannot meet with any former client but can meet with any five of them. If that were true, the rule would serve no purpose.

His mention of "five entities" likely was a reference to the Ethics Pledge exception for meetings that do not focus on party matters and are "open to all interested parties."[59] OGE has articulated a rule of thumb that five parties can satisfy the multiplicity requirement, but this interpretive gloss on the "open to all interested parties" requirement does not apply if the circumstances raise concerns about special access. OGE's guidance states:

> Because meeting spaces are typically limited, and time and other practical considerations also may constrain the size of meetings, common sense demands that reasonable limits be placed on what it means to be "open to all interested parties." Such meetings do not have to be open to every comer, but should include a multiplicity of parties. For example, if an agency is holding a meeting with five or more stakeholders regarding a given policy or piece of legislation, an appointee could attend such a meeting even if *one* of the stakeholders is a former employer or former client; such circumstances do not raise the *concerns about special access* at which the Executive Order is directed. . . . In any event, agency ethics officials will have to exercise judgment in determining whether a specific forum qualifies as a meeting or other event that is "open to all interested parties," and OGE is prepared to assist with this analysis.[60]

There is a threshold problem to Mr. Wehrum relying on the five-party rule of thumb: *only one party attended the meeting*. As discussed above, UARG is an "ad hoc unincorporated association" of members acting "collectively."[61] The available evidence suggests that member

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[57] Wehrum Ethics Pledge, ¶ 6.
[58] Eilperin, *Washington Post*, Feb. 25, 2019.
[59] Executive Order No. 13770, §§ 1(6), 2(s).
[60] OGE DO-09-11, at 2 (emphasis added).
[61] Brief for Intervenor-Petitioners National Federation of Independent Business and Utility Air Regulatory Group, *Murray Energy Corporation, v. Env. Prot. Agency, et al.*, D.C. Cir. No. 14-1112 and 14-1151, at v (Dec. 30, 2015), https://bit.ly/2YmvliQ.

companies participated in this meeting collectively as representatives of UARG. For example, when Mr. Wehrum arranged a similar meeting with EPA in July 2017 while serving as counsel for UARG, he explained that UARG would be represented by its counsel and members. In an email sent before that meeting, Mr. Wehrum, as UARG counsel, wrote:

> UARG will be represented by Makram Jabar ([Hunton]), Andrew Knudsen ([Hunton]), Mikes [sic] Gears (Duke Energy) and Justin Walters (Southern Co.). Makram and Andrew are counsel to the UARG HAPs committee. Mike and Justin are co-chairs of the UARG HAPs Committee."[62]

He also characterized an earlier June 2017 meeting with EPA as a UARG meeting: "UARG is holding a meeting here at Hunton's offices in DC on the afternoon of June 22 and the morning of June 23."[63] In this context, his December 2017 presentation is best characterized as having been attended by only UARG and its counsel. The meeting, thus, fails the multiplicity requirement.

There is an even more fundamental problem with Mr. Wehrum relying on the five-party rule of thumb. Underlying the rule of thumb is the legal standard that a meeting must be "open to all interested parties" to alleviate concerns about special access.[64] OGE has explained that the purpose of the Ethics Pledge is "to address concerns that former employers and clients may appear to have privileged access, which they may exploit to influence an appointee out of the public view."[65] Consistent with this purpose, EPA has acknowledged that "the term 'open to all interested parties' means that the meeting should include a multiplicity of parties representing a diversity of viewpoints."[66] Rather than being open to a diversity of viewpoints, the audience in this instance was an exclusive group of similarly-situated energy companies that had hired Hunton to advocate against EPA's attempts to regulate their industry. It appears Hunton acted as a gatekeeper, excluding everyone but its own clients from the meeting. In fact, Hunton admitted

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[62] Email from William Wehrum to Mandy Gunasekara, July 20, 2017 (*New York Times* Documents, at 74).
[63] Email from William Wehrum to Mandy Gunasekara, May 23, 2017 (*New York Times* Documents, at 31).
[64] Executive Order No. 13770, § 2(s).
[65] OGE DO-09-11, at 2.
[66] The quoted language comes from the recusal statement EPA's Administrator Andrew Wheeler signed when he was Deputy Administrator. Recusal Statement of Andrew R. Wheeler, May 24, 2018, https://bit.ly/2KTqyng. Mr. Wehrum, however, omitted this requirement from his recusal statement, which he refused to sign until September 2018. Wehrum Recusal Statement. Some recusal statements filed by EPA officials in 2017, like Mr. Wehrum's recusal statement, did not mention the "diversity of viewpoints" requirement. American Oversight, EPA Political Appointee Ethics Records, Resumes, and SF-50s, at 101, 114, Oct. 30, 2018 (Recusal Statement of Tate Bennett, Nov. 1, 2017; Recusal Statement of Erik Baptist, Oct. 12, 2017), https://bit.ly/2DtWSHp. But by 2018, when Mr. Wehrum filed his recusal statement, EPA had expanded its discussion of the Ethics Pledge in recusal statements to elaborate on that requirement. There are numerous examples of senior EPA officials discussing the "diversity of viewpoints" or "diversity of interests" requirement in recusal statements they filed in 2018 before and after Mr. Wehrum filed his. *See, e.g.*, Recusal Statement of Steven Cook, Apr. 20, 2018, https://bit.ly/2W3XTNl; Recusal Statement of Michael Stoker, June 4, 2018, https://bit.ly/2DtWSHp; Recusal Statement of Peter Wright, July 24, 2018, http://src.bna.com/ABQ; Recusal Statement of Anne Idsal, July 24, 2018, https://bit.ly/2UUzRbl; Recusal Statement of David Dunlop, Dec. 19, 2019, https://bit.ly/2GHLJ6H. Therefore, by the time Mr. Wehrum had signed his recusal statement, EPA's ethics office had firmly established that the five-party rule of thumb only applies when the parties represent a diversity of viewpoints. Mr. Wehrum cannot simply point to the language in his recusal statement to avoid that limitation. If he attempts to do so, OIG should ascertain what advice EPA's ethics officials would have given Mr. Wehrum had he consulted them before agreeing to deliver the Hunton presentation.

only a select group of clients who were dues-paying members of UARG, Mr. Wehrum's former client. It would be impossible to argue that this closed-door UARG meeting met the standard of being "open to all interested parties." To the contrary, this meeting delivered precisely the sort of *special access* for UARG that the Ethics Pledge is designed to prevent. Therefore, the exception was inapplicable, and Mr. Wehrum violated his Ethics Pledge.

In addition to violating his Ethics Pledge, Mr. Wehrum may have violated his ethics agreement. A violation occurred if he discussed any party matter, such as litigation, involving Hunton, UARG, or Duke Energy as a party or a representative. Meeting materials show that Mr. Wehrum discussed "NSR" (new source review) in his presentation.[67] Notably, late on the same day as his presentation, EPA issued a memorandum on NSR in connection with a case involving Hunton as a representative.[68] As discussed in more detail in the next section, Mr. Wehrum participated in development of that NSR memorandum, and it was Hunton's attorneys who delivered it to the Supreme Court one day after his presentation. Under these circumstances, an investigation is warranted to ascertain whether Mr. Wehrum discussed the NSR memorandum with Hunton or any other party matter involving a meeting participant.

C. Mr. Wehrum's Involvement in Developing the EPA Memorandum Used by Hunton

Mr. Wehrum also apparently violated his recusal obligations under his ethics agreement and Ethics Pledge by assisting in the development of the NSR memorandum, which was tied to litigation in which his former employer, Hunton, was representing DTE Energy ("DTE"). EPA recognized the need for his recusal from the NSR memorandum due to its connection to the DTE litigation. On December 7, 2017, Mr. Wehrum's deputy, Mandy Gunasekara, emailed the final NSR memorandum to EPA's Chief of Staff, Ryan Jackson, explaining that "Bill [Wehrum] is recused."[69] Similarly, when Ms. Gunasekara sent Mr. Wehrum a redacted draft on December 5, 2017, she wrote: "I have redacted the potentially offending language given your recusal issues."[70] Later that week, *The Hill* reported on December 8, 2017, that EPA "said Wehrum was not involved in Thursday's memo, having recused himself because his former law firm, Hunton & Williams, represents DTE in the litigation."[71]

EPA's claim that Mr. Wehrum "was not involved" was later revealed to be untrue. As the *Washington Post* reported, Mr. Wehrum participated personally and substantially in EPA's development of the NSR memorandum:

---

[67] William Wehrum, Clean Air Act: Update on Stationary Source Regulations, Dec. 7, 2017, (presentation at meeting) (*New York Times* Documents, at 200).
[68] Eilperin, *Washington Post*, Feb. 25, 2019.
[69] Email from Mandy Gunasekara to Ryan Jackson, Dec. 7, 2017 (Senators' OIG Letter, at 115).
[70] Email from Mandy Gunasekara to William Wehrum and David Harlow, Dec. 5, 2017 (Senators' OIG Letter, at 103). It is not clear why Ms. Gunasekara would have thought redaction of only part of the NSR memorandum was sufficient.
[71] Timothy Cama, EPA works to ease air pollution permitting process, *The Hill*, Dec. 8, 2017, https://bit.ly/2VwgoK8.

> "I looked at that [redacted] document, and then I sat in one meeting where we talked about the meaning of the 2002 rules," Wehrum said. "That was it. That was my involvement."
>
> However, two people familiar with the meeting, speaking on the condition of anonymity to discuss internal deliberations, said the discussion ranged beyond the 2002 rules, covering topics such as the memo's potential impact on future EPA enforcement activities and the need to issue it before the Supreme Court [certiorari] conference on the DTE case.[72]

Mr. Wehrum's acknowledgment that he reviewed the redacted document and sat in on a meeting establishes that he participated personally and substantially in development of the NSR memorandum, as does the account of the two sources who indicate that his participation was greater than he has acknowledged.

This information is corroborated by other reporting and a documentary record of his personal and substantial participation in the NSR memorandum's development in early December 2017. The *New York Times* reported that "[d]uring a morning meeting on Dec. 5th, according to E.P.A. officials interviewed by The New York Times, the DTE/New Source Review memo was discussed, even though Mr. Wehrum had at times asserted he was recusing himself from this topic." [73] A heavily redacted email from an attorney in EPA's Office of General Counsel on December 5, 2017 also announced a "late-breaking meeting today with Bill Wehrum at 1 p.m. on New Source Review,"[74] and an entry in Mr. Wehrum's calendar for 1:00 p.m. that day is titled "NSR Discussion."[75] At 1:06 p.m. on December 5, Ms. Gunasekara sent the previously discussed draft of the NSR memorandum to Mr. Wehrum, which was attached to an email in which she indicated she was sending the draft in preparation for "tomorrow's NSR discussion," suggesting that Mr. Wehrum may have participated in another meeting on December 6, 2017.[76] Mr. Wehrum also received two more emails regarding the NSR memorandum on December 7, 2017, and one on December 8, 2017.[77] In addition, Mr. Wehrum was listed as a required participant in a calendar entry for a scheduled conference call regarding the memorandum on December 11, 2017.[78]

Regardless of whether Mr. Wehrum's views were incorporated in the final NSR memorandum, his participation in deliberations regarding its development constituted personal

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[72] Eilperin, *Washington Post*, Feb. 25, 2019 (the insertion of "[redacted]" appears in the original text of the article).
[73] Annotation to Wehrum calendar for Dec. 5, 2017 added by the *New York Times* (*New York Times* Documents, at 178).
[74] Email from Brian Doster to Justin Schwab and Marcella Burke, Dec. 5, 2017 (Senators' OIG Letter, at 105).
[75] Wehrum calendar for Dec. 5, 2017 (*New York Times* Documents, at 179).
[76] Email from Mandy Gunasekara to William Wehrum and David Harlow, Dec. 5, 207 (Senators' OIG Letter, at 103).
[77] Email chain between Susan Bodine and Mandy Gunasekara, Dec. 7, 2017 (cc:ing Mr. Wehrum) (*New York Times* Documents, at 202); Email from Susan Bodine to William Wehrum, Dec. 8, 2017 (*New York Times* Documents, at 228).
[78] Wehrum calendar for Dec. 11, 2017 (Senators' OIG Letter, at 113).

and substantial participation.[79] OGE's regulations explain that participation "may be substantial even though it is not determinative of the outcome of a particular matter."[80] Moreover, redaction of some language in a draft did not negate his participation in the NSR memorandum's development, for both his Ethics Pledge and his ethics agreement establish the duty to recuse from a "particular matter involving specific parties" and not merely parts of the matter.[81]

The focus on the "2002 rules" in Mr. Wehrum's above-quoted explanation seems, at least implicitly, to challenge the notion that development of the NSR memorandum was part of a party matter—a necessary predicate to finding a violation of his recusal obligations. The record makes clear, however, that EPA drafted and timed the memorandum for the DTE litigation, which was undeniably a party matter.[82] In an email transmitting a draft of the memorandum to colleagues, one EPA official wrote: "Attached is the latest version of the NSR Memo pertaining to the issues at issue in the DTE case. I thought we may have more time, but know now that the [Supreme Court's] cert hearing is planned for Wednesday."[83] A second official wrote: "Attached for review are the current drafts of two memos regarding the issues in the DTE NSR litigation."[84] A third emailed a copy of the memorandum to colleagues along with a second attachment that he described as "an analysis of options for addressing NSR issues raised by DTE."[85] A fourth referred to the memorandum as the "NSR DTE memo."[86] A fifth even discussed distributing the memorandum to the media only after the Supreme Court's certiorari hearing concluded.[87]

The content of the NSR memorandum itself resolves any doubt about its function. Its first paragraph alluded to the pending litigation involving Mr. Wehrum's former law firm.[88] EPA declared that the memorandum "is not final agency action" and has no legally operative effect: "This memorandum does not change or substitute for any law, regulation or other legally binding requirement and *is not legally enforceable*."[89] Instead, it claimed to seek only to address "uncertainty" arising directly from the DTE litigation—one day before the Supreme Court was scheduled to decide whether to address that uncertainty by granting certiorari.[90]

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[79] *See, e.g.*, Office of Gov't Ethics, DO-04-12, June 1, 2004 ("Involvement in preliminary discussions, in interim evaluations, in review or approval at intermediate levels, or in supervision of subordinates working on a matter also amounts to personal and substantial participation."), https://bit.ly/2T3IH5D.
[80] 5 C.F.R. § 2635.401(b)(4).
[81] Ethics Agreement at 1; Wehrum Ethics Pledge.
[82] 5 C.F.R. § 2641.201(h)(1) (establishing that a "court case" is a particular matter involving specific parties).
[83] Email from Mandy Gunasekara to Susan Bodine and Patrick Taylor, Dec. 4, 2017 (Senators' OIG Letter, at 93).
[84] Email from Brian Doster to Justin Schwab, et al., Oct. 4, 2017 (Senators' OIG Letter, at 131).
[85] Email from Josh Lewis to Mandy Gunasekara (Senators' OIG Letter, at 117).
[86] Attachment to email from Peter South to Mike Koerber, Oct. 3, 2017 (Senators' OIG Letter, at 128-29).
[87] Email from Liz Bowman to Jahan Wilcox, Dec. 7, 2017 ("Can you please help us get this to a few people who might be interested, after the Hearing concludes?") (Senators' OIG Letter, at 155).
[88] NSR Memo, at 1.
[89] *Id.* at 2 (emphasis added).
[90] *Id.* at 1 ("I understand that two recent appellate court decisions in the pending enforcement proceeding against DTE Energy have created uncertainty…").

The NSR memorandum recounts in detail the history and effect of the DTE litigation.[91] It even acknowledges its specific connection to the upcoming certiorari hearing the next day, stating:

> The matters at issue in the DTE litigation are complex, and the appellate court decisions have left ambiguity regarding the scope of the applicable regulations and what sources must do to comply. Further, the Supreme Court has been asked to review the second appellate court opinion. Considering this uncertainty, the EPA believes it would be helpful to explain to stakeholders how the EPA plans to proceed in implementing and exercising its authority under those regulations pending further review of these issues by the EPA.[92]

EPA issued the NSR memorandum late on December 7, 2017, and Hunton delivered it to the Supreme Court the next morning in time for the certiorari conference.[93] Hunton explained in a cover letter that the NSR memorandum was a product of a review that EPA had advised the Court it was undertaking in a pleading filed by the Justice Department on its behalf.[94] In this context, it seems unusual that Hunton delivered the NSR memorandum to the Supreme Court instead of the Justice Department. These circumstances further highlight that the NSR memorandum was a document that EPA created for the benefit of Hunton's client in a specific litigation. In other words, the NSR memorandum was part of a party matter. Investigation by OIG could reveal whether or not EPA officials improperly coordinated with Hunton regarding the creation and delivery of this document.

For these reasons, it seems clear that the NSR memorandum was a litigation document prepared for a case in which Hunton was representing a party. Mr. Wehrum's personal and substantial participation in the development of that memorandum violated the recusal obligations in both his ethics agreement and his Ethics Pledge.

Conclusion

When William Wehrum joined EPA after years fighting on behalf of industry clients, he promised to distance himself from both his law firm and his former clients. He signed an ethics agreement and a separate Ethics Pledge that created related but distinct recusal obligations not to participate personally and substantially in any party matter, communication, or meeting involving either the firm or a recent former client as a party or representative.

After less than a month as an EPA Assistant Administrator, Mr. Wehrum broke this promise. He accepted an invitation to present on EPA's regulatory activity in a December 2017 meeting at the firm's office with a coalition of energy companies that he had represented before entering government. Earlier that same year, while working for the firm, he had represented the

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[91] NSR Memo, at 5-6, 8.
[92] *Id.* at 6 (emphasis added).
[93] Letter from Hunton & Williams to Clerk of the Supreme Court, Dec. 8, 2017 (*New York Times* Documents, at 212).
[94] *Id.*

same coalition in two meetings in the same office with an EPA official who discussed the same subject. Contemporaneously with his December 2017 presentation, Mr. Wehrum also helped develop a memorandum for a case involving his former law firm as a representative.

To allay concerns that he may have violated his recusal obligations, Mr. Wehrum has offered a legalistic explanation that misconstrues the requirements of the Ethics Pledge and fails to address the distinct recusal obligations under his ethics agreement. He also admits that he did not consult EPA's ethics officials prior to engaging in the conduct at issue here. Mr. Wehrum seems not to appreciate that his recusal is intended to protect against representatives of special interests trading on their relationships with him to gain special access to the levers of power that affect all Americans. As such, despite his explanations, his conduct appears to violate the recusal requirements in his ethics agreement and Ethics Pledge. Therefore, we respectfully request that OIG investigate this matter and take appropriate action.

Sincerely,

Noah Bookbinder
Executive Director

cc: Director Emory A. Rounds, U.S. Office of Government Ethics

Message

From: Ware, Rochelle [Ware.Rochelle@epa.gov]
on behalf of OIG WEBCOMMENTS [OIG_WEBCOMMENTS@epa.gov]
Sent: 7/31/2019 11:21:30 AM
To: OIG Hotline [OIG_Hotline@epa.gov]; Wheeler, Andrew [wheeler.andrew@epa.gov]; Sheehan, Charles [Sheehan.Charles@epa.gov]; Shields, Edward [Shields.Ed@epa.gov]
CC: Kaplan, Jennifer [Kaplan.Jennifer@epa.gov]; Elbaum, Kentia [elbaum.kentia@epa.gov]
Subject: FW: Call for EPA to require US Refineries to phase-out HF within 4 years
Attachments: 2019-07-29_Coalition letter to EPA- commercially viable, inherently safer technologies.pdf

Good morning,

The following email was received in the OIG Webcomments mailbox. We are forwarding to the Hotline for appropriate action

From: TRAA <traasouthbay@gmail.com>
Sent: Monday, July 29, 2019 7:21 PM
To: OIG WEBCOMMENTS <OIG_WEBCOMMENTS@epa.gov>; R9.Info <R9.Info@epa.gov>
Cc: Steve Goldsmith <sgoldsmith84@gmail.com>
Subject: Call for EPA to require US Refineries to phase-out HF within 4 years

July 29th, 2019

Please see the attached letter.

We look forward to hearing from you soon.

Andrew R. Wheeler
(202) 564-4700
US EPA Administrator
1200 Pennsylvania Ave., N.W. (1101A), Washington DC 20460

Charles Sheehan and Edwards Shields
(202) 566-2391
OIG_WEBCOMMENTS@epa.gov
US EPA, Office of the Inspector General
1200 Pennsylvania Ave., N.W. (2410T), Washington DC 20460

Mike Stoker
(415) 947-4235
r9.info@epa.gov
US EPA Region 9 Administrator
75 Hawthorne St., San Francisco CA 94105

Torrance Refinery Action Alliance

July 29th, 2019

Andrew R. Wheeler
(202) 564-4700
US EPA Administrator
1200 Pennsylvania Ave., N.W. (1101A), Washington DC 20460

Dear Mr. Wheeler,

The Torrance Refinery Action Alliance, Ban Toxic MHF and the Sierra Club are contacting you on behalf of the millions of people at risk of exposure to toxic Hydrogen Fluoride from the Torrance Refining Company and the Valero, Wilmington Refinery.

Within the last four years we have seen three Hydrogen Fluoride near-misses in U.S. refineries that use large quantities of Hydrofluoric Acid for alkylation. The Torrance, CA and the Husky, WI explosions were determined by the US Chemical Safety Board to be a 'near-miss' of a catastrophic HF release that could have put hundreds of thousands of lives at risk.

"As we see these catastrophic accidents, we see the potential for a release of a massive quantity of HF, which could be deadly for a lot of people," said Dr. Kristen Kulinowski, the Chemical Safety Board interim executive and board member.

Over the last three years, the South Coast Air Quality Management District (SCAQMD) Staff have identified new, inherently safer alkylation technologies that are proven and commercially viable, including Advanced Sulfuric Acid and Ionic Liquid Alkylation. HF becomes airborne upon accidental release and can therefore quickly travel into surrounding communities. Sulfuric Acid has long been used for alkylation in refining and is inherently safer than HF, posing no risk to communities beyond the refinery fenceline as it stays a liquid upon accidental release.

The County of Los Angeles Public Health Department has determined "after reviewing the available information from SCAQMD staff, along with comments provided by the refinery operators, community members, and local medical providers, Public Health has determined that in the event of a low-probability, high-consequence release of MHF, the surrounding communities would incur severe health damage and casualties."

The County of Los Angeles Public Health Department's letter to the SCAQMD continues, "Field tests and experience from other major chemical incidents suggest that evacuation zones in response to an MHF release could extend up to ten miles from the refinery; this equates to potentially millions of people at risk. Emergency responders, emergency rooms and burn centers would be overwhelmed and unprepared; for example, medical providers have testified that local clinics do not have enough medication (calcium gluconate) to treat burn victims. Due to the uniquely hazardous nature of MHF, it would be very challenging for the current health care infrastructure to respond to resulting injuries and to mitigate the extent of casualties."

Considering recent near miss incidents and the proven viability of inherently safer technology, we specifically ask that **the EPA require US refineries to phase-out the use of HF within 4 years and replace with one of the inherently safer technologies within that timeframe**. Time is of the essence and we respectfully request there be no further delay in additional studies as regulatory action needs to be taken immediately to protect the millions of people at risk.

4733 Torrance Blvd., P.O. Box 400 • Torrance, CA 90503 • info@TRAASouthBay.com

Released via FOIA EPA-2019-008216

We look forward to hearing from you.

Sincerely,
Steve Goldsmith
(310) 542-6782
Sgoldsmith84@gmail.com
Co-Founder, TRAA

Sally Hayati, Ph.D.
Director, Ban Toxic MHF
Contact@BanToxicMHF.com

Al Sattler
Sierra Club
Palos Verdes-South Bay Regional Group

SIERRA CLUB
ANGELES CHAPTER

CC:
Charles Sheehan and Edwards Shields
(202) 566-2391
OIG_WEBCOMMENTS@epa.gov
US EPA, Office of the Inspector General
1200 Pennsylvania Ave., N.W. (2410T), Washington DC 20460

Mike Stoker
(415) 947-4235
r9.info@epa.gov
US EPA Region 9 Administrator
75 Hawthorne St., San Francisco CA 94105

Released via FOIA EPA-2019-008216

Message

From: Lagda, Jeffrey [Lagda.Jeffrey@epa.gov]
Sent: 4/24/2019 2:59:08 PM
To: OIG Leadership Committee [Ex. 6 Personal Privacy (PP)] @epa.gov]; OIG Deputy Assistant Inspectors General [Ex. 6 Personal Privacy (PP)] @epa.gov]; OIG-OC-Attorneys [Ex. 6 Personal Privacy (PP)] @epa.gov]; OIG-HQ-OCPA [Ex. 6 Personal Privacy (PP)] @epa.gov]; [Ex. 6 Personal Privacy (PP)] @epa.gov]
Subject: CNN: House Oversight opens investigation into EPA administrator's compliance with ethics law

House Oversight opens investigation into EPA administrator's compliance with ethics law

Jeffrey A. Lagda
Congressional and Media Liaison
Office of Congressional and Public Affairs - Office of Inspector General
U.S. Environmental and Protection Agency
1301 Constitution Ave. NW, Rm 3102
Washington, DC 20460
202-566-2584
Lagda.Jeffrey@epa.gov

House Oversight opens investigation into EPA administrator's compliance with ethics law

By Ellie Kaufman, CNN

Updated 10:53 AM ET, Wed April 24, 2019

(CNN) The House Oversight and Government Reform Committee has opened an investigation into Environmental Protection Agency Administrator Andrew Wheeler's compliance with an ethics law that requires officials to disclose all sources of money earned in an amount greater than $5,000 two years prior to holding an appointed position, according to a letter House Oversight chairman Elijah Cummings sent Wheeler.

Wheeler, a former coal lobbyist, did not disclose that he previously lobbied for Darling Ingredients while working at Faegre Baker Daniels Consulting on his financial disclosure forms, according to documents obtained by the committee.

The committee cited the lobbying firm Faegre's quarterly disclosure forms to point out the omission in Wheeler's financial disclosure report. Wheeler "engaged in lobbying activities on behalf of Darling" from April 2015 to May 2016, according to Faegre's forms cited in the House letter to the EPA.

The EPA declined to comment on the committee's request, stating they would respond to the committee through the "proper channels."

The Oversight Committee claims this omission means that Wheeler violated the Ethics in Government Act, which requires federal officials to disclose all money earned in an amount greater than $5,000 in the two years before holding a government position.

Wheeler submitted his financial disclosure forms in August 2017 for the 2015 to 2017 period, with no mention of Darling Ingredients. The lobbying quarterly disclosure forms show that he worked on behalf of Darling in 2015 and 2016, according to the letter.

Wheeler held a meeting with Darling Ingredients on June 26, 2018, while he was serving as deputy administrator at the agency, according to his calendar, the letter states.

"These documents indicate that you may have improperly omitted Darling from your financial disclosure, and they raise concerns that you may have failed to identify other clients who paid for your service as a lobbyist during the period covered by your disclosure report," the letter reads.

The committee initially requested documents regarding Wheeler's lobbying work with Darling on Feb. 13. The EPA did not submit the documents in response to the committee's request.

Instead, EPA Associate Administrator Troy Lyons responded to the committee on March 6 stating that Wheeler's meeting with Darling in June 2018 had not violated Executive Order 13770, which prohibits federal officials from participating "in any particular matter" that is related to a former employer or former client for two years after being appointed to the government position. The EPA's response did not mention potential violations of the Ethics in Government Act.

Wheeler joined the agency as deputy administrator but was appointed as administrator after former EPA Administrator Scott Pruitt resigned amid a host of ethics controversies in July 2018. Wheeler was confirmed as the agency's next administrator in February.

The committee asked the EPA to tell them whether or not they plan to comply with the document request by April 30.

Message

From: Ware, Rochelle [Ware.Rochelle@epa.gov]
on behalf of OIG WEBCOMMENTS [OIG_WEBCOMMENTS@epa.gov]
Sent: 4/22/2019 11:59:00 AM
To: OIG Hotline [OIG_Hotline@epa.gov]; Sheehan, Charles [Sheehan.Charles@epa.gov]
CC: Kaplan, Jennifer [Kaplan.Jennifer@epa.gov]; Lagda, Jeffrey [Lagda.Jeffrey@epa.gov]; Hanger, Eric [Hanger.Eric@epa.gov]
Subject: FW: Second Ethics Complaint Against EPA Head Andrew Wheeler

Good morning,

The following email was received in the OIG Webcomments mailbox. We are forwarding to the Hotline and OCCPA for appropriate action.

v/r,

Rochelle Ware
Administrative Officer
U.S. Environmental Protection Agency
Office of the Inspector General
Office of Congressional and Public Affairs
1200 Pennsylvania Avenue, NW, MC 2491T
Room 3106A
Washington, D.C. 20460
(202) 566-0661 Office
(202) 566-2549 Fax

-----Original Message-----
From: Robert Rutkowski <r_e_rutkowski@att.net>
Sent: Wednesday, April 17, 2019 2:39 PM
To: OIG WEBCOMMENTS <OIG_WEBCOMMENTS@epa.gov>
Subject: Second Ethics Complaint Against EPA Head Andrew Wheeler

Charles J. Sheehan, Acting Inspector General Environmental Protection Agency Office of Inspector General
1200 Pennsylvania Avenue, N.W. (2410T)
Washington, DC 20460
OIG_WEBCOMMENTS@epa.gov

Re: Second Ethics Complaint Against EPA Head Andrew Wheeler

Dear Inspector General:

Administrator Andrew Wheeler appears to have violated his ethics pledge and executive branch standards of ethical conduct by working on issues on which he previously lobbied and should have recused from.

As a condition of his appointment, Wheeler signed an ethics pledge barring him for two years from working on issue areas on which he lobbied within two years of his appointment. Wheeler, in his role as Acting EPA Administrator, signed off on a proposed rule that could reverse prior EPA actions taken to regulate emissions from coal- and oil-fired electric utilities, a policy issue on which he appears to have lobbied on behalf of his former client Murray Energy. As a result of his apparent lobbying, Wheeler should have recused from participating in the proposed rule for two years after he was appointed to the EPA on April 20, 2018. However, he participated in the matter less than a year later when he signed the proposed rule on December 27, 2018, likely violating his Ethics Pledge. Wheeler's involvement in the proposed rule also produced the appearance of a lack of impartiality, which appears to violate his obligations under the Standards of Ethical Conduct for executive branch employees.

It is becoming more and more clear why coal and energy companies are happy to have their former lobbyist Andrew Wheeler in charge of the EPA.
Administrator Wheeler's apparent failure to abide by ethics obligations and to avoid the reality or appearance of conflicts continues to undermine the EPA's integrity and weakens public confidence in our government. It is imperative that you investigate these apparent violations and work closely with the Office of Government Ethics to enforce the government's ethics rules.

Yours sincerely,
Robert E. Rutkowski

cc:
Representative Steny Hoyer

House Majority Leader
Legislative Correspondence Team
1705 Longworth House Office Building
Washington DC 20515
Office: (202) 225-4131
Fax: (202) 225-4300
https://www.majorityleader.gov/content/email-whip

2527 Faxon Court
Topeka, Kansas 66605-2086
P/F: 1 785 379-9671
E-mail: r_e_rutkowski@att.net

Re: CREW complaint:
https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2019/04/16174818/Wheeler-Supplemental-Complaint-4-16-19.pdf

Message

From: Ex. 6 PP / Ex. 7(C) @epa.gov]
Sent: 8/15/2019 4:30:08 PM
To: Shields, Edward [Shields.Ed@epa.gov]; Sheehan, Charles [Sheehan.Charles@epa.gov]; Wong, Helina [wong.helina@epa.gov]
CC: Ex. 6 PP / Ex. 7(C)
Subject: FW: OPR MM - LAW ENFORCEMENT SENSITIVE

Good afternoon,

Here is our OPR agenda for this afternoon:

AGENDA

TIER I CASES

UPDATE:

- Ethics Pledge

Ex. 6 PP / Ex. 7(C)

COMPLAINT

Ex. 6 PP / Ex. 7(C)

HOTLINE COMPLAINTS

Ex. 6 PP / Ex. 7(C)

- Hotline 2019-0324 – Pebble Mine

CHUCK/ED

- Get backs or questions

BREAK

If anyone has any questions ahead of time, please don't hesitate to touch base,

Best,

Ex. 6 PP / Ex. 7(C)

Released via FOIA EPA-2019-008216

Message

From: Elbaum, Kentia [elbaum.kentia@epa.gov]
Sent: 8/16/2019 6:30:30 PM
To: Ex. 6 Personal Privacy (PP) @epa.gov]
CC: Lagda, Jeffrey [Lagda.Jeffrey@epa.gov]; Shields, Edward [Shields.Ed@epa.gov]
Subject: FW: Draft Responses re Wehrum and Harlow
Attachments: Response to RM Whitehouse_Wehrum and Harlow Ethics_7-23-19-edits jk_V3.docx; Response to Chairman Pallone_Wehrum and Harlow Ethics_08-07-19.docx; Response to RM Carper_Wehrum and Harlow Ethics_7-23-19-edits jk.doc; incoming_2019-03-20 Supplemental Ltr EPA IG.pdf; incoming_2019-02-21 Wehrum Letter to EPA IG final.pdf; EPW Report Carper Whitehouse Redefining Air Wehrum 7-2019.pdf; incoming_07.21.19 TC SW to CS Hunton report letter.pdf

Chuck,

If you have any edits to the attached letters regarding Wehrum and Harlow, please send them to Jeff. I will be out of the office until Tuesday, September 3rd.

Thank you,

Tia

From: Shields, Edward <Shields.Ed@epa.gov>
Sent: Thursday, August 8, 2019 12:05 PM
To: Ex. 6 Personal Privacy (PP) @epa.gov>
Cc: Elbaum, Kentia <elbaum.kentia@epa.gov>
Subject: Fw: Draft Responses re Wehrum and Harlow

Approved.

From: Elbaum, Kentia <elbaum.kentia@epa.gov>
Sent: Thursday, August 8, 2019 8:50 AM
To: Ex. 6 Personal Privacy (PP) @epa.gov>
Subject: FW: Draft Responses re Wehrum and Harlow

Hi Ed,

For your review, attached please find draft responses to the letters from Pallone, Carper and Whitehouse re potential ethics violations by Wehrum and Harlow.

Links to the documents can be found here: Ex. 6 Personal Privacy (PP)

Ex. 6 Personal Privacy (PP)

An editor, the OCPA Front Office, Jennifer and Eric have reviewed the letters.

Thank you,

Tia

From: Hanger, Eric <Hanger.Eric@epa.gov>
Sent: Thursday, August 8, 2019 8:14 AM
To: Kaplan, Jennifer <Kaplan.Jennifer@epa.gov>
Cc: Elbaum, Kentia <elbaum.kentia@epa.gov>
Subject: RE: Draft Responses re Wehrum and Harlow

Yep, I agree. Let's move it on!

From: Kaplan, Jennifer <Kaplan.Jennifer@epa.gov>
Sent: Thursday, August 8, 2019 7:11 AM
To: Hanger, Eric <Hanger.Eric@epa.gov>
Cc: Elbaum, Kentia <elbaum.kentia@epa.gov>
Subject: RE: Draft Responses re Wehrum and Harlow

Good morning.

Ex. 5 Deliberative Process (DP)

you agree, I think that this letter is now ready for Tia to move forward.

Jennifer

From: Hanger, Eric <Hanger.Eric@epa.gov>
Sent: Wednesday, August 07, 2019 4:46 PM
To: Kaplan, Jennifer <Kaplan.Jennifer@epa.gov>
Cc: Elbaum, Kentia <elbaum.kentia@epa.gov>
Subject: RE: Draft Responses re Wehrum and Harlow

You are so right. **Ex. 5 Deliberative Process (DP)**
Eric

I saved this as different version:

Ex. 6 Personal Privacy (PP)

From: Kaplan, Jennifer <Kaplan.Jennifer@epa.gov>
Sent: Wednesday, August 7, 2019 9:55 AM
To: Hanger, Eric <Hanger.Eric@epa.gov>
Cc: Elbaum, Kentia <elbaum.kentia@epa.gov>
Subject: RE: Draft Responses re Wehrum and Harlow

Thanks, Eric. I think that your changes look fine **Ex. 5 Deliberative Process (DP)**

Ex. 5 Deliberative Process (DP)

Jennifer

From: Hanger, Eric <Hanger.Eric@epa.gov>
Sent: Monday, August 05, 2019 4:34 PM
To: Elbaum, Kentia <elbaum.kentia@epa.gov>; Kaplan, Jennifer <Kaplan.Jennifer@epa.gov>
Subject: RE: Draft Responses re Wehrum and Harlow

Tia – Thanks for drafting up these. I have some changes and am cc'ing Jennifer to also look at it. The file is located here:

Ex. 6 Personal Privacy (PP)

Eric

From: Elbaum, Kentia <elbaum.kentia@epa.gov>
Sent: Friday, July 26, 2019 11:43 AM
To: Hanger, Eric <Hanger.Eric@epa.gov>
Subject: FW: Draft Responses re Wehrum and Harlow

Hi Eric,

For your review, attached please find draft responses to the letter from Pallone, Carper and Whitehouse re potential ethics violations by Wehrum and Harlow.

Links to the documents can be found here Ex. 6 Personal Privacy (PP)

Ex. 6 Personal Privacy (PP)

An editor, the OCPA Front Office and Jennifer have reviewed the letters.

Thank you,

Tia

From: Kaplan, Jennifer
Sent: Friday, July 26, 2019 11:32 AM
To: Elbaum, Kentia <elbaum.kentia@epa.gov>
Subject: RE: Draft Responses re Wehrum and Harlow

Tia,

You're welcome—happy to help. The suggested edits look good. Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Thanks again,

Jennifer

From: Elbaum, Kentia
Sent: Friday, July 26, 2019 9:12 AM
To: Kaplan, Jennifer <Kaplan.Jennifer@epa.gov>
Subject: RE: Draft Responses re Wehrum and Harlow

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Tia

From: Kaplan, Jennifer
Sent: Friday, July 26, 2019 7:58 AM
To: Elbaum, Kentia <elbaum.kentia@epa.gov>
Subject: RE: Draft Responses re Wehrum and Harlow

Hi Tia,

Thank you for preparing these. I have edits and questions in all three draft response letters. Please see attached and let me know if you'd like to discuss anything.

Jennifer

From: Elbaum, Kentia
Sent: Wednesday, July 24, 2019 7:29 AM
To: Kaplan, Jennifer <Kaplan.Jennifer@epa.gov>
Subject: FW: Draft Responses re Wehrum and Harlow

Hi Jennifer,

For your review, attached please find draft responses to the letter from Pallone, Carper and Whitehouse re potential ethics violations by Wehrum and Harlow.

Links to the documents can be found here Ex. 6 Personal Privacy (PP)

Ex. 6 Personal Privacy (PP)

An editor and the OCPA Front Office have reviewed the letters.

Thank you,

Tia

From: Ware, Rochelle
Sent: Wednesday, July 24, 2019 7:16 AM
To: Elbaum, Kentia <elbaum.kentia@epa.gov>
Subject: RE: Draft Responses re Wehrum and Harlow

Reviewed, no comment.

From: Elbaum, Kentia
Sent: Tuesday, July 23, 2019 3:34 PM
To: Ware, Rochelle <Ware.Rochelle@epa.gov>
Subject: FW: Draft Responses re Wehrum and Harlow

Hi Rochelle,

For your review, attached please find draft responses to the letter from Pallone, Carper and Whitehouse re potential ethics violations by Wehrum and Harlow.

Links to the documents can be found here: Ex. 6 Personal Privacy (PP)

Ex. 6 Personal Privacy (PP)

An editor has reviewed the letters.

Thank you,

Tia

Kentia Elbaum
Public Affairs Specialist
Office of Congressional and Public Affairs - Office of Inspector General
U.S. Environmental and Protection Agency
1301 Constitution Ave. NW, Rm 3102
Washington, DC 20460
202-566-2548
Elbaum.Kentia@epa.gov

From: Elbaum, Kentia
Sent: Tuesday, July 23, 2019 3:30 PM
To: Sternberg, Gary <Sternberg.Gary@epa.gov>; Ex. 6 Personal Privacy (PP) @epa.gov>
Subject: RE: Draft Responses re Wehrum and Harlow

Thanks, Gary.

Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Tia

From: Sternberg, Gary
Sent: Tuesday, July 23, 2019 3:21 PM
To: Elbaum, Kentia <elbaum.kentia@epa.gov>; Ex. 6 Personal Privacy (PP) @epa.gov>
Subject: RE: Draft Responses re Wehrum and Harlow

Tia:

Attached are the edited versions of all three letters.

Ex. 5 Deliberative Process (DP)

Thanks.

Gary

From: Elbaum, Kentia
Sent: Tuesday, July 23, 2019 2:55 PM
To: Ex. 6 Personal Privacy (PP) @epa.gov>
Subject: Draft Responses re Wehrum and Harlow

Good afternoon,

For your review, attached please find draft responses to the letter from Pallone, Carper and Whitehouse re potential ethics violations by Wehrum and Harlow.

Links to the documents can be found here: Ex. 6 Personal Privacy (PP)

Ex. 6 Personal Privacy (PP)

Thank you,

Tia

Kentia Elbaum
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July 2019

Redefining Air:

Industry's Pipeline to Power at EPA's Office of Air and Radiation

Thomas R. Carper, Ranking Member of the U.S. Senate Environment and Public Works Committee

Sheldon Whitehouse, Ranking Member of the U.S. Senate Clean Air and Nuclear Safety Subcommittee

Released via FOIA EPA-2019-008216

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EXECUTIVE SUMMARY

This report describes the efforts, outcomes, and potential ethical concerns associated with several industry organizations represented by Hunton Andrews Kurth LLP (formerly Hunton & Williams, hereafter "Hunton"). Hunton is the law firm that Bill Wehrum, the top air pollution regulator at the Environmental Protection Agency (EPA), and his deputy, David Harlow, worked at prior to their tenures at EPA. While at Hunton, Wehrum served as co-chairman of the firm's environmental practice and led the administrative law group.[1] As partners at the law firm, both Wehrum and Harlow advocated before EPA and the courts on behalf of some of the biggest polluters.

These Hunton-represented industry groups are similar to the recently dissolved Utility Air Regulatory Group (UARG), a "secretive utility industry coalition"[2] that has long-represented the interests of coal-fired power plants before air pollution regulators, and in the courts. Like UARG, these industry organizations superficially appear to be organizations with unique names, and officers such as "Executive Directors" and "Managers." However, these amorphous industry "groups," "coalitions," "forums," and "alliances" appear to have no independent existence apart from Hunton, and their officers are almost all Hunton lawyers. They appear to exist largely for the purpose of coordinating payments to Hunton for legal services, and to provide a well-funded, expert-led effort to influence EPA and the courts without revealing the identities of their members.

On June 26, 2019, EPA Administrator Andrew Wheeler announced that Wehrum would be leaving his position at EPA, thanking him for the "tremendous progress he has made" repealing climate regulations and "in so many other regulatory initiatives."[3]

This report demonstrates that Wehrum's "tremendous progress" was largely to the benefit of Hunton-represented industry groups, which have had remarkable success under his tenure achieving their policy objectives to roll back air pollution protections. And while Wehrum left the agency under the scrutiny of congressional oversight, after less than two years on the job, Harlow, his senior counsel, remains.

Staying behind as well are the Hunton-driven rollbacks that Wehrum and Harlow undertook, which will continue to have consequences for everyone who breathes air. These include major efforts to weaken or undermine landmark climate and air toxics regulations, such as the Clean Power Plan (CPP) and the Mercury and Air Toxics Standards (MATS) rule, at the expense of human health. For example, the Trump EPA proposed to repeal the Clean Power Plan despite the fact that, by the Trump EPA's own admission, doing so could prematurely kill 1,400 people per year.[4] Although the final rule stayed

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[1] Q&A With Hunton & Williams' Bill Wehrum, LAW360, May 6, 2013, https://www.huntonak.com/images/content/2/4/v2/2407/Law360_Bill_Wehrum_QA.pdf

[2] Zack Colman, *Industry group tied to EPA air chief dissolves*, POLITICO, May 10, 2019.

[3] Statement of Administrator Andrew Wheeler regarding the departure of Assistant Administrator Bill Wehrum, June 26, 2019 (press release).

[4] Lisa Friedman, *Cost of New E.P.A. Coal Rules: Up to 1,400 More Deaths a Year*, N.Y. TIMES, Aug. 21, 2018.

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largely the same in substance, the economic analyses were changed to no longer show those harms.[5] As another example, Wehrum withdrew the "Once In, Always In" policy for toxic air pollution, and on June 25, 2019 the Trump EPA issued a proposed rule to codify the shift, even while acknowledging that it would allow 3,912 facilities nationwide to substantially increase their toxic air pollution.[6] Independent analyses indicate that those sources could more than double their toxic air pollution under this new approach.[7]

But these higher-profile rollbacks are not the only Hunton-advocated policies being carried out by the Trump EPA. This investigation also identified numerous technical, often arcane, policy shifts sought by Hunton-represented industry groups that carry major air pollution implications. These policy shifts, and agency actions to implement them, illustrate the close relationship between Hunton and former Hunton employees who now direct this country's air pollution policy at EPA. Such shifts include the adoption of a novel legal interpretation of New Source Review regulations that was used to abandon EPA's legal posture in an enforcement action against a Hunton client, DTE Energy; a change to the meaning of "conflict of interest" that allowed EPA to purge academic researchers from several of its scientific advisory panels and replace them with industry-funded consultants; a redefinition of "ambient air" that would exclude more open air from being subject to the Clean Air Act; and even an argument that the Clean Air Act's looser requirements for "International border areas" should apply everywhere in the country, regardless of proximity to any international border.

This report also explores significant questions about the ongoing relationship between Wehrum, Harlow, and the member companies of the various Hunton-represented industry groups. Such questions include whether Wehrum and Harlow have been forthright about their past legal work on behalf of these entities, and whether they have adhered to the ethical requirements of public service. This investigation identifies circumstances in which Wehrum and Harlow may have involved themselves in litigation and other matters to benefit Hunton and former clients; failed to report the existence of former clients from which they should have been recused; and impermissibly met with former clients, including former clients that were not properly disclosed to agency ethics officials.

There has been good deal of reporting on the dissolution of UARG, which "has participated in every major EPA rulemaking affecting the electric generating industry" since the group was formed in 1977.[8] UARG repeatedly advocated in those rulemakings for shifts in public policy that would increase air pollution, exacerbate climate change, and limit public access to information about pollution in their communities.

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[5] https://www.epa.gov/sites/production/files/2019-06/documents/utilities_ria_final_cpp_repeal_and_ace_2019-06.pdf

[6] Proposed Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act at 95 (pre-publication version).

[7] *See* ENVTL. DEF. FUND, PRUITT'S NEW AIR TOXICS LOOPHOLE at 2 (Aug. 2018) (estimating that eligible facilities in the Houston-Galveston area could increase their toxic air pollution by 146% to 152% under the new approach).

[8] Defendant Duke Energy Corp.'s Reply, *United States et al. v. Duke Energy Corp.*, 2003 WL 25509066 (M.D.N.C. Feb. 13, 2003) (citing Declaration of Norman W. Fitchorn).

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For example, while at Hunton, one of Harlow's clients was DTE Energy, a UARG member. DTE sought Hunton's assistance in an EPA enforcement case alleging that one of the utility's coal-fired power plants had emitted pollution in violation of the Clean Air Act's New Source Review (NSR) program. In that case, Wehrum personally filed a brief as a lawyer for UARG in support of DTE's position.[9] Despite Wehrum's private practice advocacy, DTE Energy had not been successful in its efforts to resolve this NSR matter. The utility had already lost twice before the U.S. Court of Appeals for the 6th Circuit, and faces millions of dollars in penalties.

On December 7, 2017, shortly after Harlow and Wehrum left Hunton for EPA, the agency published a memorandum (known as the "DTE Memo"). The DTE Memo reversed the agency's position in Hunton's DTE case.[10] Furthermore, the release of the DTE Memo was timed so that DTE's Hunton lawyers could file it with the U.S. Supreme Court before the Court decided the very next day whether it would hear DTE's appeal.[11] These actions – along with other evidence suggesting that Wehrum and Harlow participated in the development of the DTE Memo, despite ethical rules barring their involvement in matters involving their particular clients (UARG and DTE Energy, respectively) – led Senator Sheldon Whitehouse (D-RI), along with Senate Environment and Public Works Committee Ranking Member Tom Carper (D-DE) and House Energy and Commerce Chairman Frank Pallone, Jr. (D-NJ) to ask the Acting Inspector General of the EPA on February 25, 2019 to undertake an investigation.[12] On May 10, 2019, following additional supplemental filings with the Acting Inspector General,[13] along with other disclosures[14] and congressional investigation,[15] UARG's "policy committee" announced that they would "disband" the organization.

UARG is not the only Hunton-represented industry group comprised of polluting interests with business before the EPA. On May 6, 2019, the offices of Senators Carper and Whitehouse discovered that language included by EPA in the DTE Memo was copied verbatim from a document that Hunton

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[9] Brief Amici Curiae of UARG et al. in Support of Defendants-Appellees, at *2, *United States v. DTE Energy Co. & Detroit Edison Co.*, 2012 WL 1656078 (May 8, 2012) (listing Wehrum as "Counsel for UARG").

[10] Memorandum from EPA Admin'r Scott Pruitt to Reg'l Administrators, *New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected Actual Applicability Test in Determining Major Modification Applicability*, at 8 (Dec. 7, 2017).

[11] Letter from Senator Whitehouse, Senator Carper, Representative Pallone to Charles J. Sheehan, Acting Inspector General, U.S. EPA, at 7–8 & Exhs. M–N (emails from EPA political appointee Mandy Gunasekara stating that the memorandum "needs to go out before" the Supreme Court considers whether to hear the DTE enforcement case), https://www.whitehouse.senate.gov/download/doj-ig-memo-letter.

[12] https://www.whitehouse.senate.gov/news/release/democrats-call-for-investigation-of-top-epa-officials-role-in-reversing-enforcement-position. An ethics watchdog group, Citizens for Responsibility and Ethics in Washington (CREW), later filed a supplemental complaint with the Inspector General. https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2019/05/28205410/William-Wehrum-Complaint-29-MAY-2019.pdf.

[13] https://www.whitehouse.senate.gov/download/wehrum-oig-supplemental-letter

[14] https://www.epw.senate.gov/public/index.cfm/press-releases-democratic?ID=E598EA19-BB86-4737-ABE8-BE97F356D11E

[15] https://energycommerce.house.gov/newsroom/press-releases/ec-leaders-launch-investigation-of-secretive-front-group-uarg-and-its-ties

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had submitted to EPA on behalf of the Air Permitting Forum,[16] a similar Hunton-represented industry group with little existence independent from the law firm.

The full list of Hunton organizations examined in this report includes:

- The **Utility Air Regulatory Group**, itself a former client of both Wehrum and Harlow, which until its recent demise was comprised of multiple trade organizations and coal-fired power plant operators, including at least three more former Wehrum clients (Dominion, Duke Energy, and Salt River Project) and at least two more former Harlow clients (DTE Energy and LG&E & KU Energy);

- The **Air Permitting Forum**, which nominally advocates on Clean Air Act permitting matters, and whose members include one former client shared by Wehrum and Harlow (Chevron), as well as at least three other former Wehrum clients (ExxonMobil, Georgia-Pacific, and General Electric), and six additional companies that are not former Wehrum or Harlow clients (Fiat Chrysler, Ford, General Motors, Toyota, Shell, and International Paper);

- The **Auto Industry Forum**, a "sub-coalition" of the Air Permitting Forum that represents several automakers on issues related to stationary source emissions, and whose members include at least Fiat Chrysler, Ford, General Motors, and Toyota;

- The **NAAQS Implementation Coalition**, which advocates for policy changes that would increase opportunities for political interference with, or otherwise weaken, air quality standards, and whose members include UARG (and thus UARG's members) and at least three other former Wehrum clients (the American Forest & Paper Association, the American Petroleum Institute, and the Brick Industry Association); and

- The **CCS Alliance**, which advocates on issues related to carbon capture and storage matters, and whose membership includes at least two former UARG members (the National Mining Association (NMA) and the National Rural Electric Cooperative Association (NRECA)), as well as Berkshire Hathaway Energy, NRG Energy, PacifiCorp, and Zurich North America.

This report provides a comprehensive examination of Hunton court filings, public comments, and regulatory petitions made on behalf of these five organizations in order to determine the extent to which they have influenced policy within the Trump EPA air office. Although the examination covers submissions to EPA and the courts extending back decades, this report focuses primarily on submissions made during the Trump Administration, including submissions made in response to EPA's April 2017 request for the identification of "regulations that may be appropriate for repeal, replacement, or modification."[17]

[16] https://www.epw.senate.gov/public/index.cfm/press-releases-democratic?ID=E598EA19-BB86-4737-ABE8-BE97F356D11E

[17] 82 Fed. Reg. 17793 (Apr. 13, 2017).

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The analysis shows that since the beginning of the Trump Administration, these organizations have been highly successful in obtaining policy outcomes that benefit their corporate clients at the expense of everyone who breathes air (Finding #1). They also raise more questions about whether Wehrum and Harlow have been forthright in their ethical obligations to put the public trust above the interests of their friends and former clients, and to avoid even the appearance of impropriety (Finding #2).

In sum, this investigation indicates that private companies no longer need to pay for Hunton lawyers to effectuate their goals, because those very same lawyers are now representing their interests at the highest levels within EPA, at the taxpayers' expense. Summaries of the key findings are below.

SUMMARY OF FINDING #1: With Wehrum and Harlow at EPA, Hunton-represented industry groups are getting the policy results they seek.

Hunton-represented industry groups have sought sweeping regulatory changes that would increase air pollution, exacerbate climate change, and reduce the amount of pollution information available to the public. Among the dozens of changes, Hunton and its organizations have asked EPA to weaken greenhouse gas requirements for new and existing coal-fired power plants; to allow the largest polluters to release more toxic air pollution; and to allow upwind power plants to pollute more downwind communities. These Hunton-represented industry groups have also made highly technical and novel arguments that EPA has adopted or is in the process of adopting, such as how to account for certain types of benefits when conducting economic analyses for mercury regulations, how to sideline independent scientists on scientific advisory boards, or even how to redefine what counts as "ambient air" protected by the Clean Air Act in the first place. Specifically:

- Although **UARG** has taken dozens of industry-friendly positions on the Clean Air Act, early in the Trump Administration it emphasized 17 rules, sets of rules, or programs it recommended be withdrawn, revisited, or severely weakened. Of those, the Trump EPA has already taken actions responsive to eight of UARG's most significant requests to weaken air pollution rules, including the reversal adopted in the DTE Memo.[18]

- The **Air Permitting Forum** (an umbrella group that includes the **Auto Industry Forum**) prioritized 19 changes to permitting requirements, emission standards, or the National Ambient Air Quality Standards (NAAQS). Of those priorities, the Trump EPA has already formally adopted eight rollbacks – including using verbatim text submitted by the Forum in the DTE Memo – and has stated that it is actively considering another two of the Forum's priorities.[19]

[18] The only UARG priority that the Trump EPA appears to have proposed rejecting is to remove the subcategory "stationary combustion turbines" from the Clean Air Act's hazardous air pollutant (HAP) program. That is because the D.C. Circuit ruled 12 years ago that EPA has no authority to remove a subcategory from HAP regulation. However, the Trump EPA has proposed that no additional health-based standards should be required for the subcategory.

[19] The only Forum priority that the Trump EPA appears to have rejected outright was withdrawal of an EPA rule regarding how the agency would treat disagreements among federal courts regarding the Clean Air Act – a rule

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- The **NAAQS Implementation Coalition** requested dozens of changes to how the NAAQS are developed and implemented. The Coalition's most notable successes have been to undermine the science-based NAAQS development process, which by statute is led by the independent Clean Air Scientific Advisory Committee (CASAC). The Trump EPA has adopted the Coalition's recommendations to change CASAC's membership – including through the appointment and elevation of Committee members who have scientific views that are well outside the mainstream – and changed the definition of "conflict of interest" to allow for the removal of independent members from academia, while adding industry-funded members. The full extent of Coalition's successes may become more evident as the Trump EPA reviews the NAAQS for ground-level ozone (smog) and particulate matter (soot), to be proposed in March 2020.

- Although the **CCS Alliance** nominally promotes carbon capture and storage (CCS) technology, its submissions to EPA's air office have largely been to advocate that EPA should *not* use the existence of partial CCS technology as the basis for any air pollution standards. The Trump EPA has proposed to no longer use partial CCS technology to set greenhouse gas emission limitations for new power plants, echoing the Alliance's positions.

SUMMARY OF FINDING #2: Former Hunton lawyers Wehrum and Harlow appear to have violated ethical requirements in their rush to serve former clients tied to Hunton-represented industry groups.

Wehrum and Harlow's continued engagement with their former clients and Hunton-represented industry groups (and the members thereof) raises numerous ethical questions for EPA's Designated Ethics Official, EPA's Inspector General, and the U.S. Office of Government Ethics. Specifically, the "Trump Ethics Pledge" (Executive Order 13770) prohibits Wehrum and Harlow, "for a period of 2 years from the date of [their] appointment[s]," from participating in any meeting, any communications, or "any particular matter involving specific parties that is directly and substantially related to [their] former employer [Hunton] or former clients, including regulations . . . ."[20] A limited exception to the Trump Ethics Pledge permits them to participate in "communications and meetings" with Hunton or their former clients, but only if the event is both (1) on a matter of general applicability, and (2) "open to all interested parties," a phrase interpreted to mean "*five or more* stakeholders" representing a diversity of viewpoints, "even if *one* of the stakeholders is a former employer or former client."[21]

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unanimously upheld by courts as lawful against a legal challenge brought by Wehrum himself in 2016 when he was in private practice.

[20] E.O. 13770 § 1, ¶ 6 ("Trump Ethics Pledge").

[21] Memorandum from Robert I. Cusick, Dir. of U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, DO-09-011, at 1–2 (Mar. 26, 2009) (explaining the meaning of the phrase "open to all interested parties") (emphasis added); Legal Advisory from David J. Apol, General Counsel of U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, LA-17-02, at 1 (Feb. 6, 2017) (emphasis added) ("With respect to [President Trump's] Executive

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As of July 2, 2019, neither Wehrum nor Harlow had received a waiver from the Trump Ethics Pledge.[22] In addition, the Office of Government Ethics' impartiality regulations and Wehrum's pre-confirmation ethics agreement make his recusal from such meetings mandatory, unless he had received prior written authorization from an agency ethics official.[23] As of September 29, 2018, Wehrum had never received prior authorization from an agency ethics official to participate in a matter otherwise prohibited by the Office of Government Ethics regulations.[24]

This report demonstrates that:

a. ***Wehrum and Harlow appear to have violated the terms of the Trump Ethics Pledge and Ethics in Government Act regulations by participating in the development of the DTE Memo.*** Although Wehrum and Harlow were both recused from working on "any particular matter" in which a recent former client is a party, or in which Hunton "represents a party," Wehrum and Harlow appear to have violated this ethical requirement by involving themselves in the development of the DTE Memo, in which EPA (1) analyzed litigation in which DTE, a former Harlow client, was represented by Hunton, and in which Wehrum entered an appearance on behalf of UARG; (2) reversed EPA policy on the eve of the Supreme Court's consideration of this litigation to adopt the position Hunton advocated on behalf of its clients that the agency should not "second-guess" polluters' own calculations of how much pollution they expect to emit; (3) directly copied language submitted to EPA by Hunton on behalf of the Air Permitting Forum into the DTE Memo; and (4) cited the Hunton-DTE litigation as the basis for that shift in policy. Although EPA previously stated that Wehrum was not involved in developing the DTE Memo,[25] Wehrum subsequently acknowledged this was false.[26]

b. ***In his recusal statement, Wehrum failed to disclose at least three former clients that he previously represented in court – the Alliance of Automobile Manufacturers; the Minnesota Trucking Association; and the Minnesota Automobile Dealers Association***[27] – in addition to two confidential clients he is contractually prohibited from

Order 13770, ethics officials and employees may continue to rely on OGE's prior guidance regarding [President Obama's] Executive Order 13490 to the extent that such guidance addresses language common to both orders").

[22] U.S. Office of Gov't Ethics, *USOGE | Agency Ethics Pledge Waivers (EO 13770)* (last visited July 2, 2019).

[23] *See* Letter from William L. Wehrum to Kevin S. Minoli, Designated Agency Ethics Official, U.S. EPA, at 1 (Aug. 28, 2017) (citing 5 C.F.R. § 2635.502(d)).

[24] Letter from Kevin S. Minoli, Designated EPA Ethics Official, to Sen. Sheldon Whitehouse, at 1 (Sept. 29, 2018) ("To date, Mr. Wehrum has not received any waivers or authorizations issued pursuant to Executive Order 13770, 18 U.S.C. § 207(b)(1), or 5 C.F.R. § 2635.502(d).").

[25] https://thehill.com/policy/energy-environment/364015-epa-works-to-ease-air-pollution-permitting-process

[26] Juliet Eilperin, *EPA regulator skirts the line between former clients and current job*, Wash. Post (Feb. 25, 2019).

[27] *See, e.g.*, Mem. of Law in Support of Mot. For Partial Summary Judgment, Doc. 47 at *27, *Minn. Trucking Ass'n et al. v. Stine et al.*, No. 15-cv-2045-JRT-KMM (D. Minn. Sept. 29, 2016) (listing Wehrum and five other lawyers, including two others from Hunton, as "Attorneys for Plaintiffs Minnesota Trucking Association, Minnesota

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disclosing. Wehrum's failure to disclose his recent former clients frustrates the "screening arrangement" in his recusal statement, which stated that his subordinates would "assist in screening EPA matters" involving the entities he listed to ensure his compliance with ethical rules. Furthermore, although the recusal statements for both Wehrum and Harlow disclosed "confidential" clients, only Harlow's statement acknowledges his personal obligation "not to participate in specific party matters for the duration of my ethics obligation," even for clients "who are not listed."[28]

c. ***Wehrum has had at least six meetings with one of his undisclosed former clients, the Alliance of Automobile Manufacturers, in apparent violation of Ethics in Government Act regulations and the Trump Ethics Pledge.***[29] None of these meetings appear to have been "open to all interested parties" as the Office of Government Ethics defines that term, and were thus impermissible even if Wehrum only spoke about generally applicable regulations affecting his former client's interests. All members of the Hunton-represented industry group the Auto Industry Forum are also members of the Alliance of Automobile Manufacturers.

d. ***Wehrum and possibly Harlow appear to have artificially – and perhaps improperly – limited their list of former clients from which they are recused.*** Although Wehrum and Harlow were nominally recused from certain meetings with "UARG," their recusal statements imposed no limits on discussions with *UARG members* (1) who paid hefty UARG "dues" that went almost exclusively to Hunton (and thus to Wehrum and Harlow as Hunton partners), or (2) with whom Wehrum and Harlow may have developed an attorney-client or other privileged relationship, even absent direct billing. Under D.C. attorney ethics rules it is "well established" that "neither a written agreement nor the payment of fees is necessary to create an attorney-client relationship."[30] Additionally, Hunton and UARG have successfully argued in court that Hunton lawyers and UARG members have attorney-client privileged conversations, adding further credence to the notion that Wehrum and Harlow should have listed more UARG members as former clients in their recusal statements.

e. ***Wehrum repeatedly met with clients he worked with in private practice – actions that appear to violate the intent of the Trump Ethics Pledge and Wehrum's own ethics agreement.*** A review of Wehrum's calendars shows that at least 10 different UARG members have been in attendance at nine separate meetings with Wehrum (American Electric Power; Dominion Energy; Duke Energy; Minnesota Power; Otter Tail Power; Southern Company;

Automobile Dealers Association, Alliance of Automobile Manufacturers, American Petroleum Institute, and American Fuel & Petrochemical Manufacturers").

[28] *Compare* Harlow recusal at 2 nn.1–2 ("For my former clients who are not listed, I understand that I am personally obliged not to participate in specific party matters for the duration of my ethics obligations."), *with* Wehrum recusal at 2 n.1 (simply acknowledging the existence of two "confidential clients").

[29] Wehrum has had at least six small meetings with his former client the Alliance for Automobile Manufacturers to discuss regulatory policy: 11/27/2017 (with one other entity); 12/27/2017 (alone with board); 2/21/2018 (with lawyers/lobbyists); 4/16/2018 (alone); 5/22/2018 (alone); 5/23/2018 (alone), and 7/16/2018 (with one other entity).

[30] *In re Lieber*, 442 A.2d 153, 156 (D.C. 1982).

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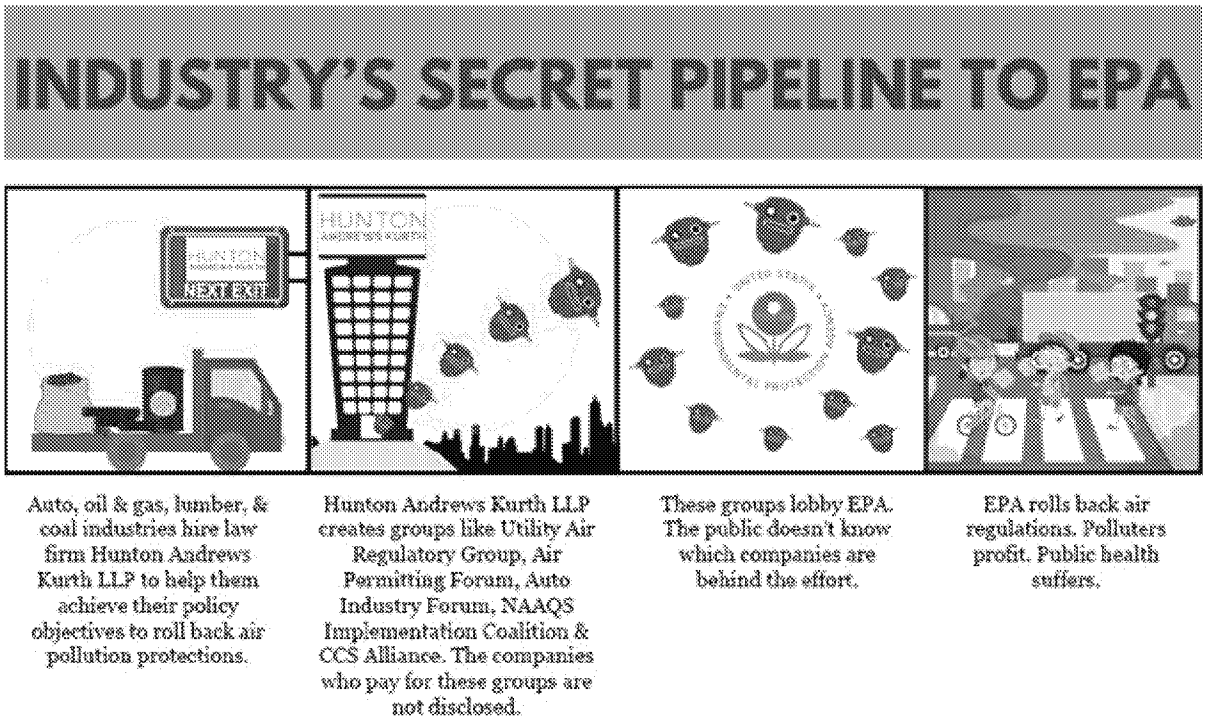
the American Coalition for Clean Coal Electricity; the Edison Electric Institute; the National Mining Association; and the National Rural Electric Cooperative Association). On December 7, 2017, the same day EPA issued the DTE Memo, Wehrum gave a closed-door briefing on Clean Air Act regulatory developments at his former employer Hunton. This presentation occurred during a two-day set of meetings at Hunton that appears to have been a pre-planned gathering of UARG's membership. Such a gathering raises the prospect that the event was really a meeting with a single entity, UARG, which Wehrum was prohibited from meeting with alone – not a meeting with five parties. In any event, the meeting was also not "open to all interested parties" as required by the Trump Ethics Pledge, because Hunton only invited its own clients to this closed-door meeting. Wehrum also held two private meetings with his former client General Electric (which is also a member of the Air Permitting Forum). Under the terms of his ethics agreement, Wehrum is supposed to be recused from "any meetings or communications relating to the performance of [his] official duties" with his former clients or employer – the only exception being for meetings with at least five parties present where the discussion is limited to matters of general applicability. The purpose of these meetings is unknown; one of these meetings was solely with General Electric, while the other was with five members of the Gas Turbine Association, which at the time of the meeting was chaired by a General Electric manager.



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SECTION #1: With Wehrum and Harlow at EPA, Hunton-represented industry groups are getting the policy results they seeking.

Introduction

This report describes a comprehensive examination of Hunton court filings, public comments, and regulatory petitions made on behalf of amorphous "coalitions," "forums," "groups," and "alliances," that are secretive about their membership and have little existence outside the Hunton law firm. In fact, the Hunton-represented industry groups described in this report appear to exist solely for the purposes of coordinating payments to Hunton for legal services. They are not incorporated anywhere, hold no legal status, and are not required to publicly disclose their members. Their "staff" are attorneys at Hunton, where Wehrum and Harlow worked before assuming their roles at EPA. The organizations exist only on paper, and among the benefits they impart on their "members" is the assumption of anonymity and the ability to coordinate a well-funded, expert-led effort to influence EPA under the public's radar.

Hunton-represented industry groups are achieving remarkable success with their policy objectives, on everything from major efforts to roll back landmark climate and toxic air pollution regulations, to more technical changes that allow for more air pollution such as by narrowing the definition of "ambient air" or expanding the Clean Air Act's "International border areas" to include states without international borders.

Most of these Hunton-represented industry groups filed comments in response to EPA's April 2017 request for the identification of "regulations that may be appropriate for repeal, replacement, or modification."[31] One of the groups (UARG) sought 17 rollbacks, and the Trump EPA air office has acted on the eight most significant ones. Another group, the Air Permitting Forum, sought 13 changes to weaken Clean Air Act permitting programs, and the Trump EPA air office has acted upon or has stated it is actively considering eight of the requests. Still another Hunton-represented industry group formed to weaken the National Ambient Air Quality Standards (NAAQS) program has seen the Trump EPA begin to implement its suggestions for doing so, including by removing government-funded academics from science advisory panels under the guise of "conflict of interest," while adding industry-funded consultants who have long questioned the health effects of pollution.

Appendices to this report contain more detailed information, including quotes and citations, to where the Trump EPA appears to be granting the requests of these Hunton-represented industry groups. Research revealed at least five such organizations represented by Hunton that have advocated for policy changes from the EPA air office:

- Utility Air Regulatory Group (UARG)
- Air Permitting Forum ("the Forum")
- Auto Industry Forum (AIF)

[31] 82 Fed. Reg. 17793 (Apr. 13, 2017).

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- CCS Alliance ("the Alliance")
- NAAQS Implementation Coalition ("the Coalition")

In some cases, these organizations are also members of each other. For example, UARG is a "member" of the NAAQS Implementation Coalition, and the Auto Industry Forum is a "sub-coalition" of the Air Permitting Forum. This makes it particularly difficult to determine who is a member of each group. In all cases, however, the public-facing representatives of these organizations are lawyers at Hunton.

Below are descriptions of each Hunton-represented industry group, along with a summary of some of the long-desired policy goals the groups are achieving from the Trump EPA's air office. This report includes detailed appendices cataloguing these and other positions taken by the Hunton-represented industry groups that the Trump EPA's air office has subsequently adopted.

a. The Utility Air Regulatory Group (UARG)

One of Wehrum's and Harlow's mutual clients was the recently-disbanded Utility Air Regulatory Group (UARG), which advocates against pollution limits for fossil fuel-fired power plants and their related interests (*e.g.*, coal mining). In court filings, UARG's Hunton lawyers have stated that, "since its inception in 1977, UARG has participated in every major EPA rulemaking affecting the electric generating industry."[32] UARG has alternatively described itself as an "informal consortia" of power plant operators and "national associations";[33] "an ad hoc, unincorporated association" of electricity generators and "industry groups";[34] and as "a not-for-profit association" of individual [electric] generating companies and national trade associations."[35]

In 1988, UARG counted 64 individual electric utility companies among its members, as well as three related trade associations.[36] By 2017, UARG's membership consisted of 25 power plant companies, five coal-related trade associations, and the federally owned Tennessee Valley Authority.[37]

Together, Hunton and UARG have been among the most prolific industry-funded participants in EPA rulemakings and litigation under the Clean Air Act (CAA). In 2017, Mr. Wehrum accepted an award for Hunton's representation of UARG and others fighting public health protections at EPA, stating that those fights are "very important issues to our clients, and we are doing everything we can

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[32] Defendant Duke Energy Corp.'s Reply, *United States et al. v. Duke Energy Corp.*, 2003 WL 25509066 (M.D.N.C. Feb. 13, 2003) (citing Declaration of Norman W. Fitchorn).

[33] Hunton & Williams comments of UARG et al., Docket Id. No. 102-RQ-14-116, at 1 (Aug. 25, 1983).

[34] Brief for Intervenor-Petitioners UARG et al., Case Nos. 14-1112 & 14-1151 at v (D.C. Cir.) (filed Dec. 30, 2014).

[35] *See* Comments of UARG, Docket Id. ID No. EPA-HQ-OAR-2017-0355-24421 (Aug. 31, 2018).

[36] *See Maine v. Thomas*, 690 F. Supp. 1106, 1107 n.2 (D. Me. 1988) (describing those entities all as "members of the Utility Air Regulatory Group").

[37] Leaked UARG Policy Committee document

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to represent them successfully in these issues."[38] Wehrum's nomination to lead the Trump EPA air office was announced less than nine months later.

While Hunton may attempt to imply that "UARG" is an organization with meaningful independence from Hunton, the facts indicate otherwise:

- Documents indicate that although UARG counts many corporations and trade associations among its "members," the organization itself has little existence outside the walls of Hunton's firm. Indeed Hunton itself "founded" UARG in the late 1970s,[39] and has served as counsel to UARG and its members ever since.

- An internal budget proposal presented to the "UARG Policy Committee" in June 2017 sought nearly $2 million in "dues" from UARG members, to cover work during the period "June 23 to early September 2017."[40] Although couched as a request for "technical consultant *and* legal support," only 2.3% of the proposed budget ($45,000 out of $1,955,000) would have supported technical services. The remaining 97.7% went to Hunton for legal services in 11 subject areas.

- Hunton appeared to be in control of day-to-day management and growth of UARG itself. For example, Hunton was the sole entity paid for UARG's "planning/general coordination," with $100,000 in legal fees proposed to go to Hunton in exchange for "continuation of efforts to recruit new members" for UARG.

The following is a list of all UARG's members as of June 2017, shortly before Wehrum and Harlow left for EPA.[41] The five Wehrum/Harlow clients from which they are formally recused are also noted below:[42]

- American Electric Power
- Ameren
- Consumers Energy
- **Dominion (Wehrum recused)**
- **DTE Energy Co. (Harlow recused)**
- **Duke Energy Corp. (Wehrum recused)**
- Dynegy Inc.
- Eversource Energy/Pub Service of N.H.
- FirstEnergy Corp.
- Kansas City Power & Light Co.

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[38] Stan Parker, *Environmental Group Of The Year: Hunton & Williams*, LAW360, Jan. 17, 2017 (9:59 PM EST).

[39] *United States v. Illinois Power,* Civil Action No. 99-CV-833-MJR (S.D. Ill. April 24, 2003) (J. Proud).

[40] Leaked UARG Policy Committee document at 1.

[41] *See id.* at 6.

[42] *See* Wehrum recusal at 2 (listing former clients); Harlow recusal at 2 (listing former clients).

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- **LG&E & KU Energy LLC (Harlow recused)**
- Luminant
- Minnesota Power Co./ALLETE
- NiSource Inc.
- Oglethorpe Power Corp.
- Ohio Valley Electric Corp.
- Otter Tail Power Co.
- Pinnacle West/Arizona Public Service
- **Salt River Project (Wehrum recused)**
- South Carolina Elec & Gas Co. (SCANA)
- Southern Company Services
- Tri-State Generation & Transmission
- Tucson Electric Co.
- Wabash Valley Power Association
- WeEnergies
- American Coalition for Clean Coal Electricity
- American Public Power Association
- EEI-J/E [Edison Electric Institute]
- National Rural Electric Cooperative Association (NRECA)
- National Mining Association (NMA)
- Tennessee Valley Authority (TVA)

UARG's 2018 budgeting document, prepared for a meeting less than three months before Wehrum was nominated, had projected that the group would require an overall budget of between $8.2 and $8.5 million. The precise amount, UARG wrote, would depend on whether "the new Administration is ready and able in 2018 to undertake a substantial number of initiatives to reform the unreasonable Clean Air Act programs of the previous Administration...."[43] Wehrum has stated that he does not remember this two-day UARG meeting, at which his former client voted on whether to pay Hunton millions of dollars in legal fees, but others have confirmed he attended.[44]

UARG has taken dozens of industry-friendly positions on the Clean Air Act, the most salient of which can be found in Appendix 1 to this report alongside the status of corresponding Trump EPA actions.

[43] *See* Leaked UARG Policy Committee document at 3 (projecting an $8.2 million budget request, or potentially "3-4% higher than that" depending on the Trump EPA's ambitions).

[44] Zack Colman, *Industry group tied to EPA air chief dissolves,* POLITICO, May 10, 2019.

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In May 2017, UARG submitted a prioritized set of 17 rules, sets of rules, or programs it suggested should be withdrawn, revisited, or changed in ways that would severely weaken public health protections.[45] Of those 17 rollbacks, the Trump EPA has taken concrete steps to effectuate the eight most significant matters:

1. UARG asked EPA to repeal the Clean Power Plan's greenhouse gas (GHG) emission guidelines for certain existing power plants, and to replace them with weaker requirements and significant room for states to create further loopholes. The Trump EPA issued a final rule doing so in June 2019. The Trump EPA's own analysis of the proposal projected that it could prematurely kill 1,400 people a year by 2030.[46] Although the final rule stayed largely the same in substance, the economic analyses were changed to no longer show those harms.[47]

2. UARG asked EPA to repeal or revise GHG limits for new power plants. The Trump EPA has proposed to do so, and to finalize the rule in December 2019.

3. UARG asked EPA to weaken the framework interstate pollution rules. On August 31 and October 19, 2018, the Trump EPA issued memoranda and guidance documents that would allow for more interstate air pollution under those framework rules.[48]

4. UARG asked EPA to make changes to the New Source Review (NSR) permitting program that would allow older sources to continue polluting without having to install additional controls. The Trump EPA has proposed rules and issued guidance documents to weaken NSR in at least five different ways, starting December 7, 2017 with the "DTE Memo," which announced that the agency would no longer "second guess" the projections of UARG members and other large polluters regarding whether upgrades would "significantly increase" emissions and thus require pollution controls. Wehrum and Harlow's involvement in developing the DTE Memo raises substantial ethical concerns, as discussed in Section 2 of this report. The Trump EPA has announced plans to propose multiple changes to the NSR program in the summer of 2019.

5. UARG asked EPA to weaken the rules restricting regional haze in national parks and wilderness areas. On December 20, 2018 and April 4, 2019, the Trump EPA issued guidance documents to that effect,[49] and also announced in a letter to Hunton that it would propose a rule to accomplish other related UARG-sought changes.

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[45] Hunton comments for UARG, Docket Id. No. EPA-HQ-OA-2017-0190-40140 (May 12, 2017).

[46] Lisa Friedman, *Cost of New E.P.A. Coal Rules: Up to 1,400 More Deaths a Year*, N.Y. TIMES, Aug. 21, 2018.

[47] https://www.epa.gov/sites/production/files/2019-06/documents/utilities_ria_final_cpp_repeal_and_ace_2019-06.pdf

[48] *See* Stuart Parker, *EPA Guidance Grants States 'Flexibilities' To Avoid Interstate Air Mandates*, INSIDEEPA, Nov. 1, 2018.

[49] *See, e.g.*, Stuart Parker, *EPA Expands Air Data Waivers for 'Exceptional' Events, Sparking Criticism*, INSIDEEPA (Apr. 11, 2019) (noting that the expanded waivers could be used in "selecting data to show compliance with EPA's rule limiting regional haze).

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6. UARG asked EPA to repeal a rule that, if repealed, would allow states to create loopholes where polluters can emit unlimited quantities of air pollution during certain operational phases, such as when the facility is "malfunctioning." The Trump EPA has proposed to partially repeal that rule, and has told courts that it is considering whether to allow additional loopholes.

7. UARG asked EPA to reconsider the GHG emission guidelines for municipal solid waste landfills – presumably to establish regulatory precedents that could limit similar EPA regulations of existing coal-fired power plants. The Trump EPA announced that it is reconsidering the landfill rule and, separately, has proposed to postpone some of the rule's implementation deadlines from six months to two years.

8. UARG asked EPA to reduce the electronic reporting requirements for emissions of hazardous air pollution under the Mercury and Air Toxics Standards (MATS) rule. The Trump EPA has granted power plants a two-year reprieve from these requirements, and has also proposed to reverse the economic and legal underpinning of the entire MATS rule.

EPA appears to have outright rejected only one UARG request from this prioritized wish list: a request to remove the "stationary combustion turbine" subcategory from regulation under the Clean Air Act's hazardous air pollution program. EPA has proposed to reject this request because a D.C. Circuit case expressly holds that EPA has no legal ability to remove subcategories (rather than categories) from regulation under the hazardous air pollution program.[50] However, the Agency proposed to determine that no additional health-based controls on the subcategory were necessary.

b. The Air Permitting Forum ("the Forum") and its sub-coalition, the Auto Industry Forum (AIF)

Another opaque "coalition" nominally housed at Hunton is the Air Permitting Forum ("the Forum"). In public comments, the Forum has described itself as "a coalition of manufacturing companies focused on stationary source implementation issues under the Clean Air Act"[51] who "are subject to numerous CAA regulatory requirements . . . ."[52] The Forum is closely associated with the Auto Industry Forum (AIF), which describes itself as a "sub-coalition" within the Forum that is focused on stationary source regulations affecting the automobile manufacturing industry.[53] Because AIF is a sub-entity of the larger "Forum," this investigation ascribes the Forum's policy positions to all of its members, including those within the smaller AIF entity.

[50] 84 Fed. Reg. 15046, 15068 (Apr. 12, 2019).

[51] Forum comments on Title V rule, Docket Id. No. EPA-HQ-OAR-2016-0194-0031, at 1 (Oct. 24, 2016).

[52] Forum comments on CPP repeal, Docket Id. No. EPA-HQ-OAR-2017-0355-19903, at 1 (Apr. 26, 2018),

[53] Forum comment on stratospheric ozone, Docket Id. No. EPA-HQ-OAR-2003-0167-0166 at 1 (March 7, 2012).

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The Forum originally existed outside of Hunton, but the organization's two longtime lawyers were hired by Hunton in June 2016.[54] Since then, Wehrum and Harlow's former law firm has represented the Forum on numerous matters before EPA and the courts, including in litigation filed jointly with Wehrum himself against EPA.[55]

Like UARG, the Forum does not have any apparent physical address, or even a public website. In the headers for the Forum's and AIF's public comments, the organization has listed individuals serving in various roles for the groups, such as an "Executive Director," "Director," "Counsel," and "Manager" – but all of these individuals are lawyers employed by the Hunton law firm, and their contact information is their Hunton email address.[56]

Unlike UARG, however, neither the Forum nor its sub-coalition AIF are listed as a former client of Wehrum or Harlow. Accordingly, it appears that neither Wehrum nor Harlow have recused themselves from meetings with, or working on particular matters related to, the Forum or its representatives.

Evidence suggests that the Forum is comprised of at least some former Wehrum and Harlow clients. In May 2015, 18 individuals associated with the Forum met with EPA staff about Clean Air Act rulemakings. As required,[57] EPA staff docketed summaries of those meetings, including a list of attendees representing the Forum.[58] In addition to three lawyers (all of whom would later join Hunton), the Forum's representatives included employees from four automakers, three oil and gas companies, two pulp and paper companies, and General Electric. Forum members from whom Wehrum or Harlow are recused are noted below:

- Fiat Chrysler
- Ford
- General Motors
- Toyota
- **Chevron (Wehrum & Harlow recused)**
- **ExxonMobil (Wehrum recused)**
- Shell
- **Georgia-Pacific (Wehrum recused)**
- International Paper
- **General Electric (Wehrum recused)**

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[54] https://www.huntonak.com/en/news/chuck-knauss-and-shannon-broome-join-global-environmental.html

[55] *See* Proof Petitioners' Opening Brief, *Nat'l Envtl. Dev. Assn's Clean Air Project v. EPA*, Case No. 16-1344 (D.C. Cir. Aug. 30, 2017) (brief filed by Wehrum on behalf of the American Petroleum Institute, alongside other Hunton lawyers on behalf of the Air Permitting Forum).

[56] *See, e.g.*, Forum comments on CPP repeal, Docket Id. No. EPA-HQ-OAR-2017-0355-19903, at 1 (Apr. 26, 2018).

[57] *See Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977).

[58] *See* U.S. EPA, "Summary of EPA Stakeholder Meeting – Air Permitting Forum; May 19, 2015"; U.S. EPA "Summary of Meeting with the Air Permitting Forum on May 20, 2015."

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The Hunton-represented Forum has been highly successful in getting EPA to adopt its policy positions on rollbacks – so much so that language written by Hunton lawyers for the Forum was copied verbatim into the DTE Memo, without attribution, as part of EPA's justification for rolling back New Source Review permitting requirements. Specifically, Hunton's submittal to EPA on behalf of the Forum stated that:

> "While historically EPA has recognized that a source must exercise judgment to exclude increases for which the project is not the 'predominant cause,' more recent EPA actions reflect the view that all emission increases are presumed to be caused by the change."[59]

Despite the fact that this statement was erroneous,[60] nearly identical language appeared without explanation in EPA's DTE Memo disavowing the federal government's position in litigation involving Hunton, UARG, and a UARG member:

> "Because increased emissions may be caused by multiple factors, the EPA has recognized that the source must exercise judgment to exclude increases for which the project is not the 'predominant cause."[61]

The only other instance in which this particular legal argument was made – albeit not with the same words – was also by Hunton. Hunton made this argument in briefs defending UARG member DTE Energy from the EPA enforcement action that was the impetus for the agency's DTE Memo.[62, 63]

EPA's use of language supplied by the Forum in the DTE Memo is only the tip of the iceberg. Like UARG, the Forum has achieved remarkable success in convincing EPA to change its position in ways that mirror the Forum's advocacy. The May 2017 Forum document that EPA plagiarized included a wish list of 19 desired rollbacks of Clean Air Act permitting requirements and emission limits, and of the National Ambient Air Quality Standards.

As of July 2019, the Trump EPA has adopted six of the Forum's air permitting and emission standard rollbacks in final rules, orders, and/or final guidance documents, or a combination – including the substance of the DTE Memo described above:

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[59] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 12 (May 15, 2017).

[60] https://energycommerce.house.gov/newsroom/press-releases/pallone-whitehouse-carper-raise-new-questions-about-wehrum-s-involvement-in

[61] DTE Memo at 7.

[62] https://www.whitehouse.senate.gov/news/release/whitehouse-carper-pallone-raise-new-questions-about-wehrum

[63] This is not the first time Bill Wehrum appears to have copy-pasted text verbatim from documents provided by his former clients. In 2004, while Wehrum was serving as chief counsel in the Bush Administration's Office of Air and Radiation, EPA proposed mercury emissions rules that *also used verbatim text from his former law firm* – in that case, the firm Latham & Watkins. *See* Eric Pianin, *Proposed Mercury Rules Bear Industry Mark*, WASH. POST, (Jan. 31, 2004).

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1. With respect to air toxics, the Forum asked the EPA to withdraw its "once in, always in" policy that requires major sources of toxic air pollution to continue meeting strong emission limits. In a January 25, 2018 memorandum from Wehrum, the Trump EPA withdrew the policy, and on June 25, 2019 proposed a rule that would enshrine the looser toxic air pollution limits in regulation.[64] The Forum and UARG joined litigation helping the Trump EPA defend the issuance of what they call, "the Wehrum Memo," in court.[65] If the withdrawal of the "once in, always in" policy is finalized, the Trump EPA projects that 3,912 facilities nationwide – nearly half of all major air toxic polluters – could substantially increase their toxic air pollution.[66] Independent analyses indicate that those sources could more than double their toxic air pollution under the new approach.[67] The Trump EPA has acknowledged that it conducted no health or environmental analysis before Wehrum withdrew the policy in 2018.[68]

2. With respect to New Source Review, the Forum asked EPA to "reduce, if not eliminate, federal second-guessing" of state permitting programs to ensure compliance with legal requirements. The Trump EPA has issued a memorandum calling for "General Deference" to states and tribes implementing those programs.[69]

3. With respect to New Source Review, the Forum also asked EPA to "clarify its position" regarding deference to polluters' projections of their own emissions, and included language inaccurately characterizing the types of pollution that EPA has allowed sources to exclude from their calculations. The Trump EPA issued the DTE Memo "to provide greater clarity" on that issue, and adopted verbatim without citation the Forum's novel legal argument, which itself mirrored Hunton's position on behalf of a UARG member in the DTE litigation. As discussed in Section 2, Wehrum and Harlow's involvement in developing the DTE Memo raises serious ethical concerns.

4. With respect to New Source Review, the Forum also asked EPA to expand the scope of "netting," which allows polluters to upgrade old equipment – and prolong the life of their facility – without triggering new pollution control requirements. In guidance, the Trump EPA changed its interpretation of its rules to allow for that exact expansion of project netting – now called "project emissions accounting" – and in March 2019 it sent a proposal to OMB

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[64] https://www.epa.gov/sites/production/files/2019-06/documents/frn_mm2a_proposal_and_reg_text_6_25_19.pdf

[65] *See generally* Intervenor-Respondents Air Permitting Form, et al. Final Response to Petitioners' Opening Brief, *Calif. Communities Against Toxics v. U.S. Envtl. Protection Agency*, 2019 WL 858013 (D.C. Cir.).

[66] Proposed Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act at 95 (pre-publication version).

[67] ENVTL. DEF. FUND, PRUITT'S NEW AIR TOXICS LOOPHOLE at 2 (Aug. 2018) (estimating that eligible facilities in the Houston-Galveston area could increase their toxic air pollution by 146% to 152% under the new approach).

[68] Testimony of Scott Pruitt, Senate Comm. on Env't and Publ. Works, Jan. 30, 2018, https://www.c-span.org/video/?440282-1/epa-administrator-pruitt-testifies-senate-oversight-hearing&live&start=1832

[69] Memorandum from Andrew R. Wheeler, *Principles and Best Practics for Oversight of Federal Environmental Programs Implemented by States and Tribes* at 3 (Oct. 30, 2018).

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that would enshrine the change in EPA regulations.[70] EPA expects to publish the proposal sometime in July 2019.[71]

5. With respect to New Source Review, the Forum also asked EPA to lift the agency's stay of a 2009 rule finalized in the last week of the George W. Bush Administration, which would have allowed polluters to artificially divide the significant emissions from construction projects into smaller pieces, and thereby claim that no individual piece significantly increases emissions. The Trump EPA decided it would lift the Obama Administration EPA's stay of this "aggregation" rule, allowing the Bush Administration rule to come into effect.[72]

6. With respect to the Clean Air Act's core operating permit program, the Forum's "highest priority" was to limit the public's ability to challenge certain illegal permit conditions before EPA – what the Forum derisively referred to as "a second bite at the apple." The Trump EPA rejected a Sierra Club petition on that precise basis, stating the group was, "in essence, asking for a 'second bite at the apple' . . . ."[73]

The Trump EPA has also stated that it is actively considering two more of the Forum's permitting rollbacks:

7. With respect to New Source Review, the Forum asked EPA to expand the "debottlenecking" rule, which would allow major polluters to ignore emissions increases that upgrades cause at other parts of the plant. In October 2017, the Trump EPA listed changes to the debottlenecking rule as one of the "important areas" it would assemble a task force to review.[74]

8. With respect to New Source Review, the Forum also asked EPA to redefine the word "routine," so that even changes that "occur only once or twice during the life of a plant" are considered routine and thus exempt from triggering additional pollution control requirements. In April 2018, the Trump EPA said it was "evaluating the need to clarify the interpretation and appropriate application" of this exception to New Source Review.[75]

In addition to permitting rollbacks, the Forum also sought a number of other changes to the way EPA establishes and implements the National Ambient Air Quality Standards (NAAQS). The full scope of the Forum's success in influencing the Trump EPA regarding the NAAQS will become clear as the agency undertakes a major scientific review of the NAAQS for particulate matter (soot) and ground-

[70] Memorandum from Scott Pruitt, Admin'r, to Reg'l Admin'rs, *Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program* (Mar. 13, 2018).

[71] https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2060-AT89

[72] 83 Fed. Reg. 57324, 57324 (Nov. 15, 2018).

[73] *In re PacificCorp Energy Hunter Power Plant*, Order on Petition No. VIII-2016-4 at 17 (Oct. 16, 2017).

[74] U.S. EPA, FINAL REPORT ON REVIEW OF AGENCY ACTIONS THAT POTENTIALLY BURDEN THE SAFE, EFFICIENT DEVELOPMENT OF DOMESTIC ENERGY RESOURCES UNDER EXECUTIVE ORDER 13783 at 2 (Oct. 25, 2017).

[75] Anna Marie Wood, U.S. EPA, *NAAQS and Other Implementation Updates* at slide 33 (Apr. 5, 2018).

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level ozone (smog), but early signs indicate substantial influence. Most notably, the Trump EPA appears determined to undermine the scientific reviews underpinning the NAAQS. The seven-member Clean Air Scientific Advisory Committee (CASAC) is charged by law with providing independent advice on the public health and environmental science of air pollution. Whereas CASAC was previously "a committee of nationally and internationally recognized researchers at the leading edge of their fields,"[76] the Trump EPA has replaced all but one of the academic research scientists, and appointed as chair a fossil fuel consultant, Tony Cox, who disputes the well-established health effects of particulate matter (PM).[77,78] The Trump EPA then disbanded a 20-person panel of experts who advise CASAC specifically on PM science, leaving CASAC – according to the Trump appointees' own admission – unable to conduct a "meaningful independent scientific review" of the literature.[79] The Trump EPA further recommended that individual CASAC members should be allowed to share their own personal views of the science with EPA political officials, even when those views "fall outside the committee consensus."[80] Combined, these changes to undermine in-depth scientific review and to elevate fringe views of CASAC members, could provide cover for EPA political appointees to differ wildly from mainstream public health science when setting the NAAQS.

During the time Wehrum was at the helm of the Trump EPA air office, the agency sought to adopt several Forum-proposed rollbacks concerning the NAAQS, such as:

9. The Forum asked EPA to review how it evaluates the health benefits that come from reducing PM pollution, even if the reductions are in places already meeting the NAAQS. Five months later, in an October 2017 proposal concerning the Clean Power Plan, the Trump EPA floated the possibility that any benefits from PM reductions below the NAAQS levels could be treated as "zero" benefit.[81] In May 2019, Wehrum publicly questioned[82] the public health benefits of PM reductions caused by the MATS rule in areas achieving the NAAQS. In June 2019, rather than rely on the agency's independent science advisory boards, the Trump EPA "invite[d] the

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[76] Letter from former members of CASAC Particulate Matter Review Panel to Tony Cox, CASAC Chair, at 2 (Dec. 10, 2018).

[77] Stuart Parker, *CASAC Research Scientist Attacks Panel Chairman's NAAQS Review Shift*, INSIDEEPA (Mar. 26, 2019).

[78] *See*, U.S. EPA, *Health and Environmental Effects of Particulate Matter (PM)*, https://www.epa.gov/pm-pollution/health-and-environmental-effects-particulate-matter-pm (last visited July 2, 2019).

[79] *See* Letter from Tony Cox, Chair of CASAC, to Andrew Wheeler, EPA Admin'r, at 2 (Apr. 10, 2019) (stating that "CASAC recommends that the EPA reappoint the previous CASAC PM panel (or appoint a panel with similar expertise)," among other recommendations, in order to review an integrated scientific assessment that will "enable independent scientific review" by CASAC).

[80] Memorandum from Scott Pruitt to Asst. Admin'rs, *Back-to-Basics Process for Reviewing National Ambient Air Quality Standards*, at 10 (May 9, 2018).

[81] 82 Fed. Reg. 48035, 48044 (presenting an "alternative approach" to calculate premature death from particulate matter in which "Forgone $PM_{2.5}$ co-benefits fall to zero in areas whose model-predicted air quality is at or below the annual average $PM_{2.5}$ NAAQS").

[82] Lisa Friedman, *E.P.A. Plans to Get Thousands of Pollution Deaths Off the Books by Changing Its Math*, N.Y. TIMES, May 20, 2019.

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public to nominate scientific experts" who could review a forthcoming reexamination of how PM benefits are calculated.[83]

10. The Forum asked EPA to reexamine how it treats "foreign sources of emissions" for purposes of achieving the NAAQS.[84] The Trump EPA now states that the Clean Air Act's weaker "International border area" provision is no longer restricted to areas on the international border, and instead applies to any emissions that can be traced back to foreign countries.[85]

Indeed, this investigation could find only one change sought by the Forum that the Trump EPA has expressly rejected: Repealing an EPA "regional consistency" rule that four Hunton lawyers – including Bill Wehrum himself – were challenging in court. EPA defended the rule against Hunton's challenge, and the D.C. Circuit unanimously rejected Hunton's arguments on June 8, 2018, seven months after Wehrum began his current tenure at EPA.[86]

c. The NAAQS Implementation Coalition ("the Coalition")

The NAAQS Implementation Coalition ("the Coalition") appears to have been established at Hunton in 2011, which is also when it submitted its first public comments to EPA (in that case, asking the agency to weaken the way it models violations of air quality standards).[87]

Like the other Hunton-represented industry groups, the Coalition has no public website, no apparent physical address, and no employees other than its Hunton "counsel."

In recent years, the Coalition has been similarly opaque about its membership and funding, instead merely describing itself as being "comprised of trade associations, companies, and other entities who confront difficulties in permitting and operating facilities" pursuant to EPA's National Ambient Air Quality Standards (NAAQS), particularly for smog-forming ozone.[88] However, the Coalition's first-ever public comment – filed in 2011 by a former managing partner of Hunton's Washington, D.C. office – lists the following organizations as some of the members:[89]

- American Chemistry Council
- **American Forest & Paper Association (Wehrum recused)**

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[83] *See* 84 Fed. Reg. 27632 (June 13, 2019).

[84] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 25 (May 15, 2017).

[85] 83 Fed. Reg. at 63010 (Dec. 6, 2018) ("a demonstration prepared under CAA section 179B [the Clean Air Act's international border areas provision] could consider emissions emanating from . . . intercontinental sources and is not restricted to areas adjoining international border areas . . . .").

[86] *Nat'l Envtl. Dev. Assn's Clean Air Project v. EPA*, No. 16-1344 (D.C. Cir. June 8, 2018).

[87] Coalition comment on SO2 guidance, Docket Id. No. EPA-HQ-OAR-2010-1059-0057 (Dec. 2, 2011).

[88] https://www.uschamber.com/sites/default/files/2.13.17-_coalition_comments_to_epa_on_proposed_nonattaniment_area_classifications_and_sip_requirements_for_2015_ozone_naaqs.pdf

[89] Coalition comment on SO2 guidance, Docket Id. No. EPA-HQ-OAR-2010-1059-0057, at 2 n.1 (Dec. 2, 2011),

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- **American Petroleum Institute (Wehrum recused)**
- American Wood Council
- **Brick Industry Association (Wehrum recused)**
- Corn Refiners Association
- National Oilseed Processors Association
- Rubber Manufacturers Association
- **Utility Air Regulatory Group (Wehrum and Harlow recused)**

In May 2017, the Coalition filed detailed comments with EPA asking for 21 major changes to how EPA reviews and implements the NAAQS, which form the core of the Clean Air Act. The Trump EPA has not yet had the opportunity to review air quality standards for the two most significant NAAQS pollutants, particulate matter and smog-forming ozone. However, the Trump EPA is currently undertaking reviews of those air quality standards, and has announced its intention to propose standards for both pollutants in March 2020.[90] The Trump EPA also recently disbanded a 20-person panel of experts on particulate matter.[91] The main Clean Air Science Advisory Committee that will advise on public health risks now has only one academic research scientist, and is led by an industry-backed consultant who disputes[92] the well-established health effects of particulate matter.[93]

The full scope of the Coalition's success in influencing the Trump EPA will become clear as those standards develop, but early signs indicate substantial influence. Thus far, the Trump EPA has adopted at least five of the Coalition's recommended reforms for NAAQS review and implementation:

1. Similar to the Forum, the Coalition asked EPA to expand the Clean Air Act's "International border areas" provisions to reduce air quality protections in states without any international borders. The Trump EPA now states that the weaker "International border area" provision is no longer restricted to areas on the international border.[94]

2. The Coalition asked EPA to change the meaning of "conflict of interest" to remove public health scientists who receive EPA research grants from the agency's science advisory boards, even while adding industry-funded scientists. Five months later, on October 31, 2017, the

[90] https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2060-AU40 (ozone); https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2060-AS50 (particulate matter).

[91] Lisa Friedman, *E.P.A. to Disband a Key Scientific Review Panel on Air Pollution*, N.Y. TIMES, Oct. 11, 2018.

[92] Stuart Parker, *CASAC Research Scientist Attacks Panel Chairman's NAAQS Review Shift*, INSIDEEPA (Mar. 26, 2019).

[93] *See*, U.S. EPA, *Health and Environmental Effects of Particulate Matter (PM)*, https://www.epa.gov/pm-pollution/health-and-environmental-effects-particulate-matter-pm (last visited July 2, 2019).

[94] 83 Fed. Reg. at 63010 (Dec. 6, 2018) ("a demonstration prepared under CAA section 179B [the Clean Air Act's international border areas provision] could consider emissions emanating from . . . intercontinental sources and is not restricted to areas adjoining international border areas . . . .").

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Trump EPA changed its conflict of interest rules to exclude any researchers who receive EPA grants to study pollution.[95]

3. The Coalition asked EPA to narrow the meaning of "ambient air," which would reduce the amount of outdoor air protected by the Clean Air Act in the first instance. The Trump EPA publicly circulated draft guidance that would redefine "ambient air" to exempt more outdoor air from pollution protections.[96] Other Hunton-represented industry groups, such as the Forum, submitted comments to EPA supporting this redefinition.

4. The Coalition characterized the main NAAQS science committee as "imbalanced," with members who live in similar parts of the country, and suggested that the members "should be given rotating terms." In October 2017, the Trump EPA called for membership in its scientific committees to "be balanced" with "geographic diversity," and stated that "membership should be rotated regularly."[97]

5. The Coalition criticized efforts of the main NAAQS science committee to develop "consensus" around widely accepted science, stating that members with "minority views" should be allowed to report those to EPA political appointees as alternative takes on the science. In May 2018, the Trump EPA stated that although the committee should "seek to find consensus," individual committee members should be allowed "to share their own individual opinions when they fall outside committee consensus."[98] When coupled with the Trump EPA's replacement of impartial research scientists with industry-backed consultants, this change could allow politics to interfere with the science-based NAAQS-setting process.

d. The CCS Alliance ("the Alliance")

The Alliance describes itself as "a coalition of entities, spanning a number of economic sectors, that share a common interest in removing the impediments to investment in and development of carbon capture and storage ("CCS"), as well as mitigating the potential risks associated with the deployment of this technology."[99]

The Alliance has a website (ccsalliance.net), but the site is currently inactive for "scheduled maintenance."[100] However, the Internet Archive shows what the website looked like before it went

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[95] Memorandum from Scott Pruitt, *Strengthening and Improving Membership on EPA Federal Advisory Committees*, at 3 (Oct. 31, 2017).

[96] U.S. EPA, DRAFT REVISED POLICY ON EXCLUSIONS FROM "AMBIENT AIR" (Nov. 2018).

[97] Memorandum from Scott Pruitt, *Strengthening and Improving Membership on EPA Federal Advisory Committees*, at 2 (Oct. 31, 2017).

[98] Memorandum from Scott Pruitt to Asst. Admin'rs, *Back-to-Basics Process for Reviewing National Ambient Air Quality Standards*, at 10 (May 9, 2018).

[99] Comments of the CCS Alliance, Docket Id. No. EPA-HQ-OW-2008-0390-0178, at 1 (Dec. 22, 2008).

[100] www.ccsalliance.net

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inactive sometime in late 2016 or early 2017.[101] That website bore the "Hunton & Williams" logo along the top. In addition, "Hunton & Williams" is incorporated into the CCS Alliance logo. The Alliance lists the D.C. office of Hunton & Williams on the front page, along with Hunton's telephone number. For entities seeking to "join the CCS Alliance," the website provided the contact information for Hunton, as well as for a Hunton law partner (Frederick R. Eames), and the Gmail address of an energy lobbyist who does not appear to work at Hunton.[102] Hunton appears to have been paid approximately $860,000 by the Alliance over seven years (2009–2015) to lobby Congress on various pieces of climate change legislation.[103] Hunton terminated its lobbying engagement with the Alliance in early 2016.[104]

In some cases, the Alliance produced white papers that were then cited by other Hunton organizations. For example, UARG cited an Alliance "study" to oppose the use of CCS technology in Clean Air Act rulemakings.[105]

The Alliance – which has called coal "indispensable" to meeting electricity demands – is comprised of entities that would likely lose out financially if EPA required the use of CCS technology to capture and store carbon emissions. In comments submitted to EPA in 2008,[106] the Alliance listed the following as its members:

- Berkshire Hathaway Energy[107]
- MidAmerican Energy Holdings, a Berkshire subsidiary
- National Mining Association (former UARG member)
- National Rural Electric Cooperative Association (former UARG member)
- NRG Energy
- PacifiCorp
- Zurich North America

With respect to EPA rulemakings, the Alliance appears to favor the use of CCS technology – except to the extent it would have an adverse effect on the burning of coal for electricity. For example, in 2008 the Alliance argued that CCS technology is "the only tool now on the horizon" that could address "in a major way and within a mid-term timeframe" the "very large quantities of CO_2 emissions" from fossil fuel power plants.[108] In that rulemaking, the Alliance was urging EPA to authorize the geologic sequestration of CO2 under the Safe Drinking Water Act. But when it came to actually requiring even

[101] https://web.archive.org/web/20150405023737/http://www.ccsalliance.net/

[102] https://web.archive.org/web/20150405023929/http://www.ccsalliance.net/join/

[103] *See* PROPUBLICA, *Lobbying for CCS Alliance by HUNTON & WILLIAMS LLP* (last visited July 2, 2019).

[104] *Id.*

[105] *See* UARG comment, Docket Id. No. EPA-HQ-OAR-2008-0318-1550, at 117 n.29 (Nov. 28, 2008),

[106] Alliance comments, Docket Id. No. EPA-HQ-OW-2008-0390-0178, at 1 n.2 (Dec. 22, 2008).

[107] Comments of Berkshire Hathaway Energy, Docket Id. No. EPA-HQ-OAR-2013-0495-10052, at 2 (May 9, 2014).

[108] Alliance comments, Docket Id. No. EPA-HQ-OW-2008-0390-0178, at 2 (Dec. 22, 2008).

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the *partial* use of CCS technology, the Alliance balked, repeatedly arguing that it was not "adequately demonstrated" for even brand new coal plants.

The Alliance's views on partial CCS appear to now be echoed by the Trump EPA air office:

1. In May 2011, the Alliance argued that partial CCS for new coal-fired power plants "is not adequately demonstrated" because it does "not exist in sufficient geographic dispersion." In December 2018, the Trump EPA proposed to revise that Obama EPA standard, with the "primary reason" for its proposed rollback being "the high costs and limited geographic availability of CCS." In proposing the standard, Wehrum stated in a press release that the rollback "reflects our approach of defining new, clean coal standards by data and the latest technological information, not wishful thinking."

2. The Alliance criticized the landmark Boundary Dam power plant, which uses CCS, claiming its first year of operation "offers very little evidence of reliability or efficiency" for regulatory purposes. The Trump EPA's proposed rollback of the standard cited "multiple issues" at the Boundary Dam power plant, and solicited comment on whether the facility's "first year operational problems cast doubt" on the standard.

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SECTION #2: While at the Trump EPA, former Hunton lawyers Wehrum and Harlow appear to have violated ethical requirements in their rush to serve former clients and Hunton-represented industry groups

Before becoming EPA's top air pollution regulator on November 20, 2017, Bill Wehrum was a lawyer at the law firm Hunton Andrews Kurth LLP (at the time, Hunton & Williams LLP). Wehrum served as co-chairman of Hunton's environmental practice and led the administrative law group,[109] advocating before EPA and the courts on behalf of some of the biggest polluters in America. One of Wehrum's colleagues at Hunton, a partner named David Harlow, joined EPA as "senior counsel" in the air pollution office on October 1, 2017.[110]

This investigation leads to several ethics-related conclusions:[111]

(a) Wehrum and Harlow appear to have worked improperly to benefit Hunton and a UARG member in an ongoing EPA enforcement action;

(b) Wehrum failed to disclose the existence of at least three former clients in his recusal statement;

(c) Wehrum met at least six times with an undisclosed former client;

(d) Wehrum and Harlow listed only "UARG" as their client, but not its constituent members with whom they likely also developed attorney-client relationships pursuant to D.C.'s attorney ethics rules;

(e) Wehrum met at least nine times with UARG members, almost always in situations that would not comply with ethical rules for former clients, including one meeting at Hunton's office on the same day EPA released the DTE Memo; and

(f) Wehrum held at least two additional apparently improper meetings with a former client, General Electric, which is also a member of a Hunton-represented industry group.

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[109] Q&A With Hunton & Williams' Bill Wehrum, LAW360, May 6, 2013, https://www.huntonak.com/images/content/2/4/v2/2407/Law360_Bill_Wehrum_QA.pdf

[110] Kevin Bogardus, *Chemicals official cleared to weigh in on industry litigation*, E&E NEWS (Mar. 1, 2018).

[111] This report was unable to as comprehensively evaluate David Harlow's ethical conduct while at EPA because of a lack of public records regarding his schedules and communications while at EPA, as compared to William Wehrum.

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Introduction

As political appointees at EPA, both Wehrum and Harlow signed "Recusal Statements" drafted with the guidance of agency ethics officials and designed to identify and address conflicts of interests. Although Harlow signed his recusal statement within the requisite 3-month timeframe[112] – and indeed addressed it to Wehrum as his supervisor – Wehrum's own recusal statement was signed after a substantial delay of 10 months and demands from public officials, notably Senator Whitehouse, that he do so.[113] In connection with his nomination to lead the Trump EPA air office, Wehrum further committed to recuse himself from participating personally and substantially in any particular matter involving Hunton or his former clients without obtaining written pre-approval – regardless of whether a reasonable person would question his impartiality.[114]

The recusal statements outline various ethics obligations for Wehrum and Harlow, particularly under the so-called "Trump Ethics Pledge."[115] Similar to the Ethics in Government Act regulations,[116] which also apply to Wehrum and Harlow, the Ethics Pledge prohibits them from participating "for a period of 2 years from the date of [their] appointment[s]" "in any particular matter involving specific parties that is directly and substantially related to [their] former employer or former clients, including regulations . . . ."[117]

Both Wehrum and Harlow understood that this two-year ban applies to interactions with Hunton, their former employer, and with their former clients. To that effect, each included a list of former clients in his recusal statement – 37 for Wehrum, seven for Harlow. In addition, Wehrum and Harlow noted that they have confidential clients (two for Wehrum, one for Harlow) they are contractually prohibited from disclosing.[118] It is unknown whether ethics officials are aware of the identities of those clients, or if Wehrum or Harlow have met with those clients.

Each recusal statement outlines what the so-called Trump Ethics Pledge covers, as Wehrum and Harlow were advised by EPA's ethics officials:

> [F]or the purposes of this pledge obligation, the term "particular matters involving specific parties" is broadened to include any meetings or other communication relating to the performance of my official duties, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested

[112] 5 C.F.R. § 2634.802(b).

[113] *See* Sean Reilly, *Under pressure, Wehrum details recusal obligations*, GREENWIRE, Sept. 18, 2018

[114] *See* Letter from William L. Wehrum to Kevin S. Minoli, Designated Agency Ethics Official, U.S. EPA, at 1 (Aug. 28, 2017).

[115] E.O. 13770, Ethics Commitments by Executive Branch Appointees (Jan. 28, 2017) ("Trump Ethics Pledge").

[116] 5 C.F.R. pt. 2635.

[117] *Id.* § 1, ¶ 6.

[118] Wehrum Recusal at 2 n.1; Harlow Recusal at 2 n.2.

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> parties. I am further advised that the term "open to all interested parties" means five or more parties.[119]

Wehrum purportedly delayed signing his recusal statement over confusion regarding these terms. Wehrum asserted that the delay was due to having received, "three different interpretations" about what it meant to be recused from a "particular matter involving specific parties," telling the New York Times, "[W]hat I don't want to do is sign a recusal letter and then have the rules change again."[120] It is unknown what "three different interpretations" Wehrum received, who they came from, and whether in the 10-month interim before signing, Wehrum followed the requirements as they were ultimately outlined in his recusal statement.

Strangely, Wehrum's recusal statement contains a glaring omission when compared with other EPA recusal statements signed both before and after his own. For example, the recusal statements of Andrew Wheeler (signed May 24, 2018),[121] of Peter Wright[122] and Anne Idsal[123] (both signed July 24, 2018), and of David Dunlap[124] (signed Dec. 19, 2019) all state that "open to all interested parties" means at least five parties who "represent a diversity of interests" rather than "one shared perspective" or "the same united perspective." The recusal statement that Wehrum signed September 17, 2018 omitted that critical language.

a. Wehrum and Harlow appear to have violated the terms of the Trump Ethics Pledge and Ethics in Government Act regulations by participating in the development of the DTE Memo.

While at Hunton, David Harlow represented DTE Energy, a UARG member. DTE sought Hunton's assistance in an EPA enforcement case alleging that one of the utility's coal-fired power plants had emitted pollution in violation of the Clean Air Act's New Source Review (NSR) program. In that case, Wehrum personally filed a brief as a lawyer for UARG in support of DTE's position.[125] DTE Energy lost twice before the U.S. Court of Appeals for the 6th Circuit, and faces millions of dollars in penalties. In May 2017, Hunton lawyers lobbied EPA to reform the Clean Air Act's NSR program, stating that the DTE Energy litigation specifically "highlight[ed] the uncertainty these [NSR]

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[119] Wehrum Recusal at 2; Harlow Recusal at 2.

[120] Eric Lipton, *As Trump Dismantles Clean Air Rules, an Industry Lawyer Delivers for Ex-Clients*, N.Y. TIMES (Aug. 19, 2018).

[121] Wheeler Recusal at 2 (May 24, 2018)

[122] Wright Recusal at 1 (July 24, 2018)

[123] Idsal Recusal at 2 (July 24, 2018)

[124] Dunlap Recusal at 2 (Dec. 29, 2018)

[125] Brief Amici Curiae of UARG et al. in Support of Defendants-Appellees, at *2, *United States v. DTE Energy Co. & Detroit Edison Co.*, 2012 WL 1656078 (May 8, 2012) (listing Wehrum as "Counsel for UARG").

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regulations have created," and justified reform.[126] In July 2017, DTE filed a petition for certiorari with the U.S. Supreme Court, asking the Court to reverse the judgment against it.

Then, in December 2017, shortly after Harlow and Wehrum left Hunton for EPA, the agency published a memorandum (known as the "DTE Memo"). The DTE Memo reversed the agency's position in Hunton's DTE case, stating (like Hunton had) that the DTE case was evidence of "uncertainty regarding the applicability of NSR permitting requirements": When determining whether a major polluter expected to significantly increase its emissions as a result of a major project, the agency would no longer "'second guess[]' the owner or operator's emissions projections,"[127] as EPA had done in the DTE litigation. The memorandum was issued December 7, 2017, intentionally timed to give DTE's Hunton lawyers time to file it with the U.S. Supreme Court as the Court was considering DTE's petition for certiorari the very next day.[128] That same day, at the request of one of DTE's lawyers in the litigation, Wehrum gave a speech at Hunton before UARG (of which DTE is a member).

Evidence subsequently emerged through the Freedom of Information Act (FOIA) that Wehrum and Harlow appear to have participated in the development of the DTE Memo, despite ethical rules barring their participation in matters involving their particular clients, or in matters where their former employer Hunton represented a client. This evidence, along with other materials, led Senator Sheldon Whitehouse (D-RI), along with Senate Environment and Public Works Committee Ranking Member Tom Carper (D-DE) and House Energy and Commerce Chairman Frank Pallone, Jr. (D-NJ), to ask the Acting Inspector General of the Environmental Protection Agency (EPA) on February 25, 2019 to undertake an investigation of Wehrum's and Harlow's role in helping to reverse EPA's position in the DTE enforcement action to benefit DTE Energy and Hunton.[129]

On March 20, 2019, Senator Whitehouse, Ranking Member Carper, and Chairman Pallone informed the Acting Inspector General in a supplemental letter that, in the DTE Memo, EPA adopted without discussion a novel interpretation of NSR regulations that had previously been enunciated only by Hunton's lawyers in the underlying DTE litigation.[130] On May 6, 2019, the offices of Senators Carper

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[126] Hunton comments for UARG, Docket Id. No. EPA-HQ-OA-2017-0190-40140, at 17 n.37 (May 12, 2017) (citing litigation against DTE Energy in the U.S. Court of Appeals for the Sixth Circuit).

[127] Memorandum from EPA Admin'r Scott Pruitt to Reg'l Administrators, *New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected Actual Applicability Test in Determining Major Modification Applicability*, at 8 (Dec. 7, 2017).

[128] Letter from Senator Whitehouse, Senator Carper, Representative Pallone to Charles J. Sheehan, Acting Inspector General, U.S. EPA, at 7–8 & Exhs. M–N (emails from EPA political appointee Mandy Gunasekara stating that the memorandum "needs to go out before" the Supreme Court considers whether to hear the DTE enforcement case). The May 2019 complaint by CREW also discusses circumstances demonstrating that EPA's memorandum was essentially a litigation memorandum crafted to support Hunton's aims and timed for maximum effect on the DTE litigation.

[129] https://www.whitehouse.senate.gov/news/release/democrats-call-for-investigation-of-top-epa-officials-role-in-reversing-enforcement-position.

[130] https://www.whitehouse.senate.gov/download/wehrum-oig-supplemental-letter

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and Whitehouse identified language in the DTE Memo, this time copied verbatim from a document that Hunton had submitted to EPA on behalf of the Air Permitting Forum, a similar Hunton-represented industry group with no existence outside the law firm.[131]

Any involvement by Wehrum or Harlow in the DTE Memo would seem to fit squarely within the prohibition on involvement in particular matters with specific parties who are former clients or represented by former employers: DTE Energy, a former client of Harlow, was a specific party represented by the former employer of both Wehrum and Harlow, facing millions of dollars in penalties and damages in a specific enforcement matter in which Wehrum had personally made an appearance while in private practice.

Although EPA originally stated that Wehrum had no involvement in reviewing the DTE Memo, he subsequently admitted to *The Washington Post* that this was not true, and additional reporting from other sources indicates that the discussion with Wehrum "cover[ed] topics such as the memo's potential impact on future EPA enforcement activities and the need to issue it before the Supreme Court conference on the DTE case."[132]

Indeed, documents obtained under FOIA corroborate those reports by revealing that EPA political appointees were intent on issuing the DTE Memo on a timeframe where it could impact the DTE litigation. For example, one EPA political appointee wrote: "I thought we may have more time, but know now that the cert hearing [Supreme Court's conference to consider which appeals to hear] is planned for Wednesday. This memo needs to go out before."[133] The DTE Memo was posted on EPA's web page sometime during the evening of December 7, 2017,[134] the same day that Wehrum had spoken to a private meeting of UARG members at his old Hunton office. The next morning, DTE's Hunton lawyers – not EPA or the Department of Justice lawyers opposing them in the case – informed the Supreme Court about the DTE Memo.[135]

Wehrum's participation appears to have been both personal and substantial. As the ethics watchdog Citizens for Responsibility and Ethics in Washington (CREW) explained in a complaint it filed with EPA's Acting Inspector General: "OGE's regulations explain that participation 'may be substantial even though it is not determinative of the outcome of a particular matter.'" [136] Moreover, the efforts by Wehrum's deputy to redact "potentially offending language" from a draft of the DTE Memo being reviewed by Wehrum "did not negate his participation" in the DTE Memo's development, "for both

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[131] https://www.epw.senate.gov/public/index.cfm/press-releases-democratic?ID=E598EA19-BB86-4737-ABE8-BE97F356D11E

[132] Juliet Eilperin, *EPA regulator skirts the line between former clients and current job*, Wash. Post (Feb. 25, 2019).

[133] *See* Letter from Sen. Whitehouse, Sen. Carper and Rep. Pallone, to Charles J. Sheehan, Acting Inspector General at 7 & n.19 (Feb. 21, 2019). Gunasekara's email misstates the day of the conference; it was actually scheduled for Friday (December 8), not Wednesday, of that week.

[134] *Id.* at 8.

[135] *Id.* at 101 (Exhibit P).

[136] Letter from Noah Bookbinder to Charles Sheehan at 3–4, 10–13, May 29, 2019 (citing 5 C.F.R. § 2635.401(b)(4)).

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his Ethics Pledge and his ethics agreement establish the duty to recuse from a 'particular matter involving specific parties' and not merely parts of the matter."[137]

Federal ethics regulations prohibit officials from taking certain actions where there is and appearance of a lack of impartiality.[138] Accordingly, Wehrum and Harlow should have consulted with ethics officials, which it appears that Wehrum did not do. Specifically, federal ethics regulations require employees to recuse from participation in "a particular matter involving specific parties" that is "likely to have a direct and predictable effect on the financial interest of . . . a person with whom he has a covered relationship," or a person who "represents a party to such a matter."[139] Employees are advised to seek assistance from ethics officials and supervisors in determining "whether a relationship would cause a reasonable person to question his impartiality . . . ."[140] In addition, even if a matter is not "specifically described" in this ethics rule, an employee concerned that circumstances "would raise a question regarding his impartiality should use the [pre-authorization] process to determine whether he should or should not participate in a particular matter."[141] According to EPA's ethics officials, Wehrum had not received any such waivers as of September 29, 2018.[142]

b. In his recusal statement, Wehrum failed to disclose at least three former clients that he previously represented in court – the Alliance of Automobile Manufacturers; the Minnesota Trucking Association; and the Minnesota Automobile Dealers Association.

If an agency's designated ethics official is not made aware of potential conflicts by a political appointee, the recusal statement approved by the official may be both incomplete and inadequate. Wehrum's recusal statement does not list at least three recent former clients he represented in litigation: the Alliance of Automobile Manufacturers; the Minnesota Trucking Association; and the Minnesota Automobile Dealers Association.

In 2015, a number of entities challenged a Minnesota law related to biofuels. In 2016, Wehrum filed a brief in the case along with five other lawyers – including two from Hunton – where they were listed as "Attorneys for Plaintiffs Minnesota Trucking Association, Minnesota Automobile Dealers Association, Alliance of Automobile Manufacturers, American Petroleum Institute, and American Fuel & Petrochemical Manufacturers."[143]

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[137] *Id.*

[138] *See generally* 5 C.F.R. § 2635.502.

[139] *Id.* § 2635.502(a).

[140] *Id.* § 2635.502(a)(1).

[141] *Id.* § 2635.502(a)(2).

[142] Letter from Kevin S. Minoli, Designated EPA Ethics Official, to Sen. Sheldon Whitehouse, at 1 (Sept. 29, 2016) ("To date, Mr. Wehrum has not received any waivers or authorizations issued pursuant to Executive Order 13770, 18 U.S.C. § 207(b)(1), or 5 C.F.R. § 2635.502(d).").

[143] *See, e.g.*, Mem. of Law in Support of Mot. For Partial Summary Judgment, Doc. 47 at *27, *Minn. Trucking Ass'n et al. v. Stine et al.*, No. 15-cv-2045-JRT-KMM (D. Minn. Sept. 29, 2016) (listing Wehrum and five other lawyers, including two others from Hunton, as "Attorneys for Plaintiffs Minnesota Trucking Association, Minnesota

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Wehrum's recusal statement includes the latter two plaintiffs (American Petroleum Institute and the American Fuel & Petrochemical Manufacturers), but not the other three. Accordingly, there was no way for the EPA air office employees identified in Wehrum's recusal statement to properly screen him from participating in meetings with those clients. As described below, Wehrum has in fact met with one of those undisclosed former clients in a manner that appears to violate the Ethics Pledge and the Ethics in Government Act regulations.

In addition to Wehrum's undisclosed clients, both Wehrum's and Harlow's recusal statements acknowledge that they each have "confidential" clients whose identities they contractually cannot disclose. However, only Harlow's recusal statement further acknowledges that, with respect to "clients who are not listed," he has a personal obligation "not to participate in specific party matters for the duration of my ethics obligation."[144] Wehrum's recusal statement includes no such acknowledgment.

c. Wehrum had at least six meetings with one of his undisclosed clients, the Alliance of Automobile Manufacturers, in violation of the Trump Ethics Pledge and potentially in violation of Ethics in Government Act regulations.

Wehrum had at least six meetings with one of his undisclosed clients, the Alliance of Automobile Manufacturers, including giving a speech before its board. This appears to violate Ethics in Government Act regulations and the Trump Ethics Pledge. Wehrum did not receive an ethics waiver for any of these meetings, and because none of them were "open to all interested parties," they thus appear to have been impermissible even if Wehrum only spoke about generally applicable regulations affecting his former client's interests.

Specifically, according to records obtained via FOIA and the EPA website, Wehrum met with his undisclosed client the Alliance for Automobile Manufacturers on:

- **Nov. 27, 2017,** with one other entity, to discuss fuel economy and greenhouse gas standards;
- **Dec. 27, 2017,** "to meet some of the Auto Alliance Board members";
- **Feb. 21, 2018**, with some of his former client's (current) lawyers and lobbyists, to discuss fuel economy and greenhouse gas testing;
- **Apr. 16, 2018**, to discuss an unknown topic alone with his former client;

Automobile Dealers Association, Alliance of Automobile Manufacturers, American Petroleum Institute, and American Fuel & Petrochemical Manufacturers").

[144] *Compare* Harlow recusal at 2 nn.1–2 ("For my former clients who are not listed, I understand that I am personally obliged not to participate in specific party matters for the duration of my ethics obligations."), *with* Wehrum recusal at 2 n.1 (acknowledging the existence of two "confidential clients" without offering the same assurances).

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- **May 22, 2018**, to discuss an unknown topic alone with his former client;
- **May 23, 2018**, to discuss fuel economy standards alone with his former client; and
- **July 16, 2018**, with one other entity, to discuss a model year 2020 fuel economy testing extension related to fuel without ethanol.

Because all of these meeting were either solely with his former client and its representatives, or with just one other entity, they were not "open to all interested parties" and thus violated the Trump Ethics Pledge. The Pledge prohibits Wehrum and Harlow from having any meetings or communications relating to the performance of their official duties with Hunton or their former clients, or from "participating in any particular matter involving" Hunton or their former clients.[145]

Depending on the subject matter discussed at these meetings, which is unknown, the meetings may also have violated Ethics in Government Act regulations.

d. Wehrum and possibly Harlow appear to have artificially – and perhaps improperly – limited their list of former clients from which they are recused.

As noted above, UARG was not incorporated, appears to hold no legal status, and was founded by Hunton. The organization appears to have existed only on paper as part of a coordinated effort by its members to influence EPA through legal services provided by Hunton.

As lawyers admitted to practice in the District of Columbia, Wehrum and Harlow are subject to attorney ethics rules that define who constitutes their clients. Under those rules, "It is well established that neither a written agreement nor the payment of fees is necessary to create an attorney-client relationship."[146] But emails obtained under FOIA reveal that when Wehrum developed his list of former clients, he merely asked Hunton for "a list of all clients to whom I *billed time* for the past 24 months," and then used that Hunton-provided list as the basis for his recusal obligations.[147]

By limiting his recusal list to only those "clients to whom [he] billed time," Wehrum's recusal statement may not include all entities with which he formed an attorney-client relationship. Particularly given Wehrum's management role as co-chairman of Hunton's environmental practice and leader of its administrative law group, he may have provided legal services to numerous additional "clients" who he did not bill directly.

Though Wehrum and Harlow recused themselves from certain meetings with representatives of "UARG," their recusal statements impose no limits on their involvement with the individual corporate members of UARG. Accordingly, the list of former clients from which they should be recused may

[145] Wehrum recusal at 2; Harlow recusal at 2.

[146] *In re Lieber*, 442 A.2d 153, 156 (D.C. 1982).

[147] *See* Maxine Joselow, *Air chief worried about conflicts of interest — emails*, E&E NEWS (Feb. 12, 2019) (emphasis added).

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be significantly under-inclusive, particularly since UARG is not incorporated and does not appear to have any other legal status.

This investigation determined that UARG and Hunton have repeatedly argued in court – successfully – that there is "an attorney-client privilege between *UARG members* and UARG's counsel, Hunton & Williams."[148] Their primary argument has been that Hunton and UARG enjoy an attorney-client relationship, and that information shared with UARG members as part of that relationship should be similarly protected from discovery under the "common interest" privilege. But in making those arguments, Hunton and UARG have repeatedly revealed that UARG was a mechanism for individual UARG-member entities to obtain legal advice useful in their day-to-day operations.

UARG has argued, for example, that it "was formed to advance the common legal interests of its members,"[149] that Hunton "provid[ed] legal services to UARG *and its members*,"[150] and that this work exposed Hunton to "confidential information from UARG *and its members*," who are constantly anticipating litigation" under the Clean Air Act.[151]

Similarly, Hunton has argued that a document it shared with UARG members "clearly falls within the attorney-client privilege" because it was about a court case with "ramifications for every *utility company* in the industry," and the document was akin to "advising [] clients about the prospects with respect to *their own potential liability*."[152] UARG, as an abstract group, has no Clean Air Act liability itself – only its individual, dues-paying members do.

An ethics opinion of the D.C. Bar states that although it is permissible for "individual subscribers" to pay a fee to an intermediary entity that entitles the subscriber to contact a law firm regarding legal matters, "the firm's client in each instance would be the subscriber and not [the intermediary]."[153]

Hunton has similarly argued that its work for UARG was not merely providing "general information and legal advice," but that UARG essentially operated as a vehicle for the UARG members to seek and receive legal advice about specific issues of concern to them.[154] In one enforcement case, for example, Hunton lawyers described various documents as containing conversations in which "UARG members" and Hunton lawyers "'agreed' to pursue certain legal strategies"; others describing

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[148] *See United States v. Duke Energy*, 2003 WL 25509097 (M.D.N.C. July 7, 2003) (emphasis added) (listing cases in which Hunton and UARG have successfully made that argument to withhold Hunton-UARG documents from discovery).

[149] UARG Opposition to Motion to Compel UARG to Comply with a Subpoena, *United States v. Duke Energy*, 1:02-mc-00480, at *2 (D.D.C.) (filed Dec. 18, 2002).

[150] *Id.* at *28 (emphasis added).

[151] *Id.* at *3 (emphases added)

[152] Def. Duke Energy Corp.'s Reply, *United States et al. v. Duke Energy Corp.*, 2003 WL 25509066 (M.D.N.C. Feb. 13, 2003) (emphasis added) (citing *Diaz v. Delchamps, Inc.*, 1997 WL 680602 (E.D. La. Oct. 31, 1997).

[153] D.C. Bar, *Ethics Opinion 225, Prepaid Legal Services* (Jan. 1992).

[154] *See, e.g.*, Def. Duke Energy's Reply in Support of its Mot. for Reconsideration, *United States v. Duke Energy*, 2003 WL 25509088 (M.D.N.C. June 6, 2003) (quoting excerpts from an internal UARG documents).

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"confidential and privileged discussions" with counsel present in which "UARG members" raised various "problems that arise"; and still other communications in which "UARG members" requested legal advice from Hunton via the UARG organization, and Hunton lawyers "respond[ed] to that request" with written legal opinions.[155]

At least three federal courts have protected UARG documents from discovery in enforcement matters involving UARG members.[156] In a 2003 enforcement case involving Ohio Edison, a subsidiary of former UARG member FirstEnergy, a federal court considered whether certain documents in Ohio Edison's possession were created by Hunton "in response to a request of legal advice from UARG *or any of its members*."[157] The court explained that there "is no dispute that Hunton & Williams is legal counsel to UARG and may be consulted *by UARG members* for legal advice on issues which are common to some or all of the members," including on "issues relating to *whether UARG members are in compliance with federal environmental regulations* and whether those regulations apply to *specific projects being considered by the members* . . . "[158] The court concluded that Hunton "clearly generated these memoranda in response to an ongoing relationship involving the rendition of legal advice *at the request of UARG's members*," and that those communications "would at least arguably reveal client confidences, including the types of subjects about which *the UARG members sought legal advice*."[159] The court upheld Hunton and UARG's claims of privilege.

Hunton has maintained a similar position as late as 2012,[160] as Hunton and continued to characterize its UARG work as "providing legal services to UARG *and its members*," and should thus be considered attorney-client privileged from discovery in Clean Air Act enforcement matters against UARG members – in that case, Duke Energy.[161]

Substantial public evidence indicates that UARG members paid their hefty dues in part to receive individualized legal advice and communications from Hunton attorneys, possibly including Wehrum and Harlow. For example, media obtained a copy of the most recent UARG "membership agreement" for the Tennessee Valley Authority (TVA).[162] That 2015 agreement[163] states that Hunton

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[155] *Id.*

[156] *Id.* n.1 (listing *United States v. Ohio Edison Co., et al.,* Case No. C2-99-1181 (S.D. Ohio Jan. 6, 2003) (denying motion to compel UARG documents) (J. Kemp); *United States v. Illinois Power,* Civil Action No. 99-CV-833-MJR (S.D. Ill. April 24, 2003) (J. Proud) (denying motion to compel UARG documents); and *United States v. Illinois Power,* Civil Action No. 99-CV-833-MJR (S.D. Ill. May 19, 2003) (J. Reagan denying Government's motion for reconsideration)).

[157] *See* Opinion and Order, *United States v. Ohio Edison Co.*, No. C2–99–1181 at *3–4 (S.D.Ohio Jan. 6, 2003) (J. Kemp).

[158] *Id.* at *3–4 (emphasis added).

[159] *Id.* at *7 (emphasis added).

[160] *See United States v. Duke Energy Corp.*, No. 1-cv-1262, 2012 WL 1565228, at *12 (M.D.N.C. Apr. 30, 2012).

[161] Defendant Duke Energy's Reply to the United States Opposition to Duke Energy's Cross-Motion for Protective Order Regarding UARG, 2003 WL 25509066 (M.D.N.C. Feb. 12, 2003).

[162] *See* Sean Reilly, *TVA defends its role in trade group*, E&E News, May 7, 2019.

[163] TVA-UARG contract, Mar. 10, 2015 (emphasis added).

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"serves as counsel to UARG *and its members*" on CAA matters, that Hunton would "provide necessary legal advice to UARG *and its members, including TVA*," and that the information exchanged "among UARG members and its counsel . . . are developed in anticipation of litigation [i.e., attorney work product] and/or constitute attorney-client communications for the purpose of obtaining advice from UARG counsel."[164] The agreement further contemplates that, "as a member of UARG," TVA "may have communications" with Hunton that are "privileged and confidential."[165]

And even in 2017, mere months before Wehrum left Hunton to join EPA, some of UARG's designated "legal" costs went to Hunton to pay for "communications with UARG members"[166] and "responding to members' questions"[167] – questions and communications that Hunton would argue in court are subject to attorney-client privilege.

Further evidence indicates that Hunton and individual UARG members even discussed the matter of payment. An internal UARG document proposes that Hunton would be paid for "[c]ommunications *with individual UARG members* concerning their membership plans for 2018 and the likely level of members' dues for 2018."[168] Although the Hunton may not have "billed time" directly to UARG members, when UARG members then paid those "dues" discussed with Hunton, 97.7% of the total "dues" went to Hunton for legal services.

In the UARG membership agreement documents, the collection of fees from UARG's member entities, and in court filings, Hunton has maintained that both UARG and its individual members create various privileged relationships with the law firm, including in some cases an attorney-client privilege. Under these circumstances, Wehrum's and Harlow's former clients included not only UARG, which has no apparent legal status, but also its individual members. By omitting the full list of UARG members from their list of former clients, Wehrum and Harlow appear to be frustrating – or violating – their ethical obligations.

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[164] *Id.* at 1.

[165] *Id.* at 3.

[166] *See, e.g.*, Leaked UARG Policy Committee document at 13 (request to pay Hunton for "communications with UARG members" regarding potential EPA changes to greenhouse gas rules for new and existing coal-fired power plants).

[167] *See, e.g.*, *id.* at 20 (request to pay Hunton for "responding to members' questions" regarding regional haze requirements).

1. [168] Leaked UARG Policy Committee document at 26 ("PLANNING/GENEAL COORDINATION").

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e. Wehrum has repeatedly met with clients he would worked with in private practice – actions that appear to have violated the intent of the Trump Ethics Pledge and Wehrum's own ethics agreement.

Shortly after Bill Wehrum assumed control of the EPA air office, his former law partner, Makram B. Jaber, emailed to invite him "to speak to our group regarding air regulations and regulatory outlook."[169] Nominally, the presentation to "our group" would be on "behalf" of five entities – UARG, plus four UARG members: American Electric Power, Southern Company, Duke Energy, and Dominion Energy. Of those five, Wehrum's recusal statement (which he only agreed to sign ten months later) makes clear that he was recused from individual meetings or communications relating to his EPA work with three of them: UARG, Duke Energy, and Dominion Energy.[170] Wehrum eventually gave that invitation-only briefing on December 7, 2017, less than three weeks after assuming his new role at EPA.

The fact that Hunton partner Makram B. Jaber stated that the meeting was on behalf of five entities is notable. Although Wehrum and Harlow are forbidden by the Trump Ethics Pledge – and by their recusal statements incorporating the Pledge – from meeting in private with any *single* former employer or client, there is a limited exception for events "open to all interested parties," a phrase that means "*five or more* stakeholders," representing a diversity of viewpoints "even if *one* of the stakeholders is a former employer or former client."[171]

With respect to the December 7, 2017 meeting at Hunton, circumstantial evidence indicates that Jaber's characterization of the entities attending may have been a pretense for Wehrum to maintain that the meeting was "open to all interested parties" because there were *exactly five* entities invited, and thus he could argue that his recusal obligations did not apply. Indeed, when confronted about this meeting, Wehrum appeared to believe that it was immaterial that the event would be hosted at and by Hunton, his former employer, and believed it immaterial that the event was being held on behalf of his former clients UARG and four companies that were *also UARG members* – including two, Duke Energy and Dominion, that were former Wehrum clients in their own right. Indeed, Wehrum has stated that it would have been permissible for him to discuss EPA matters behind closed doors with *just his former clients present* – provided there were at least five former clients.[172]

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[169] Email from Jaber Makram to Bill Wehrum, "Invitation to speak," Nov. 21, 2017 (6:21 AM). Mr. Jaber was subsequently named co-leader of Hunton's environmental team.

[170] Wehrum recusal at 2.

[171] Memorandum from Robert I. Cusick, Dir. of U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, DO-09-011, at 1–2 (Mar. 26, 2009) (explaining the meaning of the phrase "open to all interested parties"); Legal Advisory from David J. Apol, General Counsel of U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, LA-17-02, at 1 (Feb. 6, 2017) ("With respect to [President Trump's] Executive Order 13770, ethics officials and employees may continue to rely on OGE's prior guidance regarding [President Obama's] Executive Order 13490 to the extent that such guidance addresses language common to both orders").

[172] Juliet Eilperin, *EPA regulator skirts the line between former clients and current job*, WASH. POST, Feb. 25 ("[Wehrum] said he has concluded that his meetings comply as long as five entities participate. And, he said, it does not matter how many of those entities are former clients.").

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Such an argument represents an absurd interpretation of these ethics rules. The "open to all interested parties exception" applies to events that "do not raise concerns about special access."[173] A closed-door meeting at Wehrum's former employer, where the only invitees are Wehrum's former clients and those represented by Wehrum's former employer, is perhaps a paradigmatic example of a case of "special access."

Second, evidence does not substantiate that five stakeholders were actually present. Rather, evidence suggests this December "meeting" was a pre-planned meeting of UARG, in which case under Wehrum's view of "UARG" as his single client, all members present should have been treated as "UARG" – not a collection of independent companies. Internal UARG documents obtained by Politico reference a planned "December 2017 UARG Policy Committee meeting," at which UARG would recommend and vote upon a 2018 budget.[174] That document was itself prepared in advance of a two-day UARG Policy Committee meeting in June 2017, and the meeting that Makram Jaber invited Wehrum to speak at also spanned two days – December 7 and 8.[175] Notably, this double-counting of UARG members as distinct from "UARG" conflicts with Wehrum and Harlow's treatment of UARG members for purposes of defining their former clients: The UARG members are treated as distinct from UARG for purposes of determining whether a meeting is "open to all interested parties," but the companies are indistinguishably lumped together as "UARG" for purposes of escaping individual designation as former clients (see Section 2.d of this report). Wehrum and Harlow cannot have it both ways: Either UARG is a collection of companies, in which case they should have been recused from meeting with them all, or UARG is a single group, in which case this was a meeting with a single client that violated the Trump Ethics Pledge.

Regardless, Wehrum stated that he did not consult with agency ethics personnel about the propriety of the meeting,[176] *despite his schedule showing that he met with ethics officials from 2:00–2:30pm that day, immediately before leaving EPA for Hunton at 2:30pm.*
Wehrum's briefing, obtained via FOIA, was titled, "Clean Air Act: Update on Stationary Source Regulations."[177] Among other issues, Wehrum discussed with his former clients and law partners:

- EPA's proposal to repeal the Clean Power Plan, and his intention to seek information from the public about a replacement that accords with legal interpretations advocated by Hunton;[178]
- EPA's ongoing review of greenhouse gas standards for new coal-fired power plants;[179]

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[173] Memorandum from Robert I. Cusick, Dir. of U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, DO-09-011 (Mar. 26, 2009).

[174] Leaked UARG Policy Committee document at 4.

[175] Email from Jaber Makram to Bill Wehrum, "Invitation to speak," Nov. 21, 2017 (6:21 AM).

[176] Juliet Eilperin, *EPA regulator skirts the line between former clients and current job*, Wash. Post (Feb. 25, 2019).

[177] Wehrum presentation at Hunton at slide 1.

[178] *See id.* at slide 4.

[179] *Id.*

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- Legal challenges to the Mercury and Air Toxics Standards (MATS) Rule, including the ongoing *Murray Energy v. EPA* case being litigated by Hunton;[180]

- EPA's ongoing work to determine which areas of the country are meeting the 2015 National Ambient Air Quality Standards (NAAQS) for ozone;[181]

- EPA's progress reviewing state regional haze plans, and state haze plans currently subject to ongoing litigation[182] – at least some of which was litigation by Hunton attorneys on behalf of UARG;[183]

- Various "Permitting Actions Underway" with implications for major sources of air pollution such as power plants.[184]

Immediately afterwards, Wehrum did a "Q&A" session with his former clients and other participants.[185] There is no public record of what questions Wehrum's former clients and law partners asked him, nor what his answers were.

In addition to the December 7, 2017 meeting at UARG's office, a review of Wehrum's calendar information shows that he has continued to meet in an official capacity with UARG members, including in at least eight meetings open to fewer than five entities. For those meetings held as of September 29, 2018, Wehrum had not received any waiver from EPA's ethics officials.[186] It is unknown whether he obtained waivers before any of the subsequent meetings.

In all, at least 10 different UARG members who arguably should have been included on Wehrum's list of recused former clients were able to gain private access to him when he served at EPA: American Electric Power; Dominion Energy; Duke Energy; Minnesota Power; Otter Tail Power; Southern Company; the American Coalition for Clean Coal Electricity; the Edison Electric Institute; the National Mining Association; and the National Rural Electric Cooperative Association.

A review of Wehrum's November 2017 through May 2019 calendar information – culled from FOIA productions and EPA's website – indicates the following meetings:

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[180] *Id.* at slide 5.

[181] *Id.* at slide 6.

[182] *Id.* at slides 12–13 (noting states with ongoing litigation).

[183] *See, e.g., Texas et. al v. EPA*, 829 F.3d 405 (5th Cir. 2016) (Hunton attorneys Norman W. Fichthorn and Aaron M. Flynn representing UARG).

[184] Wehrum presentation at Hunton at slide 15.

[185] *Id.* at slide 16 ("Q&A"); Makram Jaber, "Event Information Form" at 1 (showing there would be time for "Q&A" moderated by Andrea Field, a Hunton partner).

[186] Letter from Kevin S. Minoli, Designated EPA Ethics Official, to Sen. Sheldon Whitehouse, at 1 (Sept. 29, 2016) ("To date, Mr. Wehrum has not received any waivers or authorizations issued pursuant to Executive Order 13770, 18 U.S.C. § 207(b)(1), or 5 C.F.R. § 2635.502(d).").

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- **Dec. 7, 2017:** Wehrum met at the offices of his former employer Hunton, for a private speech before his former client "UARG," as well as four UARG members: American Electric Power, Duke Energy, Dominion, and Southern Company.

- **Jan. 10, 2018:** Wehrum met alone with UARG member the American Coalition for Clean Coal Electricity.

- **Jan. 12, 2018:** Wehrum met alone with UARG member the National Mining Association and its attorneys to discuss the Clean Power Plan, New Source Review, and Ozone Transport – all regulations that UARG proposed weakening.

- **Jan. 24, 2018:** Wehrum met with UARG member the Edison Electric Institute (EEI) to discuss the Mercury and Air Toxics Standards. In attendance on behalf of EEI was John McManus, an American Electric Power employee who chaired UARG's "Policy and Steering Audit" Committee in 2017, as well as representatives from UARG members Duke (from which Wehrum is recused), Ameren, FirstEnergy, and Southern Company. Also in attendance was a representative from Berkshire Hathaway Energy, a member of Hunton's CCS Alliance.

- **March 30, 2018:** Wehrum met alone with UARG member the National Rural Electric Cooperative Association.

- **May 30, 2018:** Wehrum met alone with UARG member the Edison Electric Institute to discuss the Clean Power Plan, Mercury and Air Toxics Standards, Regional Haze, and other matters.

- **July 9, 2018:** Wehrum met alone with UARG member the American Coalition for Clean Coal Electricity.

- **Nov. 28, 2018:** Wehrum met with the "Lignite Energy Council," including representatives from UARG members Otter Tail Power Co. and Minnesota Power.

- **Dec. 11, 2018:** Wehrum met alone with UARG member the National Rural Electric Cooperative Association.

The Trump EPA has not released any information about Harlow's schedule, and this investigation was thus unable to determine whether he met with any former clients or UARG members.

In addition, Wehrum also appears to have held meetings in apparent violation of ethical rules with former clients who he acknowledged the existence of and agreed not to meet with.

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Specifically, as Senator Whitehouse noted[187] in letters to President Trump and Andrew Wheeler, Wehrum held two closed-door meetings with his former client General Electric (which is also a member of the Air Permitting Forum) in early 2018 that were not "open to all interested parties," thus violating the prohibition on participating in "any meetings or communications relating to the performance of [his] official duties," even regarding matters of general applicability.

The first meeting, on January 23, 2018, had only one additional entity present (Boeing), and thus did not satisfy the exception for being "open to all interested parties." The second meeting, on January 26, 2018 was with General Electric alone. The purpose of these small meetings with his former client is unknown. Depending on the subject matter discussed at these meetings, which is unknown, the meetings may also have violated Ethics in Government Act regulations.

Wehrum had additional meetings with General Electric representatives that appear to have included representatives of more than five other entities, on November 27, 2017 (with various members of the Association of Home Appliance Manufacturers) and on April 10, 2018 (with various members of the Gas Turbine Association).

[187] https://www.whitehouse.senate.gov/news/release/whitehouse-calls-out-wehrum-for-flaunting-trump-ethics-pledge

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APPENDICES

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APPENDIX 1: Utility Air Regulatory Group

Topic	Sub-topic	UARG's position	Trump EPA's position
Air Toxics	**MATS 2016 Supplemental Finding that it is "appropriate and necessary" to regulate mercury and other toxic air pollution from power plants under CAA section 112.**	**2011: Harlow** writes nearly 300 pages of comments opposing the MATS proposal, including that "Regulation of [power plants] Under § 112(n)(1)(A) Is Neither 'Appropriate' Nor 'Necessary'" **2016:** Argued the Obama EPA should not have found that it is "appropriate and necessary" to regulate toxic air pollution from power plants under CAA section 112.[188] "UARG" asked its members to pay money to finance Hunton's legal challenge to this Obama EPA finding.[189]	**2017:** At a closed-door session held for UARG's benefit, Wehrum discussed MATS legal challenges, including the case Hunton itself was litigating against EPA.[190] **2019:** Wehrum signed proposal to reverse the Obama EPA finding, concluding instead that "it is not appropriate and necessary" to regulate toxic air pollution from power plants under CAA section 112.[191]
Air Toxics	**MATS 2016 Supplemental Finding's treatment of co-benefits**	**2016:** While at Hunton, Wehrum stated that, "[If] you look at the benefits generated by the hazardous air pollutant reductions [the MATS] rule would achieve, the costs vastly outweigh the benefits. So from our perspective, it's a regulation that made no sense and wasn't justified."[192] UARG argued in court that, when determining whether it is "appropriate and necessary" to regulate toxic air pollution from power plants under CAA section 112, the Obama EPA should not have considered co-benefits of reducing particulate matter (PM) because PM is "addressed under . . . the § 109 NAAQS program."[193] Wrote that reductions in co-benefits constitute the "overwhelming majority" of the MATS rule benefits.[194]	**2019:** Wehrum signed proposal to "reconsider" Obama EPA finding in part on the basis that co-pollutants are "already addressed" by the NAAQS program.[195] Focused in proposal on the fact that "these projected [PM] co-benefits comprised the overwhelming majority (approximately 99.9 percent" of the monetized benefits of MATS . . . ."[196]

[188] UARG brief challenging the 2016 MATS Supplemental Finding.
[189] Leaked UARG Policy Committee document at p. 19.
[190] Wehrum presentation at Hunton at 5.
[191] 84 Fed. Reg. 2670, 2674 (Feb. 7, 2019).
[192] Juan Carlos Rodriguez, *Environmental Group Of The Year: Hunton & Williams*, LAW360, Jan. 5, 2016 (5:57 PM EST).
[193] UARG brief challenging the 2016 MATS Supplemental Finding at 47.
[194] UARG brief challenging the 2016 MATS Supplemental Finding at 21.
[195] 84 Fed. Reg. at 2677.
[196] 84 Fed. Reg. at 2676.

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Topic	Sub-topic	UARG's position	Trump EPA's position
Air Toxics	**MATS Residual Risk & Technology Review to determine whether to require additional health- or environmental-based controls on power plants**	**2011:** "HAP emissions from coal-fired EGUs pose insignificant risks to human health and ecological resources," and on that basis should be de-listed.[197] **2017:** UARG seeks dues from its members to pay Hunton to "Coordinate with EPRI regarding eventual residual risk and technology review (RTR) of MATS rule," which could have imposed additional controls on power plants beyond the MATS rule's MACT standards.[198] In the past, UARG had used EPRI analyses in August 2011 to argue that coal-fired power plants do not pose a legally significant cancer risk, and would not hurt the environment.[199]	**2019 (Wehrum's signed proposal):** "Considering all of the health risk information and [relevant] factors . . . Including the uncertainties . . . the EPA proposes that the risks are acceptable" for HAP emissions from coal- and oil-fired power plants.[200] No additional health- or environmental-based controls should be required: "we are proposing that the current MATS requirements provide an ample margin of safety to protect public health," and "it is not necessary to set a more stringent standard to prevent . . . an adverse environmental effect."[201]

[197] UARG comments at 18. Although this comment urged that power plants be entirely removed from regulation under CAA section 112, the scientific arguments advanced are similar to those in a residual risk and technology review.
[198] Leaked UARG Policy Committee document at p. 19.
[199] UARG comments at 5-14.
[200] 84 Fed. Reg. at 2700.
[201] 84 Fed. Reg. at 2700.

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Topic	Sub-topic	UARG's position	Trump EPA's position
Air Toxics	**Withdrawal of "Once In, Always In" (OIAI) policy requiring major sources to continue meeting stringent limits**	**2007:** "EPA's 'once-in-always-in' policy adds a temporal condition to source classification that is not found in the CAA or in EPA's § 112 regulations."[202] Withdrawal of the OIAI policy would be "consistent with language [sic] and structure of the CAA and should be adopted."[203] Withdrawal of the OIAI policy "must be addressed by rulemaking, not by issuance of a guidance memorandum."[204] **2019:** UARG – joined by APG, AIF and NEDACAP (four Hunton lawyers total) – intervene in lawsuit defending Wehrum's withdrawal of the OIAI policy.[205] Made same 3-part argument that EPA does: (1) "The Wehrum Memo is not subject to judicial review at this time," and (2) alternatively, "The Wehrum Memo implements the CAA's plain language," but (3) asked for "remand should the Court find statutory ambiguity."[206]	**2018 (Wehrum memo):** "Congress placed no temporal limitations on the determination of whether a source emits or has the [potential to emit air toxics] in sufficient quantity to qualify as a source. To the extent the OIAI policy imposed such a temporal limitation . . ., EPA had no authority to do so under the plain language of the statute."[207] "Nothing in the structure of the CAA counsels against the plain language reading" advanced by Wehrum.[208] **2019:** EPA files brief arguing that, (1) "The 2018 Guidance is neither a legislative rule nor final agency action," and thus cannot be directly challenged, (2) alternatively, "EPA's plain language reading of the statute should be upheld," but if it's not clear from the plain text then (3) "EPA must be given the first opportunity to consider how best to resolve that ambiguity."[209] **June 2019:** EPA proposes rule to codify the Wehrum memo. "We are proposing to make clear in this rulemaking [such sources] will not be subject to the CAA section 112 requirements applicable to the source as a major source . . . ."[210]

[202] UARG comment on OIAI proposal at 2.
[203] *Id.* at 3.
[204] *Id.* at 1.
[205] California Communities Against Toxics v. EPA, 18-1085 (D.C. Cir.) (briefs for Hunton-aligned groups filed in January 2019 in Feb. 2019).
[206] UARG OIAI brief, 2019 WL 858013.
[207] Wehrum OIAI memo at 3.
[208] *Id.* at 4.
[209] EPA OIAI brief, 2019 WL 858006.
[210] https://www.epa.gov/sites/production/files/2019-06/documents/frn_mm2a_proposal_and_reg_text_6_25_19.pdf

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Topic	Sub-topic	UARG's position	Trump EPA's position
Climate	**GHG NSPS for new power plants; decision to base the "best system of emission reduction" (BSER) for power plants in part on what can be achieved using partial carbon capture and storage (CCS) technology**	**2012 (Wehrum):** "There is no doubt that CCS [carbon capture and storage] cannot possibly be considered to be the BSER [best system of emission reduction] at the present time . . . ."[211] **2014:** "CCS has not been shown to meet the CAA's criteria for determining whether technology has been adequately demonstrated."[212] **2015:** "[O]perational experience to date at Boundary Dam does not support finding that CCS is adequately demonstrated or that it is the BSER for coal-fired EGUs."[213] **2017:** UARG files briefs in lawsuit challenging the Obama EPA rule. UARG sought dues from its members for "preparation of a possible replacement" of the Obama EPA rule.[214] **2019:** "UARG supports EPA's proposed finding that neither 'full' nor 'partial' CCS constitutes the BSER for new coal-fired EGUs."[215]	**2017:** "EPA . . . is reviewing the [2015 Rule] and, if appropriate, will as soon as practicable and consistent with law, initiate reconsideration proceedings to suspend, revise or rescind the rule."[216] **2018:** "EPA is proposing to revise its [2015] analysis and determine that CCS is not adequately demonstrated . . . ."[217] "[T]he EPA proposes to revise to the BSER . . . . The primary reason for this proposed revision is the high costs and limited geographic availability of CCS."[218] "While the carbon capture technology at the Boundary Dam is currently operating, that project experienced multiple issues with [the CCS technology] during its first year of operation . . . . EPA solicits comment on whether Boundary Dam's first-year operational problems cast doubt on the technical feasibility of fully integrated CCS."[219] ***Wehrum*:** "Today's actions reflect our approach of defining new, clean coal standards by data and the latest technological information, not wishful thinking."[220]

[211] Comments of Bill Wehrum et al. for UARG, Docket Id. No. EPA-HQ-OAR-2011-0660-9995, at 77 (June 25, 2012).
[212] UARG Comments, Docket Id. No. EPA-HQ-OAR-2013-0495-9666, at 41–42 (May 9, 2014).
[213] UARG petition for reconsideration, Docket Id. No. EPA-HQ-OAR-2013-0495-11894, at 5 (Dec. 22, 2015).
[214] Leaked UARG Policy Committee document at 13.
[215] UARG comments, Docket Id. No. EPA-HQ-OAR-2013-0495-12621, at 14 (Mar. 18, 2019).
[216] 82 Fed. Reg. 16330 (Apr. 4, 2017).
[217] 83 Fed. Reg. at 65441 (Dec. 20, 2018).
[218] *Id.* at 65426.
[219] *Id.* at 65444.
[220] https://www.epa.gov/newsreleases/epa-proposes-111b-revisions-advance-clean-energy-technology

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Topic	Sub-topic	UARG's position	Trump EPA's position
Climate	**Clean Power Plan; determination of the "best system of emission reduction" (BSER) for reducing GHGs from power plants**	**2014:** "A standard of performance under section 111 must be achievable for individual sources based on measures the source's owner can integrate into the design or production process of the source itself."[221] "[T]he plain text of section 111 of the CAA establishes a program that is focused on reducing the rate of emissions . . . through the application of systems that can be integrated into the design or operation of the source itself."[222] "Likewise, the CAA's other similar programs . . . are limited to measures incorporated into the design or production processes of individual sources."[223] **2017:** "Any replacement or revision to the Clean Power Plan under CAA § 11(d) must . . . be based on a 'best system of emission reduction' that can be applied at the individual [sources] subject to the rule . . . "[224]	**2017:** "[T]he Agency proposes to return to a reading of CAA section 111(a)(1) (and its constituent term, 'best system of emission reduction') as being limited to emission reduction measures that can be *applied to or at* an individual stationary source. That is, such measures must be based on a physical or operational change to a building, structure, facility, or installation at that source, rather than measures that the source's owner or operator *can implement on behalf of* the source at another location."[225] This "source-specific approach" includes measures "integrated into its design or operation."[226] **2019:** The word "system" is "limited to lower-emitting processes, practices, designs, and add-on controls that are applied at the level of the individual facility."[227]

[221] UARG CPP comments, Docket Id. No. EPA-HQ-OAR-2013-0602-22768, at 17 (Dec. 1, 2014).
[222] *Id.* at 28.
[223] *Id.* at 36.
[224] UARG comments, Docket Id. No. EPA-HQ-OA-2017-0190-40140, at 5 (May 12, 2017).
[225] 82 Fed. Reg. 48035, 48309 (Oct. 16, 2017).
[226] *See* 82 Fed. Reg. at 48037.
[227] Repeal of Clean Power Plan at 99 (July 19, 2019) (pre-publication).

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Topic	Sub-topic	UARG's position	Trump EPA's position
Climate / permitting	**Clean Power Plan; exemption from New Source Review (NSR) permitting requirements**	**2007:** "UARG members strongly support EPA's proposal to adopt an hourly emissions increase test as a threshold requirement for what is a 'modification' under the NSR program . . . ."[228] **2014:** "EPA's failure to account for the potential cost of NSR—and NSR uncertainty" in the Clean Power Plan is unlawful.[229] **2018:** "Adopting a maximum hourly emission rate increase threshold test for major modifications will promote the safe, reliable, and efficient operation of [power plants]. * * * UARG supports the proposed scope of EPA's revisions to the NSR applicability test . . . ."[230]	**2017:** "We are interested in actions that be taken to harmonize and streamline the NSR applicability and/or the NSR permitting process with a potential new rule. * * * What rule or policy changes or flexibilities can EPA provide as part of the NSR program that would enable [power plants] to . . . not trigger major NSR permitting while maintaining environmental protections? * * * What other approaches would minimize the impact of the NSR program on the implementation of [greenhouse gas standards for power plants]?"[231] **2018:** "EPA is proposing to amend the NSR regulations to include an hourly emissions increase test for [power plants]."[232] "EPA has historically not considered the costs of complying with other CAA programs, like NSR, when determining BSER for a source category under section 111. * * * However, due to the nature of the electric utility industry and the types of candidate control measures being considered in this proposal, it may be appropriate to consider NSR compliance costs in this instance."[233]

[228] UARG NSR comments, Docket Id. No. EPA-HQ-OAR-2005-0163-0319, at 3 (Aug. 8, 2007).
[229] UARG CPP comments, Docket Id. No. EPA-HQ-OAR-2013-0602-22768, at 177 (Dec. 1, 2014).
[230] UARG ACE comments, Docket Id. No. EPA-HQ-OAR-2017-0355-24421, at 99 (Oct. 31, 2018).
[231] 82 Fed. Reg. 61507, 61519 (Dec. 28, 2019) (ANPR).
[232] 83 Fed. Reg. 44746, 44780 (Aug. 31, 2018) (proposal).
[233] *Id.* at 44777.

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Topic	Sub-topic	UARG's position	Trump EPA's position
Climate	**Emission guidelines for methane from existing landfills, and EPA's authority to revise such guidelines**	**2015:** Opposes updates to landfill emission guidelines because EPA "lacks authority under the CAA to revise the emission guidelines to make them more stringent."[234]	**2017:** Pruitt delays effective date of the rules, but this is struck down in court. **2018:** EPA asks court to hold litigation challenging the landfill rule "in indefinite abeyance" while the agency reconsiders the rule.[235]
NAAQS	**Primary (health-based) SO2 NAAQS, and Trump EPA's decision not to strengthen it**	"UARG supports EPA's proposal to retain the primary SO_2 NAAQS without change."[236] "[T]he current NAAQS is more protective than was recognized when it was adopted. This means that the margin of safety is greater than was previously considered adequate."[237]	"[T]he Administrator has concluded that the current primary SO_2 standard is requisite to protect public health, with an adequate margin of safety, from effects of SO_X in ambient air and should be retained, without revision."[238] **Wehrum:** "[W]e have concluded that the existing standard continues to provide adequate health protection to our most vulnerable populations."[239]
NAAQS	**Primary (health-based) NO2 NAAQS, and Trump EPA's decision not to strengthen it**	"UARG supports the proposal to retain the primary NO_2 NAAQS . . . ."[240] "In fact, the present standards are even more protective than the Administrator recognizes."[241]	"EPA is retaining the current primary NO_2 standards, without revision."[242]

[234] UARG Comments, Docket Id. No. EPA-HQ-OAR-2014-0451-0198, at 1 (Oct. 26, 2015).
[235] Joint Motion to Govern Further Proceedings, *Nat'l Waste & Recycling Ass'n v. EPA*, No. 16-1372 (D.C. Cir. Apr. 3, 2018).
[236] UARG Comments, Docket Id. No. EPA-HQ-OAR-2013-0566-0207, at 2 (Aug. 9, 2018).
[237] UARG Comments, Docket Id. No. EPA-HQ-OAR-2013-0566-0207 at 10 (Aug. 9, 2018).
[238] 84 Fed. Reg. 9866, 9867 (Mar. 18, 2019).
[239] https://www.epa.gov/newsreleases/epa-retains-national-ambient-air-quality-standards-sulfur-dioxide
[240] UARG Comment, Docket. ID No. EPA-HQ-OAR-2013-0146-0150, at 1 (Sept. 25, 2017).
[241] *Id.* at 10.
[242] 83 Fed. Reg. 17226, 17227 (Apr. 18, 2018)

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Topic	Sub-topic	UARG's position	Trump EPA's position
NAAQS	**Review of ozone NAAQS, sidelining of independent science**	**May 2011**: "Recent research on morbidity effects" of ozone exposure "is inconsistent and unremarkable,"[243] and "recent research on mortality effects is inconsistent and inconclusive."[244] **Dec. 2011:** "EPA staff continues in [the draft Integrated Science Assessment] to present new research in a manner that suggests that the new science changes what was known previously about the effects of ozone exposure on public health. . . . This biased approach is highly inappropriate, contrary to the purpose of the NAAQS review process," and illegal.[245] **Aug. 2012:** "Unfortunately, EPA staff takes the same . . . biased approach" in the Third Draft ISA, again "present[ing] the recent research in a manner that suggested that the new science changes what was known" in 2008.[246] **Oct. 2012:** EPA's draft Health Risk and Exposure Assessment (HREA) for ozone pollution is "overly complex and inaccessible . . . 533 pages long and well over one-inch thick when printed double-sided."[247]	**April 2018:** Wehrum publicly advocates a faster NAAQS review process by "reducing some scientific advisory input and accepting data that is 'close enough' to justify a review rather than 'perfect,' . . . ."[248] **Oct. 2018:** EPA eliminates plans for an Ozone Review Panel, which would have provided expert scientific advice for purposes of considering whether to update the NAAQS.[249]

[243] UARG comment on draft Integrated Science Assessment, Docket Id. No. EPA-HQ-ORD-2011-0050-0009, at 6 (May 5, 2011).
[244] *Id.* at 21.
[245] UARG comment on Second External Review of the draft ISA, Docket Id. No. EPA-HQ-ORD-2011-0050-0031, at 6, (Dec. 30, 2011).
[246] UARG Comment on Third External Review of the draft ISA, Docket Id. No. EPA-HQ-ORD-2011-0050-0046, at 3 (Aug. 20, 2012).
[247] UARG comment, Docket Id. No. EPA-HQ-OAR-2008-0699-0096, at 8 (Oct. 12, 2012).
[248] *EPA Air Chief Plans To Speed NAAQS Reviews Using 'Close Enough' Data*, INSIDEEPA (Apr. 19, 2018).
[249] *See* Dino Grandoni & Juliet Eilperin, *EPA scraps pair of air pollution science panels*, WASH. POST (Oct. 13, 2018).

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Topic	Sub-topic	UARG's position	Trump EPA's position
NAAQS	**Startup, Shutdown, and Malfunction (SSM) Rule**[250]	**2013**: "UARG members have a significant, direct interest in EPA's proposal and the CAA interpretations on which it is based. * * * UARG disagrees that EPA has demonstrated that the identified SIP provisions are 'substantially inadequate.' * * * UARG also disagrees with many of the CAA interpretations that EPA suggests justify the proposed result."[251] **2016**: "EPA has not met its burden to justify a SIP call."[252] **2017**: "EPA should convene a proceeding to withdraw the SSM SIP calls by applying a SIP call standard that is consistent with its limited authority under the CAA and obligation to consider the impacts of its exercise of that authority."[253]	**Oct. 2018**: "Region 6 has received concurrence from the relevant office in EPA's Office of Air and Radiation to convene a proceeding for reconsideration of the Texas SIP call, the outcome of which may potentially entail Region 6 proposing an action inconsistent with EPA's interpretation in the 2015 SSM SIP Action when acting pursuant to the reconsideration of the Texas SIP call. * * * EPA will conduct notice-and-comment proceedings as part of that reconsideration process if the Agency proposes to change the Texas SIP call."[254] **Apr. 2019**: "[EPA Region 6] is considering an alternative interpretation regarding affirmative defense provisions in [SIPs] . . . that departs from the EPA's 2015 policy on this subject. * * * EPA Region 6 proposes to withdraw the 2015 determination that the Texas SIP is substantially inadequate . . . ."[255] **June 2019**: "[EPA] Region 4 is considering changing the finding . . . that certain SIP provisions in the North Carolina SIP are substantially inadequate to meet CAA requirements."[256]
NSR	**DTE "second-guessing"**	**2012**: "[T]he causation standard is whether the 'change' was the 'predominant cause' of the increase."[257]	**2017**: "Because increased emissions may be caused by multiple factors . . . the source must exercise judgment to exclude increases for which the project is not the 'predominant cause.'"[258]

[250] https://eelp.law.harvard.edu/2017/09/power-plant-startup-shutdown-and-malfunction-rule/
[251] UARG comments, Docket Id. No. EPA-HQ-OAR-2012-0322-0556, at 4 (May 13, 2013).
[252] Brief of UARG and other industry petitioners, *Walter Coke, Inc. v. EPA*, No. 15-1166, at 23 (D.C. Cir. Oct. 31, 2016).
[253] UARG comments, Docket Id. No. EPA-HQ-OA-2017-0190-40140, at 25 (May 12, 2017).
[254] Letter from Anne Idsall, Reg'l Admin'r, to Jon Niermann and Janis Hudson, at 2 (Oct. 16, 2018).
[255] 84 Fed. Reg. 17986, 17987 (Apr. 29, 2019).
[256] 84 Fed. Reg. 26031, 26036 (June 5, 2019).
[257] UARG brief at 20 (Feb. 27, 2015); UARG brief at 15 & n.8 (May 1, 2012).
[258] Memorandum from EPA Admin'r Scott Pruitt to Reg'l Administrators, *New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected Actual Applicability Test in Determining Major Modification Applicability*, at 7 (Dec. 7, 2017)..

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Topic	Sub-topic	UARG's position	Trump EPA's position
NSR	**Source aggregation**	**June 2010:** "[T]he final Aggregation Rule is a step in the right direction and should not be revoked."[259]	**Nov. 2018:** "On April 15, 2010, the EPA proposed to revoke the 2009 NSR Aggregation Action. After a review of the public comments . . . the EPA has now decided not to revoke the 2009 Aggregation Action."[260]
Interstate pollution	**Rejection of "section 126" petitions from downwind states**	**July 2018:** "UARG and UARG members have a strong, direct interest in supporting EPA's proposed denial of the section 126 petitions at issue in this proceeding."[261] "[E]ach of the petitions is insufficient to support a section 126(b) finding."[262] "Although the Administrator could, in his discretion, choose to undertake a separate analysis . . . section 126(b) does not obligate or direct the Administrator to conduct such an analysis."[263]	**Oct. 2018:** "Delaware's petition provides insufficient evidence of a requisite air quality problem with respect to the 2008 ozone NAAQS within the state."[264] "The EPA has no obligation to prepare an analysis to supplement a petition that fails, on its face, to include an initial technical demonstration. Such a petition, or a petition that fails to identify the specific finding requested, can be denied as insufficient." [265]
Interstate pollution	**CSAPR close-out**	**2018:** "EPA reasonably and properly concluded" that it would evaluate downwind conditions based on projected air quality in 2023, rather than a sooner date.[266]	**2018:** "EPA is finalizing a determination that 2023 is an appropriate future analytic year to evaluate remaining good neighbor obligations."[267]

[259] UARG Aggregation Rule comments, Docket Id. No. EPA-HQ-OAR-2003-0064-0157, at 2 (June 16, 2010).
[260] 83 Fed. Reg. 57324, 57324 (Nov. 15, 2018).
[261] UARG 126 comments, Docket Id. No. EPA-HQ-OAR-2018-0295-0077, at 3 (July 23, 2018).
[262] *Id.* at 11.
[263] *Id.* at 7.
[264] 83 Fed. Reg. 50444, 50456 (Oct. 5, 2018).
[265] 83 Fed. Reg. 50444, 50452 (Oct. 5, 2018).
[266] *See* UARG CSAPR Close-Out comments, Docket Id. No. EPA-HQ-OAR-2018-0225-0319, at 8 (Aug. 31, 2018).
[267] 83 Fed. Reg. 65878 (Dec. 21, 2018).

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Topic	Sub-topic	UARG's position	Trump EPA's position
Visibility	**Changes to weaken the Regional Haze Rule**	**Mar. 2017:** "UARG requests that EPA reconsider provisions of the [Regional Haze] Rule," including "Revisions to the 'reasonably attributable visibility impairment'. . . ."[268] **May 2017:** "EPA should reconsider and modify . . . provisions concerning the 'uniform rate of progress' and provisions addressing states' consultation processes . . . with federal land management agencies."[269] **June 2017:** UARG sought additional money from its members to pay Hunton for "[p]articipation as necessary . . . proceedings regarding implementation of the regional haze rules," and "[m]onitoring and reporting on EPA activities and guidance concerning regional haze requirements . . . ."[270]	**Jan. 2018**: "We intend to commence a notice-and-comment rulemaking in which we will address portions of the [Regional Haze] rule, including but not limited to the Reasonably Attributable Visibility Impairment provisions, the provisions regarding Federal Land Manager consultation and any other elements of the rule we may identify for additional consideration," which "will provide UARG and the public an opportunity to comment on the issues . . . ."[271] **Dec. 2018:** "This guidance document includes EPA's final recommendations on . . . methods for accounting for total international impacts to adjust the uniform rate of progress . . ."[272]
NAAQS	**Manipulating data from days with bad air quality, even *without* an "exceptional event" like wildfires or volcanoes**[273]	**2016:** "UARG recommends that EPA consider making the [Exceptional Events] Rule applicable to more circumstances than the Agency has proposed."[274]	**2019:** "[This] document identifies other determinations, actions, and analyses that are not covered by the scope of the Exceptional Events Rule, but for which the exclusion, selection, or adjustment of monitoring data may be appropriate and allowable under other sections of the Clean Air Act . . . and EPA rules or guidance."[275]

[268] UARG petition for reconsideration, Docket Id. No. EPA-HQ-OAR-2015-0531-0642, at 1 (Mar. 13, 2017).
[269] UARG comments, Docket Id. No. EPA-HQ-OA-2017-0190-40140, at 11–12 (May 12, 2017).
[270] Leaked UARG Policy Committee document at 20.
[271] Letter from Scott Pruitt, Admin'r, to Hunton counsel for UARG, Jan. 17, 2018.
[272] Memorandum from Richard Wayland to Reg'l Air Division Dirs., *Technical Guidance on Tracking Visibility Progress for the Second Implementation Period of the Regional Haze Program*, at 1 (Dec. 20, 2018).
[273] *See EPA Expands Air Data Waivers For 'Exceptional' Events, Sparking Criticism*, INSIDEEPA, Apr. 11, 2019.
[274] UARG comments, Docket Id. No. EPA-HQ-OAR-2013-0572-0161, at 1 (Feb. 3, 2016).
[275] U.S. EPA, Additional Methods, Determinations, and Analyses to Modify Air Quality Data Beyond Exceptional Events, EPA-457/B-19-002, at 1 (Apr. 2019).

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APPENDIX 2: The Air Permitting Forum and its sub-coalition, the Auto Industry Forum

Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
Climate	**Hydro-fluorocarbons (HFCs); opposition to rules restricting refrigerant substitutes, and extension of compliance deadline**	***Filed with Auto Industry Forum*** Jan. 2017: "[E]xpanding the rule to include chemicals that have a high global warming potential, but no or limited impact on stratospheric ozone, is inconsistent with the intent of section 608 of the CAA."[276] "That Congress did not provide any explicit grant of authority for EPA to establish a regulatory program for substitutes indicates that no such authority exists . . . ."[277] Nov. 2018: "Like the Agency, the Forum believes the 2016 interpretation led to EPA exceeding its authority in extending . . . requirements to substitutes."[278] "The Forum recommends a twelve month extension [of the compliance date] . . . * * * EPA should issue a separate final rule that specifically extends the compliance date."[279]	Aug. 2017: "The EPA is planning to issue a proposed rule to revisit aspects of the 2016 rule's extension of . . . refrigerant management requirements to non-exempt substitutes. We are also aware of your concerns regarding the feasibility of meeting the January 1, 2018, compliance dates and will consider options for relief if we receive adequate information from you to substantiate the basis for such relief."[280] Oct. 2018: "Based on feedback from some in the regulated community, the Agency reviewed the 2016 Rule, focusing in particular on whether the Agency had statutory authority to extend the full set of . . . regulations to non-exempt substitute refrigerants, such as HFCs and HFOs. * * * [T]he Agency is now proposing to withdraw the recent extension of the appliance maintenance and leak repair provisions . . . ."[281] "EPA is proposing to take final action to extend the compliance date . . . . EPA anticipates the extension would be between six to twelve months . . . . If needed, EPA intends to take final action on the proposed extension of the compliance date separate from, and before, taking action on other proposals in this document."[282]

[276] APF HFC petition for reconsideration, Docket Id. No. EPA-HQ-OAR-2017-0629-0006, at 1 (Jan. 17, 2017).
[277] *Id.* at 4.
[278] APF HFC rollback comments, Docket Id. No. EPA-HQ-OAR-2017-0629-0295, at 4 (Oct. 1, 2018).
[279] *Id.* at 12.
[280] Letters from Scott Pruitt, EPA Admin'r, to Hunton counsel for the Air Permitting Forum, Aug. 10, 2017.
[281] 83 Fed. Reg. 49332, 49333 (Oct. 1, 2018).
[282] *Id.* at 49341.

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Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
NAAQS	Narrowing the meaning of "ambient air"	***Filed with Auto Industry Forum*** **2019:** "The Draft Revised Policy would appropriately recognize that modern measures, such as surveillance technology, should be on the same footing as fences or physical barriers in determining ambient air exclusions"[283]	**2018:** "[S]takeholders have argued that the application of the ambient air policy is overly restrictive and that . . . the restrictive language from the 1980 letter that solely focuses on the use of a 'fence or other physical barriers' to preclude public access should be updated to provide for consideration of additional types of measures that are effective in deterring or precluding access to the land by the general public . . . . "[284] "The EPA's [draft] revised ambient air policy replaces 'a fence or other physical barriers' with 'measures, which may include physical barriers, that are effective in deterring or precluding access to the land by the general public.'"[285]

[283] APF ambient air comments at 5 (Jan. 11, 2019), https://insideepa.com/sites/insideepa.com/files/documents/2019/feb/epa2019_0278b.pdf
[284] U.S. EPA, DRAFT REVISED POLICY ON EXCLUSIONS FROM "AMBIENT AIR" at 2 (Nov. 2018), https://www.epa.gov/sites/production/files/2018-11/documents/draft_ambient_air_guidance_110818.pdf
[285] *Id.* at 5.

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Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
NAAQS	**Co-benefits**	**May 2017:** "EPA's reliance on $PM_{2.5}$ co-benefits in issuing regulations has had a profound effect in not only justifying EPA regulations but in supporting the overall value of the government's regulatory enterprise. * * * [O]ver 99 percent of the projected benefits from [the Mercury and Air Toxics Standards (MATS) rule] are based on reductions in $PM_{2.5}$ exposures projected to occur in areas where the $PM_{2.5}$ levels are already below the $PM_{2.5}$ NAAQS. "The Forum recommends that EPA undertake a review of the use of co-benefits including co-benefits that derived from reductions in exposures that are well below the levels deemed safe by EPA [*i.e.*, the NAAQS]."[286]	**Oct. 2017:** Under one approach to estimating the health consequences of repealing the "Forgone $PM_{2.5}$ co-benefits fall to zero in areas whose model-predicted air quality is at or below the annual average $PM_{2.5}$ NAAQS of 12 [micrograms per cubic meter of air]."[287] **May 2019:** "A longstanding and important question is how much benefit is derived by further reducing ambient levels [of pollution] below the national standards. We are considering changes to how such benefits are calculated."[288] **May 2019 (Wehrum):** "How in the world can you get $30 or $40 billion of benefit to public health [from the MATS rule] when most of that is attributable to reductions in areas that already meet a health-based standard . . . . That doesn't make any sense."[289] **June 2019:** "EPA invites the public to nominate scientific experts to be considered as peer reviewers for the EPA-drafted report titled, 'Potential Approaches for Characterizing the Estimated Benefits of Reducing PM2.5 at Low Concentrations.'"[290]
NSR	**Reduce EPA oversight of state programs**	**May 2017:** "EPA . . . has repeatedly second-guessed the purpose, content, and timing of state permit decisions. * * * The Forum . . . recommends that EPA respect decisions made by its state partners as Congress originally intended and reduce, if not eliminate, federal second-guessing."[291]	**Oct. 2018:** Wheeler issues memorandum, "Principles and Best Practices for Oversight of Federal Environmental Programs."[292] Among other things, the memo calls for, "General Deference to States and Tribes Implementing Federally Delegated Programs."[293]

[286] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 29 (May 15, 2017)
[287] 82 Fed. Reg. at 48044 (Oct. 16, 2017).
[288] https://insideepa.com/daily-news/epa-said-cut-pm-benefits-final-ace-rule-reduce-premature-deaths
[289] Lisa Friedman, *E.P.A. Plans to Get Thousands of Pollution Deaths Off the Books by Changing Its Math*, N.Y. TIMES, May 20, 2019.
[290] https://insideepa.com/sites/insideepa.com/files/documents/2019/jun/epa2019_1027a.pdf
[291] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 7 (May 15, 2017)
[292] https://www.acwa-us.org/wp-content/uploads/2018/11/State-Oversight-Memo.pdf
[293] *Id.* at 3.

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Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
NSR	**Weaken or eliminate the independent EPA enforcement office**	**May 2017:** "Implement structural changes within the Agency for how enforcement is initiated and managed . . . . [T]he essence of a successful reorganization will be that those involved in enforcement are more connected to the standards they enforce, and those that set the standards are more connected to the enforcement of the standards they established."[294]	InsideEPA: Trump EPA Weighs Shuttering Enforcement Office By Prospects Unclear[295] *"A source familiar with the plan says Trump EPA officials intend to 'disassemble the enforcement office. They are going to take it, break it up and move it back into the program offices.'"*
NSR	**Demand-growth exclusion; DTE "second-guessing"**	**May 2017:** "The Forum recommends that EPA clarify its position on the Demand Growth Exclusion/causation requirement . . . ."[296] "While historically EPA has recognized that a source must exercise judgment to exclude increases for which the project is not the 'predominant cause,' more recent EPA actions reflect the view that all emission increases are presumed to be caused by the change."[297]	**Dec. 2017:** "We believe this memorandum is necessary to provide greater clarity for sources and states implementing the NSR regulations."[298] "Because increased emissions may be caused by multiple factors, the EPA has recognized that the source must exercise judgment to exclude increases for which the project is not the 'predominant cause.'"[299]

[294] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 9 (May 15, 2017)
[295] https://insideepa.com/daily-news/trump-epa-weighs-shuttering-enforcement-office-prospects-unclear
[296] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 13 (May 15, 2017).
[297] *Id.* at 12.
[298] Memorandum from EPA Admin'r Scott Pruitt to Reg'l Administrators, "New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected Actual Applicability Test in Determining Major Modification Applicability," at 2 (Dec. 7, 2017), *available at* https://www.epa.gov/sites/production/files/2017-12/documents/nsr_policy_memo.12.7.17.pdf.
[299] Memorandum from EPA Admin'r Scott Pruitt to Reg'l Administrators, "New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected Actual Applicability Test in Determining Major Modification Applicability," at 7 (Dec. 7, 2017), *available at* https://www.epa.gov/sites/production/files/2017-12/documents/nsr_policy_memo.12.7.17.pdf.

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Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
NSR	**Expansion of "netting" to allow old sources to avoid CAA controls when they upgrade equipment**	**May 2017:** "EPA should clearly state that emission decreases are allowed in determining project emissions changes without triggering full netting of all contemporaneous projects."[300]	**Mar. 2018:** "Based on reconsideration of some previous conclusions and an examination of the regulations as a whole, the EPA now interprets [certain NSR rules] as providing that any emissions *decreases* that may result from a given proposed project are to be considered when calculating at Step 1 whether the proposed project will result in a significant emissions increase."[301] **Mar. 2019 (InsideEPA):** "EPA has sent for [OMB] review its proposal to revise Clean Air Act new source review (NSR) permit 'project emissions accounting,' or 'netting,' one of several piecemeal NSR reforms that critics say will make it easier for companies to avoid strict air permits."[302]
NSR	**Aggregation; reinstatement of rule finalized in last week of George W. Bush Administration but never made effective by the Obama Administration**	**May 2017:** "Aggregating projects that independent, for the purposes of determining NSR applicability, increases the likelihood of triggering the cumbersome NSR process beyond what was originally intended. * * * EPA guidance has expanded the 'aggregation' criteria well beyond what is needed . . . . Had it not been put on hold, the 2009 final rule would have brought needed clarity and simplified administration of the program. EPA should remove the stay of the final [2009] rule . . . ."	**Nov. 2018:** "The Environmental Protection Agency (EPA) is concluding the reconsideration of an earlier action that the EPA published on January 15, 2009, titled 'Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation and Project Netting.' The 2009 action . . .clarified implementation of the [NSR] permitting program under the [CAA] with respect to treating related physical or operational changes as a single 'modification' for the purpose of determining NSR applicability at a stationary source. . . . [T]he EPA has now decided to not revoke the 2009 NSR Aggregation Action."
NSR	**Debottlenecking**	**May 2017:** EPA should "issue a rule to clearly state that only emission increases related to units actually being modified should be analyzed," rather than considering "upstream and downstream units (referred to as debottlenecked units) [that] have previously obtained [NSR] permits . . . ."[303]	**Oct. 2017:** Pruitt report noted that commenters recommended "reviewing the debottlenecking rule and re-proposing it to address NSR requirements for modifying sources," and that he would be convening an "NSR Reform Task Force" to "address these important areas and achieve meaningful NSR Reform . . . ."[304]

[300] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 14 (May 15, 2017)
[301] Memorandum from Scott Pruitt, Admin'r, to Reg'l Admin'rs, *Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program* (Mar. 13, 2018), at 6, https://www.epa.gov/sites/production/files/2018-03/documents/pea_nsr_memo_03-13-2018.pdf
[302] https://insideepa.com/daily-feed/epa-sends-nsr-air-permit-%E2%80%98netting%E2%80%99-proposal-omb-review
[303] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 16 (May 15, 2017).
[304] https://www.epa.gov/sites/production/files/2017-10/documents/eo-13783-final-report-10-25-2017.pdf

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Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
NSR	**Expansion of "routine maintenance" exception**	**May 2017:** "EPA continues to inappropriately interpret [the routine maintenance, repair, and replacement (RMRR)] exclusion narrowly. * * * EPA should clarify that replacements and repairs that are routine in the industry, even if they may occur only once or twice during the life of a plant . . . are considered 'routine' within the meaning of the RMRR exclusion."[305]	**Apr. 2018:** "EPA believes there is uncertainty regarding the interpretation of the Routine Maintenance, Repair and Replacement (RMRR) provisions in the New Source Review Program. * * * EPA is evaluating the need to clarify the interpretation and appropriate application of the RMRR provision . . . ."[306]
NSR	**Significant Emissions Rate (SER) for greenhouse gases**	**May 2017:** "In October 2016, EPA proposed a rule to establish a significant emission rate [SER] for GHGs of 75,000 tons per year (tpy) of carbon dioxide equivalent . . . . The Forum submitted comments on the proposed rule recommending that EPA finalize a SER value much higher than 75,000 tpy . . . ."[307]	The Obama Administration proposed a rule establishing an SER of 75,000 tons per year of CO2-equivalent emissions.[308] As of April 2019, the Trump Administration has not taken action on that proposal.[309]
NSR	**Control technology determination process; "presumptive BACT"**	**May 2017:** "[T]he Forum recommends that EPA undertake administrative changes to the NSR program to reduce uncertainty, by adopting approaches like 'presumptive BACT' and giving states the flexibility to make expeditious permitting decisions without second-guessing by EPA."[310] **Dec. 2017:** Reporting indicates that "industry officials are stepping up their push" for "presumptive BACT guidance."[311]	Unknown

[305] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 18 (May 15, 2017).
[306] Presentation by Anna Marie Wood, Dir. Air Quality Policy Div., *NAAQS and Other Implementation Updates* (Apr. 5, 2018), slide 33, https://insideepa.com/sites/insideepa.com/files/documents/2018/apr/epa2018_0631.pdf.
[307] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 18 (May 15, 2017).
[308] 81 Fed. Reg. 68110, 68113 (Oct. 3, 2016).
[309] https://www.epa.gov/nsr/prevention-significant-deterioration-and-title-v-permitting-regulations-greenhouse-gases-ghg-and (last visited Apr. 26, 2019).
[310] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 20 (May 15, 2017)
[311] https://insideepa.com/daily-news/industry-seeks-presumptive-bact-guide-bid-extend-epas-nsr-relief

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Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
Title V	**Limit review of preconstruction permits**	**May 2017:** "ENGO [environmental organizations] have filed numerous petitions for objection to Title V permits based on their disagreement with the underlying construction permit . . . ."[312] The Forum's "highest-priority Title V item" is for EPA to "make clear that challenges to the construction of a new project or new plant must be resolved at the construction permit stage and a Title V permit does not offer protestants a second bite at the apple . . . ."[313] **Jan. 2019:** "EPA's [October 2017] interpretation of the proper scope of Title V review was eminently reasonable, if not compelled by statute and regulation."[314]	**Oct. 2017:** "[P]reconstruction permit terms and conditions should be incorporated [in Title V permits] without further review . . . ."[315] "[T]itle V permitting is not intended to second-guess the results of state preconstruction permit programs . . . ."[316] "The [Sierra Club] is now, in essence, asking for a 'second bite at the apple' through EPA oversight in title V. The availability of notice, opportunity to comment, and ability to seek judicial review of the underlying preconstruction permit . . . weighs heavily against an interpretation of title V as being an appropriate avenue to reevaluate these previous permitting authority decisions . . . ."[317]
Regional consistency rule	**N/A**	**Nov. 2015:** "The Forum questions the need for this rulemaking and believes that fairness and uniformity are best served by the continued application of existing rules. * * * The proposed rule is inconsistent with . . . the CAA and is not legally plausible on its face." [318] **May 2017:** "The Forum is currently litigating EPA's recently issued rule allowing for inconsistent policy and practice . . . . As stated in our [November 2015] comments on this final rule, inconsistency on fundamental issues like this violates the CAA."[319]	**Nov. 2017:** EPA is defending the Obama Admin's rule in court,[320] against a brief filed by Wehrum (on behalf of American Petroleum Institute) with two other Hunton lawyers (on behalf of the Air Permitting Forum).

[312] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 33 (May 15, 2017)
[313] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 32 (May 15, 2017)
[314] APF amicus brief supporting EPA, *Sierra Club v. EPA*, No. 18-1038, at 4 (D.C. Cir. Jan. 16, 2019).
[315] In the Matter of PacificCorp Energy Hunter Power Plant, Order on Petition No. VIII-2016-4 (Oct. 16, 2017), at 13, https://www.epa.gov/sites/production/files/2017-10/documents/pacificorp_hunter_order_denying_title_v_petition.pdf
[316] *Id.* at 14.
[317] *Id.* at 17.
[318] APF regional consistency comments, Docket Id. No. EPA-HQ-OAR-2014-0616-0016, at 1–2 (Nov. 3, 2015).
[319] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 34 (May 15, 2017).
[320] Proof Response Brief for EPA, *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, No. 16-1344 (D.C. Cir. Nov. 20, 2017).

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APPENDIX 3: The NAAQS Implementation Coalition

Topic	Sub-topic	"NAAQS Implementation Coalition" position	Trump EPA's position
NAAQS	**Narrowing the meaning of "ambient air"**[321]	**May 2017:** "Long-standing EPA policy . . . unrealistically requires evaluation of ambient air impacts at locations where individuals would not reasonably be allowed access, much less be exposed to emissions (*e.g.*, on a waterway, roadway, railway, or within a posted/patrolled property boundary) for the duration or averaging time . . . and frequency . . . of the current probabilistic NAAQS. * * * Modeling should not be required if human exposure at a site is unrealistic for the period addressed by a NAAQS."[322] **2019:** "[W]e support EPA's review of its ambient air policy."[323]	**May 2018:** "We are evaluating several key terms associated with the definition [of 'ambient air'] including 'general public,' 'access,' and 'building' to determine where additional flexibility may be appropriate."[324] **Nov. 2018:** "[S]takeholders have argued that the application of the ambient air policy is overly restrictive and that . . . the restrictive language from the 1980 letter that solely focuses on the use of a 'fence or other physical barriers' to preclude public access should be updated to provide for consideration of additional types of measures that are effective in deterring or precluding access to the land by the general public . . . ."[325] "The EPA's [draft] revised ambient air policy replaces 'a fence or other physical barriers' with 'measures, which may include physical barriers, that are effective in deterring or precluding access to the land by the general public.'"[326]

[321] *See, e.g.*, Sean Reilly, *Wehrum's old clients back 'ambient air' plan — documents*, GREENWIRE, Mar. 7, 2019, https://www.eenews.net/stories/1060123437
[322] Coalition comments, EPA-HQ-OA-2017-0190-36049, at A-4 to A-5 (May 15, 2017).
[323] NIC ambient air comments at 5 (Jan. 10, 2019), *available at* https://www.eenews.net/assets/2019/03/06/document_pm_01.pdf.
[324] Presentation by Anna Marie Wood, *NAAQS and Other Implementation Updates*, at slide 30 (Apr. 5, 2018).
[325] U.S. EPA, DRAFT REVISED POLICY ON EXCLUSIONS FROM "AMBIENT AIR" at 2 (Nov. 2018).
[326] U.S. EPA, DRAFT REVISED POLICY ON EXCLUSIONS FROM "AMBIENT AIR" at 5 (Nov. 2018).

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Topic	Sub-topic	"NAAQS Implementation Coalition" position	Trump EPA's position
NAAQS	**International emissions under CAA section 179B ("International border areas")**	**Feb. 2017:** "[EPA] requests comment on whether it is appropriate to limit CAA § 179B demonstrations to nonattainment areas adjoining international borders. We believe it is not."[327] **May 2017:** "EPA should not constrain 179B to border regions."[328]	**Presidential Memorandum, Apr. 2018:** "[W]ith respect to section 179B demonstrations or petitions, the Administrator shall ensure that EPA does not limit its consideration to emissions emanating from Mexico or Canada, but rather considers, where appropriate, emissions that may emanate from any location outside the United States . . . ."[329] **Dec. 2018:** "[A] demonstration prepared under CAA section 179B could consider emissions emanating from North America or intercontinental sources and is not restricted to areas adjoining international border areas . . . ."[330]
NAAQS	**CASAC composition**	**May 2017:** "CASAC has in recent years been imbalanced, being composed of members with generally similar backgrounds in terms of geography, background, and research interests. * * * There should be a better balance of representation on CASAC between academia, environmental and non-governmental organizations, states, and industry. * * * Consideration should be given to rotating terms . . . ."[331]	**Oct. 2017:** "[Federal Advisory Committee] membership should be balanced with persons from different parts of the country to create geographic diversity. * * * [M]embership should be rotated regularly."[332]
NASAC	**CASAC, removing academic researchers**	**May 2017:** "EPA should review and revise CASAC's 'conflict of interest' standards, particularly those relating to receiving EPA funding, in order to promote increased transparency in CASAC's review process."[333]	**Oct. 2017:** "[I]n addition to EPA's existing policies and legal requirements preventing conflicts of interest . . . it shall be the policy of the Agency that no member of an EPA federal advisory committee currently receive EPA grants . . . or in a position that otherwise would reap substantial direct benefit from an EPA grant."[334]

[327] Comments of NAAQS Implementation Coal., Docket Id. No. EPA-HQ-OAR-2016-0202, at 9 (Feb. 12, 2017).
[328] Coalition comments, EPA-HQ-OA-2017-0190-36049, at A-7 (May 15, 2017).
[329] Presidential Memorandum for the Administrator of the Environmental Protection Agency (Apr. 12, 2018).
[330] 83 Fed. Reg. at 63010 (Dec. 6, 2018).
[331] Coalition comments, EPA-HQ-OA-2017-0190-36049, at A-13 (May 15, 2017).
[332] Memorandum from Scott Pruitt, *Strengthening and Improving Membership on EPA Federal Advisory Committees*, at 2 (Oct. 31, 2017).
[333] Coalition comments, EPA-HQ-OA-2017-0190-36049, at A-13 to A-14 (May 15, 2017).
[334] Memorandum from Scott Pruitt, *Strengthening and Improving Membership on EPA Federal Advisory Committees*, at 3 (Oct. 31, 2017).

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Topic	Sub-topic	"NAAQS Implementation Coalition" position	Trump EPA's position
NAAQS	**CASAC; encouragement of fringe views**	May 2017: "[I]n recent years, the process has been to drive CASAC members towards consensus on a single response. This has served to hide the full range of interpretation that can be supported by the scientific evidence. * * * EPA should encourage CASAC letters that reflect the full range of viewpoints by CASAC members, including reporting minority views and the reasoning behind them."[335]	May 2018: "CASAC and EPA should, consistent with CASAC's charter, seek to find consensus, but should allow for individual CASAC members to share their own individual opinions when they fall outside committee consensus."[336]
NAAQS	**Primary (health-based) NO2 NAAQS, and Trump EPA's decision not to strengthen it**	Sept. 2017: "We support EPA's decision in the NO_2 Proposal to retain the current NO_2 NAAQS."[337]	"EPA is retaining the current primary NO_2 standards, without revision."[338]

[335] Coalition comments, EPA-HQ-OA-2017-0190-36049, at A-14 (May 15, 2017).
[336] Memorandum from Scott Pruitt to Asst. Admin'rs, *Back-to-Basics Process for Reviewing National Ambient Air Quality Standards*, at 10 (May 9, 2018).
[337] NIC comment, Docket Id. No. EPA-HQ-OAR-2013-0146-0145, at 1 (Sept. 25, 2017).
[338] 83 Fed. Reg. 17226, 17227 (Apr. 18, 2018)

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APPENDIX 4: The CCS Alliance

Topic	Sub-topic	"CCS Alliance" position	Trump EPA's position
Climate	**GHG NSPS for new power plants; decision to base the "best system of emission reduction" (BSER) for power plants in part on what can be achieved using partial carbon capture and storage (CCS) technology**	**May 2011:** "[C]arbon capture and sequestration (CCS) is not yet adequately demonstrated."[339] **June 2012:** "EPA's proposed GHG emission limits [based on CCS] will deter CCS rather than promote it."[340] **May 2014:** "There is not nearly enough experience with carbon capture to reasonably determine that it is adequately demonstrated. * * * EPA should withdraw the proposed rule. * * * Only in depleted oil and gas formations is there the variety of experience to show that large amounts of CO2 can be stored safely over the long term. Those formations do not exist in sufficient geographic dispersion throughout the United States to be considered broadly available."[341] **Nov. 2014:** "The Boundary Dam facility . . . has been operating only since October of this year. Thus, it offers very little evidence of reliability or efficiency on which to legally base a new rule."[342]	**2017:** "EPA . . . is reviewing the [2015 Rule] and, if appropriate, will as soon as practicable and consistent with law, initiate reconsideration proceedings to suspend, revise or rescind the rule."[343] **2018:** "EPA is proposing to revise its [2015] analysis and determine that CCS is not adequately demonstrated . . . ."[344] "[T]he EPA proposes to revise to the BSER . . . . The primary reason for this proposed revision is the high costs and limited geographic availability of CCS."[345] "While the carbon capture technology at the Boundary Dam is currently operating, that project experienced multiple issues with [the CCS technology] during its first year of operation . . . . EPA solicits comment on whether Boundary Dam's first-year operational problems cast doubt on the technical feasibility of fully integrated CCS."[346] **Wehrum:** "Today's actions reflect our approach of defining new, clean coal standards by data and the latest technological information, not wishful thinking."[347]

[339] Alliance comments, Docket Id. No. EPA-HQ-OAR-2011-0090-3120, at 1 (Mar. 18, 2011).
[340] Alliance comments, Docket Id. No. EPA-HQ-OAR-2011-0660-10070, at 1 (June 25, 2012).
[341] Alliance comments, Docket Id. No. EPA-HQ-OAR-2013-0495-9683, at 1–2, 6 (May 9, 2014).
[342] Alliance comments, Docket Id. No. EPA-HQ-OAR-2013-0602-23551, at 3 (Nov. 26, 2014).
[343] 82 Fed. Reg. 16330 (Apr. 4, 2017).
[344] 83 Fed. Reg. at 65441 (Dec. 20, 2018).
[345] *Id.* at 65426 (Dec. 20, 2018).
[346] *Id.* at 65444 (Dec. 20, 2018).
[347] https://www.epa.gov/newsreleases/epa-proposes-111b-revisions-advance-clean-energy-technology

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United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510-6175

July 21, 2019

Charles J. Sheehan
Acting Inspector General
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Acting Inspector General Sheehan:

Enclosed please find a report documenting the extensive influence wielded by the law firm Hunton Andrews Kurth LLP ("Hunton") and EPA during the Trump Administration. As you are aware, Hunton is the former law firm of William Wehrum, who until recently was Assistant Administrator in EPA's Office of Air and Radiation, and David Harlow, currently senior counsel in that same office. We bring this report to your attention because of the pending ethics complaints about Mr. Wehrum and Mr. Harlow you are reviewing. The report raises new and serious concerns about Mr. Wehrum's and Mr. Harlow's compliance with federal ethics requirements. It also raises concerns about the agency's ethics program generally, which merit your attention. We request that you review this report carefully.

More broadly, we urge you in the strongest possible terms not to abandon or decline to pursue work on this matter in the wake of Mr. Wehrum's departure from the agency. These are institutional concerns that are capable of repetition in the future, yet will evade your review should you abdicate your responsibility to conduct and complete an evidence-based investigation. Moreover, the ethical failings and absence of accountability that pervade the Trump Administration should not be aided by an implicit message that one can avoid investigation if one simply resigns before the investigation is complete.

Section 1 of this report demonstrates that multiple Hunton-represented industry groups such as the Utility Air Regulatory Group (UARG) have sought sweeping regulatory changes that would increase air pollution, exacerbate climate change, and reduce the amount of pollution information available to the public. Among the dozens of changes, Hunton and its organizations have asked EPA to weaken greenhouse gas requirements for new and existing coal-fired power plants; to allow the largest polluters to release more toxic air pollution; and to allow upwind power plants to pollute more downwind communities. These Hunton-represented industry groups have also made highly technical and novel arguments that EPA has adopted or is in the process of adopting, such as how to account for certain types of benefits when conducting economic analyses for mercury regulations; how to sideline independent scientists on scientific advisory boards; or even how to redefine what counts as "ambient air" protected by the Clean Air Act in the first place.

While researching the policy outcomes, however, we repeatedly uncovered apparent violations of ethical rules. Some of these violations have been previously described, while others are being revealed for the first time. Section 2 of this report describes those extensive ethical failings. Specifically:

- ***Mr. Wehrum and Mr. Harlow appear to have violated the terms of the Trump Ethics Pledge and Ethics in Government Act regulations by participating in the development of the DTE Memo.*** Although Mr. Wehrum and Mr. Harlow were both recused from working on "any particular matter" in which a recent former client is a party, or in which Hunton "represents a party," Mr. Wehrum and Mr. Harlow appear to have violated this ethical requirement by involving themselves in the

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development of the DTE Memo. In the Memo, EPA (1) analyzed litigation in which DTE, a former client of Mr. Harlow, was represented by Hunton, and in which Mr. Wehrum entered an appearance on behalf of UARG; (2) reversed EPA policy on the eve of the Supreme Court's consideration of this litigation, adopting Hunton's position that the agency should not "second-guess" polluters' own calculations of how much pollution they expect to emit; (3) directly copied language submitted to EPA by Hunton on behalf of the Air Permitting Forum into the DTE Memo; and (4) cited the Hunton-DTE litigation as the basis for that shift in policy. Although EPA previously stated that Mr. Wehrum was not involved in developing the DTE Memo,[1] Mr. Wehrum subsequently acknowledged this was false.[2]

- ***In his recusal statement, Mr. Wehrum failed to disclose at least three former clients that he previously represented in court – the Alliance of Automobile Manufacturers; the Minnesota Trucking Association; and the Minnesota Automobile Dealers Association[3] – then had at least six meetings with one of those undisclosed former clients in apparent violation of Ethics in Government Act regulations and the Trump Ethics Pledge.***[4] Under the terms of his ethics agreement, Mr. Wehrum was supposed to be recused from "any meetings or communications relating to the performance of [his] official duties" with his former clients or employer – the only exception being meetings with at least five parties present where the discussion is limited to matters of general applicability. Mr. Wehrum's failure to disclose his recent former clients frustrates the "screening arrangement" in his recusal statement, which stated that his subordinates would "assist in screening EPA matters" involving the entities he listed to ensure his compliance with ethical rules. None of these meetings appear to have been "open to all interested parties" as the Office of Government Ethics defines that term, and were thus impermissible even if Mr. Wehrum only spoke about generally applicable regulations affecting his former clients' interests.

- ***Mr. Wehrum repeatedly met with other clients he worked with in private practice – actions that appear to violate the intent of the Trump Ethics Pledge and Mr. Wehrum's own ethics agreement. To accomplish this, Mr. Wehrum (and potentially Mr. Harlow) appears to have artificially – and perhaps improperly – limited his list of former clients from which he was recused.*** Although Mr. Wehrum and Mr. Harlow were nominally recused from certain meetings with "UARG," their recusal statements imposed no limits on discussions with *UARG members* (1) who paid hefty UARG "dues" that went almost exclusively to Hunton (and thus to Mr. Wehrum and Mr. Harlow as Hunton partners), or (2) with whom Mr. Wehrum and Mr. Harlow may have developed an attorney-client or other privileged relationship, even absent direct billing. Under D.C. attorney ethics rules it is "well

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[1] https://thehill.com/policy/energy-environment/364015-epa-works-to-ease-air-pollution-permitting-process

[2] Juliet Eilperin, *EPA regulator skirts the line between former clients and current job*, Wash. Post (Feb. 25, 2019).

[3] *See, e.g.*, Mem. of Law in Support of Mot. For Partial Summary Judgment, Doc. 47 at *27, *Minn. Trucking Ass'n et al. v. Stine et al.*, No. 15-cv-2045-JRT-KMM (D. Minn. Sept. 29, 2016) (listing Mr. Wehrum and five other lawyers, including two others from Hunton, as "Attorneys for Plaintiffs Minnesota Trucking Association, Minnesota Automobile Dealers Association, Alliance of Automobile Manufacturers, American Petroleum Institute, and American Fuel & Petrochemical Manufacturers").

[4] Mr. Wehrum had at least six small meetings with his former client the Alliance for Automobile Manufacturers to discuss regulatory policy: 11/27/2017 (with one other entity); 12/27/2017 (alone with board); 2/21/2018 (with lawyers/lobbyists); 4/16/2018 (alone); 5/22/2018 (alone); 5/23/2018 (alone), and 7/16/2018 (with one other entity).

established" that "neither a written agreement nor the payment of fees is necessary to create an attorney-client relationship."[5] In fact, Hunton and UARG have successfully argued in court that Hunton lawyers and UARG members have attorney-client privileged conversations, adding further credence to the notion that Mr. Wehrum and Mr. Harlow should have listed more UARG members as former clients in their recusal statements. A review of Mr. Wehrum's calendars shows that at least 10 different UARG members have been in attendance at nine separate meetings with Mr. Wehrum (American Electric Power; Dominion Energy; Duke Energy; Minnesota Power; Otter Tail Power; Southern Company; the American Coalition for Clean Coal Electricity; the Edison Electric Institute; the National Mining Association; and the National Rural Electric Cooperative Association). On December 7, 2017, the same day EPA issued the DTE Memo, Mr. Wehrum gave a closed-door briefing on Clean Air Act regulatory developments at his former employer Hunton. This presentation occurred during a two-day set of meetings at Hunton that appears to have been a pre-planned gathering of UARG's membership. Such a gathering raises the prospect that the event was really a meeting before a single entity, UARG, which Mr. Wehrum was prohibited from meeting with alone – not a meeting with five parties. In any event, the meeting was also not "open to all interested parties" as required by the Trump Ethics Pledge, because Hunton only invited its own clients to this closed-door meeting. In addition to numerous meetings with UARG members, Mr. Wehrum also held two private meetings with his former client General Electric (which is also a member of the Air Permitting Forum).

Thank you very much for your attention to this matter. We look forward to your prompt response. Should you have any questions, please contact Michal Freedhoff (michal_freedhoff@epw.senate.gov) of Senator Carper's Environment and Public Works Committee staff, or Joe Gaeta (joe_gaeta@whitehouse.senate.gov) of Senator Whitehouse's staff.

Sincerely yours,

Tom Carper
Ranking Member
Committee on Environment and Public Works

Sheldon Whitehouse
Ranking Member
Subcommittee on Clean Air and Nuclear Safety

cc: David Cozad, Acting Designated Agency Ethics Official and Acting Deputy General Counsel, Office of General Counsel, Environmental Protection Agency

[5] *In re Lieber*, 442 A.2d 153, 156 (D.C. 1982).

Congress of the United States

Washington, DC 20510

February 21, 2019

Charles J. Sheehan
Acting Inspector General
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Acting Inspector General Sheehan,

We write to request that the Environmental Protection Agency (EPA) Office of Inspector General (OIG) conduct an investigation into potential violations of the Ethics in Government Act by William Wehrum, Assistant Administrator for the EPA Office of Air and Radiation (OAR), and David Harlow, Senior Counsel in OAR. We are troubled that it appears that Mr. Wehrum and Mr. Harlow may have violated the law and associated regulations given their direct involvement in EPA's December 7, 2017 memo titled "New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability" ("DTE Memo"). The memo disavowed EPA's position in litigation against DTE Energy Company ("DTE litigation"), a client of Mr. Wehrum's and Mr. Harlow's former law firm, Hunton & Williams, and of Mr. Harlow's himself.

While the underlying facts and legal arguments in the DTE litigation are complicated, the ethics violations are simple and clear: federal employees may not participate in particular matters that involve their former clients or employers. Hunton & Williams has represented DTE in the DTE litigation since it started in 2010. Shortly after Mr. Wehrum and Mr. Harlow arrived at EPA, the agency abandoned its long-standing position and adopted the views of DTE on the legal issue central to the case, which was then pending before the United States Supreme Court. The memo was widely understood at EPA to be about the DTE litigation, the memo itself discussed the litigation, and it was issued expressly to affect the Supreme Court's decision on whether to grant a writ of certiorari. The DTE memo is a particular matter involving a client represented by their former law firm, and their participation in it was prohibited by the ethics rules.

We believe an OIG investigation is warranted in this case. No other federal agency or component of EPA will be able to fully ascertain whether, and if so, the degree to which, ethics violations have occurred. With respect to Mr. Wehrum, the facts suggest that he may have ignored ethics advice from the Office of General Counsel, which may have resulted in improper conduct. The allegations as to both men are based in large part on heavily redacted documents released by EPA in response to Freedom of Information Act requests. OIG has the authority to review unredacted communications and compel interviews with current EPA employees, both of which will be necessary for a complete investigation. Furthermore, one of your mandates under the Inspector General Act of 1978 is to keep "the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the

necessity for and progress of corrective action."[1] We view this request as consistent with that responsibility.

Attached is additional information in support of this request. We respectfully request you give this matter your fullest consideration. Should you have any questions, please contact Joe Gaeta (joe_gaeta@whitehouse.senate.gov) of Senator Whitehouse's staff, Michal Freedhoff (michal_freedhoff@epw.senate.gov) of Senator Carper's Environment and Public Works Committee staff, or Jon Monger (jon.monger@mail.house.gov) of the House Energy and Commerce Committee staff.

Sincerely,

Sheldon Whitehouse
United States Senator

Thomas R. Carper
United States Senator

Frank Pallone, Jr.
United States Representative

[1] 5 U.S.C. (IG Act) App. § 2(3)

The Ethics In Government Act prohibits Mr. Wehrum and Mr. Harlow from participating in the DTE litigation.

The Ethics in Government Act and associated regulations are designed to prevent the appearance of a conflict of interest when federal officials perform their official duties. "[A]n employee should not participate in a particular matter involving specific parties… in which he knows a person with whom he has a covered relationship is or represents a party [to such a matter], if he determines that a reasonable person with knowledge of the relevant facts would question his impartiality in the matter."[2] An attorney who enters federal service from a private law firm has a covered relationship with the firm and all its clients, and must recuse himself from matters handled by that law firm for a period of one year.[3]

Mr. Wehrum and Mr. Harlow both left their law practices at Hunton & Williams to take positions at EPA.[4] Hunton & Williams has represented DTE Energy in the DTE litigation since 2010 and continues to represent them today. Exhibits A and B.

Both Mr. Wehrum and Mr. Harlow were aware of their recusal obligations. The Assistant Administrator for OAR is a Senate-confirmed position. Accordingly, prior to his nomination hearing before the Senate Environment and Public Works Committee, Mr. Wehrum entered into an ethics agreement with EPA acknowledging his responsibility to recuse himself from participating in particular matters involving Hunton & Williams and its clients. This understanding was memorialized in an August 28, 2017 pre-confirmation letter to EPA Designated Agency Ethics Official Kevin Minoli. Exhibit C. That responsibility was confirmed in a recusal statement dated September 17, 2018. Exhibit D.

Mr. Harlow is currently Senior Counsel at OAR. He appears to have been suggested for that position by Mr. Wehrum. Exhibit E. Harlow started work at EPA on October 1, 2017. Exhibit F. Mr. Harlow acknowledged his responsibility not to participate in any particular matters involving Hunton & Williams or its clients in a memo to his supervisor, Mr. Wehrum, on December 28, 2017. Exhibit G.

It is beyond dispute that Mr. Wehrum and Mr. Harlow, in their EPA positions, cannot be involved in the DTE litigation because Hunton & Williams currently represents DTE. With respect to Mr. Wehrum, at the time the DTE memo (Exhibit H) was issued EPA reportedly acknowledged that ethics rules prohibited his participation in its development.[5] Their recusal

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[2] 5 C.F.R. § 2635.502(a)

[3] Id. at 502(b)(iv). See also Office of Government Ethics, "Conflicts of Interest Considerations: Law Firm or Consulting Employment," (June 22, 2018) available at https://www.oge.gov/web/OGE.nsf/0/53BE4061E9EFDEB4852582B400626DAA/$FILE/Law%20Firm%20or%20Consulting%20Employment.pdf. While an employee may seek authorization from the agency to participate in a particular matter notwithstanding the conflict, neither Mr. Wehrum nor Mr. Harlow appear to have received any such authorization here.

[4] Hunton & Williams is now Hunton, Andrews and Kurth.

[5] Timothy Cama, "EPA works to ease air pollution permitting process," *The Hill*, Dec. 8, 2017, ("[T]he agency said Wehrum was not involved in Thursday's memo, having recused himself because his former law firm, Hunton & Williams, represents DTE in the litigation.") available at

statements additionally show how closely they are tied to the parties and issues involved in the DTE litigation. Mr. Harlow's recusal statement lists DTE as a client. Exhibit G. Both of their recusal statements list the Utility Air Regulatory Group (UARG) as a former client.[6] Exhibits D and G. Mr. Wehrum personally entered an appearance and filed a brief on behalf of UARG in the DTE litigation in support of DTE's position. Exhibit I. As recently as 2016, it has been reported that DTE Energy self-identified as a member of UARG.[7]

Mr. Wehrum ignored OGC advice and took ten months to finalize and make public his required recusals, including those from particular matters involving Hunton & Williams.

Mr. Wehrum was confirmed by the United States Senate on November 9, 2017. Mr. Wehrum's first "Certification of Ethics Agreement Compliance" was signed by him and dated December 7, 2017, and then modified on December 19, 2017. Exhibit J. Through this certification, Mr. Wehrum represented that "I am recusing from particular matters in which any former employer or client I served in the past year is a party or represents a party, unless I have been authorized under 5 C.F.R. § 2635.502(d)," and that he had not received any authorizations exempting particular matters from this requirement.[8]

At EPA, recusals are memorialized in "recusal statements" negotiated between career ethics officials and nominees once they are confirmed. While the duty to recuse applies irrespective of whether and when a recusal statement has been signed by an employee, these statements, combined with an employee's ethics agreement, provide a clear roadmap for other EPA employees, Congress, and the public about an employee's ethics obligations under the law. Mr. Wehrum's recusal statement should have been complete when he signed his "Certification of Ethics Agreement Compliance" on December 7, 2017. After multiple inquiries over many months, we learned it was not.

Senator Whitehouse first requested Mr. Wehrum's recusal statement on February 21, 2018 from ethics officials in EPA's Office of General Counsel. That request was transferred to the Office of Congressional and Intergovernmental Relations. Senator Whitehouse's staff repeatedly requested this document on March 16, 2018, March 22, 2018, and April 23, 2018. On April 25, 2018, Senator Whitehouse wrote to Administrator Pruitt requesting this

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https://thehill.com/policy/energy-environment/364015-epa-works-to-ease-air-pollution-permitting-process.

[6] UARG is not an incorporated entity and does not appear to have a staff, physical location, or presence of any sort outside of Hunton & Williams. Its membership and decision-making processes appear opaque, and it has been described as "a front group of convenience [that] allows individual electric utility companies to shield their names and anti-public health crusades from public awareness." John Walke, "Is Your Power Company Fighting in Court Against Safeguards From Mercury and Toxic Air Pollution?" NRDC, May 25, 2012, available at https://www.nrdc.org/experts/john-walke/your-power-company-fighting-court-against-safeguards-mercury-and-toxic-air.

[7] Annalee Armstrong, "Power companies wield influence through anonymous group," *S&P Global*, July 19, 2016 available at https://www.snl.com/web/client?auth=inherit#news/article?id=37072675&cdid=A-37072675-13095

[8] The form also requires the signer to acknowledge that knows that any intentionally false or misleading statement or response provided in the Certification is a violation of law.

information. Months passed and EPA still did not provide a signed recusal statement from Mr. Wehrum.

On August 19, 2018—over eight months after he certified compliance with his ethics agreement—*The New York Times* reported that Mr. Wehrum had refused to sign a recusal statement because he claimed that he had received conflicting advice from ethics officials.[9] EPA's top ethics official Kevin Minoli explained in a September 29, 2018 letter to Senator Whitehouse that Mr. Wehrum was advised pursuant to Office of Government Ethics (OGE) legal advisories that apply to all members of the Trump administration. Exhibit K. Mr. Wehrum also was advised about the "importance of signing a recusal statement" but nevertheless he "chose to use other tools that *he deemed effective* in helping him comply with the ethics requirements…."[10] Id. (emphasis added.) To date, it remains unclear what that conflicting advice may have been, what recusals and ethics rules Mr. Wehrum followed during this time, and how in the absence of a recusal statement EPA ensured his compliance with all applicable ethics laws and regulations.

To address Mr. Wehrum's ongoing refusal to sign a recusal statement, Senator Whitehouse filed an amendment to the Blocking Regulatory Interference from Closing Kilns Act of 2018 (BRICK Act) that would have required EPA to disclose the statement. Senator Whitehouse filed his amendment on Friday, September 14, 2018. Two business days later (an hour before a scheduled markup of the BRICK Act by the Environment and Public Works Committee), he finally received a recusal statement signed by Mr. Wehrum on September 17, 2018 and a new "Certification of Ethics Agreement Compliance." Exhibits D and L. Following those disclosures, Senator Whitehouse asked Acting Administrator Andrew Wheeler for additional information about Mr. Wehrum's compliance with the terms of his recusals, but as of the date of this letter he has not yet received a response.[11]

DTE has been represented by Wehrum's and Harlow's former law firm in the DTE litigation since 2010.

In August 2010, EPA, represented by the Department of Justice, filed an enforcement action against DTE, alleging Clean Air Act violations by DTE at its Monroe facility, the largest coal-fired power plant in Michigan. EPA claimed DTE failed to acquire the necessary permit before undertaking significant modifications at the plant and stated that had DTE sought that permit it would have been required to install modern pollution controls and dramatically cut its pollution. The government's case was based on the New Source Review ("NSR") provisions of the Clean Air Act. NSR is designed to require facilities to upgrade their pollution controls when they upgrade their plants. Hunton & Williams represented DTE in this case.

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[9] Eric Lipton, "As Trump Dismantles Clean Air Rules, an Industry Lawyer Delivers for Ex-Clients," *New York Times*, August 19 2018, available at https://www.nytimes.com/2018/08/19/us/politics/epa-coal-emissions-standards-william-wehrum.html

[10] In this letter Mr. Minoli also reaffirmed that Mr. Wehrum had not been granted any authorizations to the impartiality requirements of OGE regulations.

[11] https://www.whitehouse.senate.gov/news/release/whitehouse-calls-out-wehrum-for-flaunting-trump-ethics-pledge

DTE vigorously contested the enforcement case, which made two trips to the 6th Circuit Court of Appeals during the next eight years. During the first appeal in 2013 ("DTE I"), in which EPA prevailed, the circuit court noted that "whether a permit is ultimately required is a high stakes determination."[12] The Court found the modern pollution controls that would be required if EPA prevailed would reduce pollution by over 90%, but would also be very expensive; DTE claimed these upgrades would cost DTE about $1.7 billion.[13]

The second decision by the Sixth Circuit ("DTE II") was issued on January 10, 2017, again siding with EPA.[14] The Court stated that although DTE upgraded its pollution control equipment while the enforcement case against it was pending, "if [DTE] is found to have violated the Act, DTE still could face monetary penalties and be required to mitigate excess emissions caused by the delay in installing pollution controls."[15] Facing potentially millions of dollars of penalties and mitigation, DTE filed a petition for a writ of certiorari ("DTE cert petition") on July 31, 2017, asking the United States Supreme Court to reverse the decision of the Court of Appeals.[16]

The DTE cert petition filed by Hunton & Williams was pending before the Supreme Court in the fall of 2017 when Mr. Harlow and Mr. Wehrum left Hunton & Williams and started working at EPA. After the Supreme Court denied certiorari on December 11, 2017, the case was remanded back to the Eastern District of Michigan, where counsel for Hunton & Williams continue to represent it. Exhibit A. The litigation has been stayed pending settlement negotiations since February 2018. Id.

EPA's December 7, 2017 memo was expressly about the DTE litigation.

The central issue in the DTE enforcement litigation was DTE's failure to seek an NSR permit before undertaking modifications at the Monroe coal-fired power plant, thereby avoiding required upgrades of pollution control equipment. EPA argued that DTE failed to do the appropriate calculations of projected "before" and "after" pollution emissions and that proper calculations show an NSR permit was required. DTE argued that it could do those calculations a different way, resulting in an NSR permit not being required, and that EPA was not allowed to "second guess" DTE's calculations. In May 2017, while Mr. Wehrum and Mr. Harlow were still at Hunton & Williams, the firm began lobbying EPA to change the rule, specifically citing DTE's 6th Circuit litigation. Exhibit MM (at pp. 16-17 and fn. 37).

From 2010 to 2017, EPA took the same position throughout the DTE case, prevailing twice before the Court of Appeals. DTE's cert petition asked the Supreme Court to tell EPA that its long-standing position was wrong. With Wehrum and Harlow now ensconced at EPA, the agency reversed itself, and decided that in fact it now agreed with DTE.

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[12] 711 F.3d 643, 647 (6th Cir. 2013)
[13] Id.
[14] 845 F.3d 735 (6th Cir. 2017)
[15] Id. at 737 fn. 2
[16] "DTE Initiates Last-Ditch Effort in Clean Air Act Case," *RTOInsider*, August 8, 2017. https://www.rtoinsider.com/dte-energy-supreme-court-clean-air-act-47428/

On December 7, 2017, EPA issued a memo under Administrator Scott Pruitt's signature reversing EPA's long-standing position.[17] While the DTE Memo announces a generally applicable change in EPA's enforcement position, it is replete with references to the pending DTE litigation and why EPA's position in that litigation was wrong. It also specifically acknowledges the pendency of DTE's cert petition:

> The matters at issue in the DTE litigation are complex, and the appellate court decisions have left ambiguity regarding the scope of the applicable regulations and what sources must do to comply. Further, the Supreme Court has been asked to review the second appellate court opinion. Considering this uncertainty, the EPA believes it would be helpful to explain to stakeholders how the EPA plans to proceed in implementing and exercising its authority under those regulations pending further review of these issues by the EPA.
>
> Thus, pending further review of these issues by the courts and the EPA, the agency does not intend to pursue new enforcement cases in circumstances such as those presented in the DTE matter.

Exhibit H. In addition to what the DTE Memo itself says, EPA internal discussion of the DTE memo shows widespread understanding across EPA that the memo is about the DTE case. Exhibits P, W, BB, CC and DD. And according to Mr. Wehrum's schedule, the same day the DTE Memo was released he gave a speech at Hunton & Williams.[18] Exhibit NN.

The DTE Memo was timed to forestall a decision by the Supreme Court in the DTE litigation.

EPA's new DTE Memo was released late in the evening of December 7, 2017, the day before the Supreme Court was set to consider DTE's certiorari petition at its December 8, 2017 conference. Internal EPA emails produced in response to a FOIA request reveal that there were two constraints on the timing for the release of the DTE Memo: avoid releasing it before Administrator Scott Pruitt was done testifying before the House Energy and Commerce Committee on December 7, but get it out in advance of the Supreme Court's consideration of the DTE cert petition the morning of December 8, 2017.

- December 4, 2017 email from Mandy Gunasekara to Susan Bodine and Patrick Traylor: "Attached is the latest version of the NSR Memo [DTE Memo] pertaining to the issues at issue in the DTE case. I thought we may have more time, but know now that the cert hearing is planned for Wednesday. This memo needs to go out before." Exhibit M.[19]

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[17] "New US EPA Memorandum Suggests a Hand's-Off Approach to NSR Applicability Determinations," *Fresh Law Blog from the law firm of Squire Patton Boggs*, December 18, 2017, available at https://www.freshlawblog.com/2017/12/18/new-us-epa-memorandum-suggests-a-hands-off-approach-to-nsr-applicability-determinations/, which includes a section titled, "U.S. EPA Adopts DTE's Position."

[18] Right before giving that speech, Wehrum met with EPA ethics officials. Id.

[19] The email erroneously refers to the Supreme Court conference as a "hearing" and also misstates the day of the conference: it was scheduled for Friday (December 8), not Wednesday, of that week.

- December 7, 2017 email from Mandy Gunasekara attaching the final version of the DTE Memo "discussed with the Administrator yesterday" and stating that "he would like to get this out today." Exhibit N.
- December 7, 2017 email from Mandy Gunasekara to Josh Lewis entitled "re: Signed NSR memo": "Hold tight until after the energy and comment [sic] hearing. Please have this ready for posting online once the hearing wraps up." Exhibit O.

The DTE Memo was posted on EPA's web page sometime during the evening on December 7, 2017. Early on December 8th, the day of the Supreme Court conference on the DTE cert petition, Hunton & Williams sent a letter to the Supreme Court attaching the DTE Memo. Exhibit P.[20]

Mr. Wehrum and Mr. Harlow were directly involved in the DTE Memo.

William Wehrum

Mr. Wehrum was involved in the DTE Memo before and after it was issued, contradicting EPA's statement to the media that he was not. The documents show that at minimum he participated in a meeting about the memo on December 5 – two days before the memo was released – and it appears he had additional communications about the memo before its release late on December 7, 2017.

- The DTE Memo "redacted version" was sent to Mr. Wehrum and Mr. Harlow by Mandy Gunasekara on December 5. Exhibit Q.
- An email from Brian Doster (OGC) on December 5, 2017 said that there is a "late-breaking" meeting with Mr. Wehrum that day on NSR. The topics for the meeting are redacted. 19 people are listed on the invite to the meeting, and 3 people from the Office of Enforcement and Compliance Assurance are copied. The date, the invitees, and the context of prior conversations about the memo suggest that this meeting with Wehrum includes discussion of the DTE Memo. Exhibit R. The *New York Times* reported that the DTE Memo was discussed with Mr. Wehrum during a meeting on Dec. 5.[21]
- Susan Bodine copied Mr. Wehrum on her email to Ms. Gunasekara on December 7, 2017, in which she appears to be seeking changes to the DTE Memo before it is released. The content of this email is redacted. Exhibit S.
- Ms. Bodine sent a second email to Ms. Gunasekara on the DTE Memo on December 7, 2017, also copying Mr. Wehrum, in which Ms. Bodine appears to continue to press for changes. Exhibit S.
- Ms. Bodine copied Mr. Wehrum on another email on December 8, 2017 in which she says she talked to "SP" [apparently a reference to Scott Pruitt] about the memo. The content of that email is redacted. Exhibit T.
- Mr. Wehrum was a required participant in a December 11, 2017 conference call about the "NSR Memo." Exhibit U.

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[20] The Supreme Court ultimately denied the DTE cert petition and the EPA enforcement case is still pending, albeit in a situation where EPA has announced that its own position in the litigation is wrong.
[21] Lipton, supra note 9.

The emails from Ms. Bodine suggest that she was not pleased with the contents of the DTE Memo. Copying Mr. Wehrum on these emails further suggests he was substantively involved in its development.

Other evidence shows that Mr. Wehrum and others at EPA knew that he should be recused from involvement in the DTE Memo and in some communications attempted to maintain the fiction that he was abiding by that recusal.

- Email to Mr. Wehrum from Ms. Gunasekara on December 5, 2017, attaching a version of the DTE Memo and stating that "I have redacted the potentially offending language given your recusal issues...." Exhibit Q.
- Email from Ms. Gunasekara to Ryan Jackson (Chief of Staff to the Administrator) attaching the DTE Memo for Mr. Jackson to send out to the Regional Administrators. She advised Jackson to "please cc me (since Bill is recused)." Exhibit V.

Notably, in Mr. Wehrum's September 2018 recusal statement, Ms. Gunasekara is identified as one of two people (along with Josh Lewis) responsible for screening matters related to those listed on his recusal statement, "without [his] knowledge or involvement until after [his] recusal period ends." Exhibit D. The documents suggest that at this time, a month into Mr. Wehrum's tenure at EPA, the process had not been communicated to others and/or was not effectively screening matters from Mr. Wehrum's review.

David Harlow

Mr. Harlow was also involved in the DTE Memo before it was issued. He was sent copies of the draft memo, starting just days after he left Hunton & Williams, where he represented DTE, and started work at EPA.

- Alex Dominguez sent Mr. Harlow the draft DTE Memo on October 6, 2017. Exhibit W.
- Ms. Gunasekara sent Mr. Harlow the DTE memo on November 27, 2017. Exhibit X.
- Ms. Gunasekara sent Mr. Harlow and Mr. Wehrum a "redacted" version of the DTE memo on December 5, 2017. Exhibit Q.
- Mr. Harlow was included on the list of invitees to the December 5, 2017 meeting. Exhibit R.
- Mr. Harlow was a required participant in a December 11, 2017 conference call about the "NSR Memo." Exhibit U.

Mr. Harlow's recusal statement, which is in the form of a memo he submitted to Mr. Wehrum on December 28, 2017, identifies Ms. Gunasekara and Mr. Lewis as those responsible for screening matters from which he should be recused. Exhibit G.

An OIG investigation can readily confirm the facts laid out here demonstrating that Mr. Wehrum and Mr. Harlow violated federal ethics rules.

Publicly available information strongly indicates that Mr. Wehrum and Mr. Harlow were involved in the issuance of EPA's December 7, 2017 DTE memo, despite the fact that the memo was part of a particular matter involving specific parties from which they were required to recuse themselves, and that with respect to Mr. Wehrum, EPA publicly stated he had been recused from

its development. The memo was about the DTE litigation and was timed to affect a critical decision by the Supreme Court in the case.

Ample evidence is available to OIG to further investigate this matter. Further details about email correspondence and meetings in the days leading up to the issuance of the memo would be an obvious source of information. Redacted emails indicate a robust internal debate, possibly pitting the Assistant Administrator for EPA's Office of Enforcement and Compliance Assurance Susan Bodine with Mr. Wehrum's Office of Air and Radiation, including Mr. Wehrum himself right until the memo was issued. A review of the unredacted emails and the documents references in them are likely to shed light on Mr. Wehrum's and Mr. Harlow's substantive involvement in the DTE memo. Their participation can also be confirmed by interviews with other EPA staff, including those addressed in the emails and those who attended the December 5, 2017 NSR meeting.

The reference to a "redacted" version of the DTE Memo sent to Mr. Wehrum and Mr. Harlow on December 5, 2017, suggests a transparent attempt to circumvent Wehrum's and Harlow's recusals, aided by those responsible for policing those very recusals. The redacted version has not been publicly provided, but it is hard to see what could be redacted in a memo to work around the fact that the memo was about the DTE litigation, that the DTE litigation was handled by their former law firm, and that both Wehrum and Harlow knew it.

Conclusion

If an OIG investigation confirms the facts as set forth above, that would mean two senior EPA officials were involved in litigation brought on behalf of EPA where the defendant was represented by their former firm. EPA has released heavily redacted documents after months of requests that make that conclusion almost inevitable. This would be a serious violation of the letter and the intent of federal ethics rules. As of result of the DTE memo and EPA's reversal of its long-standing position, a current client of Hunton & Williams may be in a position to reap a multi-million dollar windfall. EPA OIG is in the best position to look behind the redactions and to interview key staff under penalty of perjury to get to the bottom of this matter.

Timeline

***Bolded** documents were heavily redacted in the FOIA response and appear likely to be relevant in unredacted form.*

9/8/17	Scott Pruitt meets with Mandy Gunasekara, Susan Bodine, Patrick Traylor and others about several enforcement matters, including DTE. Exhibit Y.
9/12/17	"Following up from Friday" Gunasekara sends a few points "regarding the NSR memo I mentioned" to Josh Lewis and Sarah Dunham, two employees in the front office of OAR. **The referenced document "Emissions Projection Rule outline DRAFT" was not produced in the FOIA response**. Exhibit Z.
9/22/17	Outline sent to Susan Bodine by Gunasekara. Exhibit AA.
10/3/17	Internal OAR description of "ongoing issues" lists "NSR DTE memo – deliver draft memo on DTE by end of Sept/early Oct." Exhibit BB.
10/4/17	**Brian Doster (career attorney in OGC) sends his supervisors (Justin Schwab, Lorie Schmidt, and Gautam Srinivasan) an email "re: Memos related to DTE NSR case," attaching two draft "memos regarding the issues in the DTE NSR litigation:" a draft of the DTE Memo, plus an OGC "companion memo" identifying some points to consider in evaluating the options, and the outline prepared by Gunasekara on 9/12/17. The email is heavily redacted, and the referenced documents were not produced in the FOIA response.** Exhibit CC.
10/5/17	**Josh Lewis sends the draft DTE Memo to Gunasekara, cc Alex Dominguez and Sarah Dunham, along with an OGC "analysis of options for addressing NSR issues raised by DTE." The email is heavily redacted but mentions that the draft was reviewed by OGC staff attorneys but that "thus far OECA and regional offices have not been engaged." The referenced attachments were not produced in the FOIA response.** Exhibit DD.
10/6/17	Alex Dominguez forwards both memos to David Harlow. **The referenced memos were not produced in the FOIA response.** Exhibit W.
10/25/17	Patrick Traylor asks Gunasekara for a copy of the draft DTE Memo indicating that he has not yet seen it; she sends it to him, copying Susan Bodine. Exhibit EE.
11/17/17	Meeting with Scott Pruitt on New Source Review with Bill Wehrum, Mandy Gunasekara, Ryan Jackson, Samantha Dravis and Lincoln Ferguson. Exhibit FF.
11/27/17	Gunasekara sends the draft DTE Memo to Harlow with the note "first one attached," implying that there had been a conversation between them on the subject before she sent the memo. Exhibit X. **The referenced memo was not produced with the FOIA response.**

11/30/17 Gunasekara represents EPA at Hunton & Williams on a panel discussion titled "Which Way Does the Wind Blow: Priorities and Developments in Air Quality and Climate Change". Exhibit GG.

12/4/17 Gunasekara sends "the latest version" of the "NSR memo pertaining to the issues at issue in the DTE case" to Susan Bodine and Patrick Traylor, cc to Ryan Jackson, Samantha Dravis and Justin Schwab. She specifically notes that "I thought we may have more time, but know now that the cert hearing is planned for Wednesday. This memo needs to go out before." Exhibit M. In other versions of this same email included in the FOIA response, the reference to having to get the memo out before the Supreme Court conference is redacted as "deliberative." **The referenced attached memo was not produced with the FOIA response.**

Patrick Traylor and Susan Bodine request a meeting that day and a scheduler is sent by Traylor to Gunasekara, Susan Bodine, and Justin Schwab for a meeting at 6 pm. Exhibit HH.

12/5/17 Gunasekara sends the DTE Memo to Lincoln Ferguson for "SP review." Exhibit II.

Gunasekara sends Wehrum and Harlow a "redacted" version of the DTE Memo for "tomorrow's" meeting, cc Alex Dominguez and Justin Schwab. She says, "I have redacted the potentially offending language given your recusal issues." **The redacted memo was not produced in the FOIA response.** Exhibit Q.

Brian Doster sends an email to others in OGC re: Meeting today with Wehrum on NSR – May address [redacted], informing them of a "late breaking" meeting that same day with Bill Wehrum. There are multiple redactions in the email, but it appears that the DTE Memo is one of the topics expected to be included in the discussion. Many people are invited to the meeting scheduled by Bill Wehrum, including Mandy Gunasekara, David Harlow, Susan Bodine, Patrick Traylor and Josh Lewis, cc Phillip Brooks, Apple Chapman, Rosemarie Kelley and Justin Schwab. Exhibit R.

12/6/17 OGC sends edits to the DTE Memo to Gunasekara at 10:24 pm. **The email is redacted and the referenced document containing the suggested edits was not produced in the FOIA response.** Exhibit JJ.

12/7/17 Gunasekara sends the "final" DTE memo to unnamed people at 10:15 am, saying she "discussed it with the Administrator yesterday. He would like to get this out today." Exhibit N. **The referenced attached memo was not produced in the FOIA response.**

Gunasekara sends the "final" memo to Susan Bodine at 12:06. The contents of Gunasekara's email are redacted. Susan Bodine immediately responds (with label "Importance: High") to Gunasekara, copying Bill Wehrum, Justin Schwab and Patrick Traylor. The entire contents of Bodine's email

are redacted. Bodine sends another email to the same people at 5:24 saying "at minimum the first two of the three sentences…" (remainder redacted). Exhibit S.

Bill Wehrum meets with OGE Ethics officials at 2:00. Exhibit NN.

At 3:00, Bill Wehrum gives a speech at his former law firm Hunton & Williams on "rules affecting electric generating companies and other stationary sources. Exhibit NN.

Justin Schwab sends Gunasekara an email at 4:52 pm "expanding on some of the comments on the draft" in an email with the subject "NSR memo – general OGC thoughts on legal risk" copying Susan Bodine and Patrick Traylor. The entire 2-page email is redacted. Exhibit KK.

Liz Bowman (from the press office) emails Gunasekara and Ryan Jackson a draft desk statement titled "Dec. 7 DTE/NSR Memo." **The draft desk statement is redacted.** Exhibit LL.

The final memo is auto penned and forwarded to Gunasekara and Ryan Jackson. At 5:36, Gunasekara directs Josh Lewis to "hold tight until after the energy and comment [sic] hearing. Please have this ready for posting online once the hearing wraps up." Exhibit O.

At 6:09 Josh Lewis replies "Got it, and will do." Exhibit O.

At 10:57 pm Gunasekara sends the memo to Ryan Jackson and says that when he sends it to the Regional Administrators he should "cc me (since Bill is recused)." Exhibit V.

12/8/17 Hunton & Williams sends the DTE Memo to the Supreme Court in advance of the Court's conference about the DTE cert petition. Exhibit P.

Susan Bodine emails Wehrum and Gunasekara, cc Patrick Traylor "re: NSR memo" that she "spoke to SP about…." The remainder of the email is redacted, except for "he suggested…" and "my suggestion remains…" Exhibit T.

<u>People with relevant information</u>

A review of the publicly available documents suggests that the following EPA employees may have information related to this matter:

Office of Air and Radiation

Bill Wehrum, David Harlow, Mandy Gunasekara, Alex Dominguez, Josh Lewis and Sarah Dunham

Office of General Counsel

Justin Schwab, Lorie Schmidt, Gautam Srinivasan and Brian Doster

OGC ethics attorneys, re whether they were consulted about the need for Wehrum and Harlow to recuse from the DTE Memo and if so, were they provided the necessary facts that are outlined in this request

Office of Enforcement and Compliance Assurance

Susan Bodine, Patrick Traylor, Rosemarie Kelley, Phillip Brooks and Apple Chapman

EXHIBIT A

This case was appealed to
06th Circuit: 11-2328, 14-2274, 14-2275

US District Court Civil Docket

U.S. District - Michigan Eastern
(Detroit)

2:10cv13101

United States v. Dte Energy et al

This case was retrieved from the court on Tuesday, January 08, 2019

Date Filed: **08/05/2010**
Assigned To: **District Judge Bernard A. Friedman**
Referred To: **Magistrate Judge R. Steven Whalen**
Nature of suit: **Environmental (893)**
Cause: **Clean Air Act**
Lead Docket: **None**
Other Docket: **U.S. Court of Appeals - Sixth Circuit, 11-02328**
U.S. Court of Appeals - Sixth Circuit, 14-02275/14-02274
Jurisdiction: **U.S. Government Plaintiff**

Class Code: **OPEN**
Closed:
Statute: **42:7413(b)**
Jury Demand: **None**
Demand Amount: **$0**
NOS Description: **Environmental**

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Date	#	Proceeding Text	Source

08/05/2010	1	COMPLAINT filed by United States against DTE Energy, Detroit Edison Company. No summons requested. County of 1st Plaintiff: USA - County Where Action Arose: Monroe - County of 1st Defendant: Wayne. [Previously dismissed case: No] [Possible companion case (s): None] (Benson, Thomas) (Entered: 08/05/2010)
08/05/2010		A United States Magistrate Judge of this Court is available to conduct all proceedings in this civil action in accordance with 28 U.S.C. 636c and FRCP 73. The Notice, Consent, and Reference of a Civil Action to a Magistrate Judge form is available for download at http://www.mied.uscourts.gov (DPer) (Entered: 08/05/2010)
08/06/2010	2	Ex Parte MOTION for Leave to File Excess Pages by United States. (Christensen, Ellen) (Entered: 08/06/2010)
08/06/2010	3	Ex Parte MOTION for Leave to File An Exhibit In The Traditional Manner by United States. (Christensen, Ellen) (Entered: 08/06/2010)
08/06/2010	4	Ex Parte MOTION for Leave to File An Exhibit In The Traditional Manner by United States. (Christensen, Ellen) (Entered: 08/06/2010)
08/06/2010	5	ORDER granting 3 Motion for Leave to File in traditional manner. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 08/06/2010)
08/06/2010	6	ORDER granting 4 Motion for Leave to File sealed matter. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 08/06/2010)
08/06/2010	7	ORDER granting 2 Motion for Leave to File Excess Pages. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 08/06/2010)
08/06/2010	8	MOTION for Preliminary Injunction by United States. (Attachments: # 1 Index of Exhibits, # 2 Exhibit 1 - Chinkin Declaration, # 3 Exhibit 2 - Chatfield Declaration, # 4 Exhibit 2A - Inspection Notes, # 5 Exhibit 2B - December 2009 DTE Press Release, # 6 Exhibit 2C - March 2010 DTE Letter, # 7 Exhibit 2D - April 2010 Newspaper Article, # 8 Exhibit 2E - June 2010 Notice of Violation, # 9 Exhibit 2G - June 2010 DTE Letter, # 10 Exhibit 2H - Fessler Testimony, # 11 Exhibit 2I - May 2010 EPA Letter, # 12 Exhibit 2J - June 2010 EPA Letter, # 13 Exhibit 3 - Sahu Declaration, # 14 Exhibit 3A - November 2009 DTE Press Release, # 15 Exhibit 4 - Detroit Edison Applicability Determination, # 16 Exhibit 5 - Koppe Declaration, # 17 Exhibit 6 - Hekking Declaration, # 18 Exhibit 7 - Clay Memo, # 19 Exhibit 8 - Biewald Declaration, # 20 Exhibit 9 - Cinergy Jury Instructions, # 21 Exhibit 10 - Adams Declaration, # 22 Exhibit 11 - Kahal Declaration, # 23 Exhibit 12 - Schwartz Declaration) (Benson, Thomas) (Entered: 08/06/2010)
08/10/2010	9	NOTICE by United States re 8 MOTION for Preliminary Injunction OF FILING EXHIBIT IN THE TRADITIONAL MANNER - APPENDIX F, EXHIBIT1 (CD-ROM) (Christensen, Ellen) (Entered: 08/10/2010)
08/10/2010	10	NOTICE by United States re 8 MOTION for Preliminary Injunction OF FILING EXHIBIT IN THE TRADITIONAL MANNER - EXHIBIT 2-F (SEALED EXCERPTS OF) (Christensen, Ellen) (Entered: 08/10/2010)
08/17/2010	11	NOTICE of Appearance by Michael J. Solo on behalf of All Defendants. (Solo, Michael) (Entered: 08/17/2010)
08/18/2010	12	NOTICE of hearing on 8 MOTION for Preliminary Injunction. Motion Hearing set for Wednesday, 10/13/2010 02:00 PM before District Judge Bernard A Friedman. (CMul) (Entered: 08/18/2010)
08/18/2010	13	NOTICE TO APPEAR: Case Management Status Conference set for Wednesday, 8/25/2010 11:00 AM before District Judge Bernard A Friedman (CMul) (Entered: 08/18/2010)
08/18/2010	14	NOTICE of Appearance by Matthew J. Lund on behalf of DTE Energy, Detroit Edison Company. (Lund, Matthew) (Entered: 08/18/2010)
08/18/2010	15	MOTION to Strike 8 MOTION for Preliminary Injunction by DTE Energy, Detroit Edison Company. (Attachments: # 1 Index of Exhibits, # 2 Exhibit A-Declaration of Skiles W. Boyd, # 3 Exhibit B-March 12, 2010 letter, # 4 Exhibit C-May 28, 2010 letter, # 5 Exhibit D-June 1, 2010 letter, # 6 Exhibit E-June 2, 2010 letter, # 7 Exhibit F-June 3, 2010 letter, # 8 Exhibit G-June 4, 2010 NOV, # 9 Exhibit H-June 8, 2010 letter, # 10 Exhibit I-Amicus Brief, # 11 Exhibit J-February 23, 2004 Order, # 12 Exhibit K-ABA Transcript, # 13 Exhibit L-EPA Response to Request for Admissions, # 14 Exhibit M-August 4, 2003 EPA Opposition, # 15 Exhibit N-October 4, 2004 Reply, # 16 Exhibit O-EPA Motion to Vacate dated October 4, 2007, # 17 Exhibit P-EPA Reply dated September 5, 2003, # 18 Exhibit Q-Joint Status Report, # 19 Exhibit R-Joint Status Report) (Lund, Matthew) (Entered: 08/18/2010)
08/18/2010	16	MOTION to Stay re 8 MOTION for Preliminary Injunction or, in the Alternative, for Extension of Time to Respond to Plaintiff's Motion for Preliminary Injunction and for Leave to File a 36-Page Response Brief by DTE Energy, Detroit Edison Company. (Attachments: # 1 Exhibit A-Plaintiffs' Supplemental Statement Regarding Joint Rule 26(f) Report and Proposed Scheduling and Case Management Order) (Lund, Matthew) (Entered: 08/18/2010)
08/18/2010		Set Hearings: Telephone Conference set for 10/13/2010 01:00 PM before District Judge Bernard A Friedman (CMul) (Entered: 10/06/2010)

Released via FOIA EPA-2019-008216

08/19/2010	17	NOTICE of Appearance by Makram B Jaber - NOT SWORN on behalf of DTE Energy, Detroit Edison Company. (Jaber - NOT SWORN, Makram) (Entered: 08/19/2010)
08/19/2010	18	NOTICE of Appearance by James W Rubin - NOT SWORN on behalf of DTE Energy, Detroit Edison Company. (Rubin - NOT SWORN, James) (Entered: 08/19/2010)
08/20/2010	19	NOTICE of Appearance by Mark B Bierbower - NOT SWORN on behalf of DTE Energy, Detroit Edison Company. (Bierbower - NOT SWORN, Mark) (Entered: 08/20/2010)
08/20/2010	20	STATEMENT of DISCLOSURE of CORPORATE AFFILIATIONS and FINANCIAL INTEREST by DTE Energy (Lund, Matthew) (Entered: 08/20/2010)
08/20/2010	21	STATEMENT of DISCLOSURE of CORPORATE AFFILIATIONS and FINANCIAL INTEREST by Detroit Edison Company identifying Corporate Parent DTE Energy Company for Detroit Edison Company. (Lund, Matthew) (Entered: 08/20/2010)
08/23/2010	22	NOTICE of Appearance by F. William Brownell - NOT SWORN on behalf of DTE Energy, Detroit Edison Company. (Brownell - NOT SWORN, F.) (Entered: 08/23/2010)
08/23/2010	23	RESPONSE to 16 MOTION to Stay re 8 MOTION for Preliminary Injunction or, in the Alternative, for Extension of Time to Respond to Plaintiff's Motion for Preliminary Injunction and for Leave to File a 36-Page Response Brief MOTION to Stay re 8 MOTION for Preliminary Injunction or, in the Alternative, for Extension of Time to Respond to Plaintiff's Motion for Preliminary Injunction and for Leave to File a 36-Page Response Brief, 15 MOTION to Strike 8 MOTION for Preliminary Injunction MOTION to Strike 8 MOTION for Preliminary Injunction MOTION to Strike 8 MOTION for Preliminary Injunction MOTION to Strike 8 MOTION for Preliminary Injunction filed by United States. (Attachments: # 1 Index of Exhibits, # 2 Exhibit Ex. A - Declaration of Thomas A. Benson, # 3 Exhibit Ex. B - July 1, 2010 EPA Letter to DTE) (Benson, Thomas) (Entered: 08/23/2010)
08/24/2010	24	MOTION to Amend/Correct 8 MOTION for Preliminary Injunction by Filing Corrected Exhibit 12 (Unopposed Motion) by United States. (Attachments: # 1 Exhibit Corrected Exhibit 12 to Preliminary Injunction Motion) (Benson, Thomas) (Entered: 08/24/2010)
08/24/2010	25	NOTICE of Appearance by Brent A. Rosser - NOT SWORN on behalf of DTE Energy, Detroit Edison Company. (Rosser - NOT SWORN, Brent) (Entered: 08/24/2010)
08/25/2010	26	AMENDED NOTICE of hearing on 8 MOTION for Preliminary Injunction. Responses due by 11/4/2010 Replies due by 11/18/2010 Motion Hearing set for Wednesday, 1/19/2011 09:00 AM before District Judge Bernard A Friedman. (CMul) (Entered: 08/25/2010)
08/25/2010	27	ORDER granting 24 Unopposed Motion to Amend/Correct exhibit. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 08/25/2010)
08/25/2010		Minute Entry - Status/Scheduling Conference held on 8/25/2010 before District Judge Bernard A Friedman. (CMul) (Entered: 08/25/2010)
08/30/2010	28	(WRONG IMAGE) ORDER granting 16 Motion to Stay or in the alternative extension of time to file a response. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 08/30/2010)
08/30/2010	29	ORDER granting 16 MOTION to Stay or, in the Alternative, for Extension of Time to Respond to Plaintiff's Motion for Preliminary Injunction filed by Detroit Edison Company, DTE Energy. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 08/30/2010)
08/30/2010	30	NOTICE of Correction re 28 Order on Motion to Stay. (CMul) (Entered: 08/30/2010)
08/30/2010	31	WAIVER OF SERVICE Returned Executed. DTE Energy waiver sent on 8/5/2010, answer due 10/4/2010. (Benson, Thomas) (Entered: 08/30/2010)
08/30/2010	32	WAIVER OF SERVICE Returned Executed. Detroit Edison Company waiver sent on 8/5/2010, answer due 10/4/2010. (Benson, Thomas) (Entered: 08/30/2010)
09/07/2010	33	REPLY to Response re 15 MOTION to Strike 8 MOTION for Preliminary Injunction MOTION to Strike 8 MOTION for Preliminary Injunction MOTION to Strike 8 MOTION for Preliminary Injunction MOTION to Strike 8 MOTION for Preliminary Injunction filed by DTE Energy, Detroit Edison Company. (Attachments: # 1 Exhibit Verdict Form, U.S. v. Cinergy (S.D. Ind. May 22, 2008)) (Brownell, F.) (Entered: 09/07/2010)
09/28/2010	34	Joint MOTION to Intervene as Plaintiffs by Sierra Club, Natural Resources Defense Council. (Issod, Andrea) (Entered: 09/28/2010)
09/28/2010	35	INTERVENOR COMPLAINT filed by Natural Resources Defense Council, Sierra Club against DTE Energy, Detroit Edison Company. (Issod, Andrea) Modified on 9/29/2010 (DWor). [PROPOSED INTERVENOR COMPLAINT] (Entered: 09/28/2010)
09/29/2010	36	ATTORNEY SUBSTITUTION for Natural Resources Defense Council, Sierra Club: Holly D. Bressett - NOT SWORN added. Attorney Andrea S. Issod terminated. (Bressett - NOT SWORN, Holly) (Entered: 09/29/2010)
10/04/2010	37	ANSWER to Complaint by DTE Energy, Detroit Edison Company. (Brownell, F.) (Entered: 10/04/2010)
10/05/2010	38	NOTICE of hearing on 34 Joint MOTION to Intervene as Plaintiffs. Motion Hearing set for 11/10/2010 02:00 PM before District Judge Bernard A Friedman. (CMul) (Entered:

		10/05/2010)
10/06/2010	39	STIPULATED PROTECTIVE ORDER Signed by District Judge Bernard A Friedman. (CMul) (Entered: 10/06/2010)
10/08/2010	40	DISCOVERY plan jointly filed pursuant to Federal Rules of Civil Procedure 26(f) (Benson, Thomas) (Entered: 10/08/2010)
10/13/2010		Minute Entry - Status Conference held on 10/13/2010 before District Judge Bernard A Friedman. (Court Reporter Joan Morgan) (CMul) (Entered: 10/14/2010)
10/14/2010	41	NOTICE TO APPEAR: Status Conference set for Tuesday, 11/30/2010 11:00 AM before District Judge Bernard A Friedman Regarding facilitation and possible hearing dates. (CMul) (Entered: 10/14/2010)
10/22/2010	42	STIPULATION Regarding Claims of Prospective Intervenors by DTE Energy, Detroit Edison Company, Natural Resources Defense Council, Sierra Club (Lund, Matthew) (Entered: 10/22/2010)
10/27/2010	43	DISCOVERY plan jointly filed pursuant to Federal Rules of Civil Procedure 26(f) (Bierbower, Mark) (Entered: 10/27/2010)
10/27/2010	44	DISCOVERY plan jointly filed pursuant to Federal Rules of Civil Procedure 26(f) (Bierbower, Mark) (Entered: 10/27/2010)
11/04/2010	45	Ex Parte MOTION to Seal Exhibits and File in the Traditional Manner by All Defendants. (Rubin - NOT SWORN, James) (Entered: 11/04/2010)
11/04/2010	46	RESPONSE to 8 MOTION for Preliminary Injunction Opposition filed by All Defendants. (Attachments: # 1 Index of Exhibits Index of Exhibits, # 2 Exhibit Exhibit 1: Wolff Declaration, # 3 Exhibit Exhibit 2: Campbell Declaration, # 4 Exhibit Exhibit 3: Boyd Declaration, # 5 Exhibit Exhibit 4: Rogers Declaration, # 6 Exhibit Exhibit 5: Letter from Brooks to Solo 5/28/10, # 7 Exhibit Exhibit 6: Letter from Brooks to Solo 6/2/10, # 8 Exhibit Exhibit 7: Letter from Solo to Palermo 6/3/10, # 9 Exhibit Exhibit 8: EPA NOV, # 10 Exhibit Exhibit 9: Golden Declaration, # 11 Exhibit Exhibit 10: King Declaration, # 12 Exhibit Exhibit 11: Koppe Deposition Excerpt 11/30/05, # 13 Exhibit Exhibit 12: Verdict Form, # 14 Exhibit Exhibit 13: Moolgavkar Declaration, # 15 Exhibit Exhibit 14: Hayes Declaration, # 16 Exhibit Exhibit 15: Morris Declaration) (Brownell, F.) (Entered: 11/04/2010)
11/04/2010	47	NOTICE by All Defendants re 46 Response to Motion,,, of Filing Exhibits in the Traditional Manner, Appendix B to Attachment A to Exhibit 9 (Golden), Appendix C to Exhibit 10 (King) (Brownell, F.) (Entered: 11/04/2010)
11/05/2010	48	EXHIBIT S A & B re 45 Ex Parte MOTION to Seal Exhibits and File in the Traditional Manner by All Defendants (Rubin - NOT SWORN, James) (Entered: 11/05/2010)
11/09/2010	49	TEXT ORDER granting 45 Motion to Seal. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 11/09/2010)
11/09/2010	50	ORDER re 48 Exhibit filed by Detroit Edison Company, DTE Energy. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 11/09/2010)
11/12/2010	51	MOTION for Leave to File Supplemental Declaration (Errata) and to File Exhibit Under Seal and in the Traditional Manner by All Defendants. (Attachments: # 1 Exhibit Supplement to Exhibit 10 to Opposition to Plaintiff's Motion for Preliminary Injunction) (Brownell, F.) (Entered: 11/12/2010)
11/15/2010	52	Sealed Matter (KCas) (Entered: 11/16/2010)
11/18/2010	53	ORDER granting 51 Motion for Leave to File. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 11/18/2010)
11/18/2010	54	Ex Parte MOTION for Leave to File Excess Pages by United States. (Christensen, Ellen) (Entered: 11/18/2010)
11/18/2010	55	MOTION for Leave to File Exhibit Under Seal and in the Traditional Manner by United States. (Christensen, Ellen) (Entered: 11/18/2010)
11/18/2010	56	MOTION for Leave to File Exhibit Under Seal and in the Traditional Manner by United States. (Christensen, Ellen) (Entered: 11/18/2010)
11/18/2010	57	RESPONSE to 54 Ex Parte MOTION for Leave to File Excess Pages (Response in Opposition) filed by All Defendants. (Brownell, F.) (Entered: 11/18/2010)
11/18/2010	58	REPLY to Response re 8 MOTION for Preliminary Injunction filed by United States. (Attachments: # 1 Index of Exhibits, # 2 Appendix B: Sierra Club Slip Op, # 3 Exhibit 13: Chatfield Declaration, # 4 Exhibit 13-A: Monroe Permit Application, # 5 Exhibit 13-B: Michigan NSR Program Review, # 6 Exhibit 13-C: Monroe Permit, # 7 Exhibit 13-D: DTE Presentation (Part 1 of 2), # 8 Document Continuation 13-D: DTE Presentation (Part 2 of 2), # 9 Exhibit 14: Cinergy Special Verdict Form, # 10 Exhibit 15: Koppe Declaration, # 11 Exhibit 16: Biewald Declaration, # 12 Exhibit 17: Adams Declaration, # 13 Exhibit 18: Kahal Declaration, # 14 Exhibit 19: Sahu Declaration, # 15 Exhibit 20: Schwartz Declaration, # 16 Exhibit 21: Chinkin Declaration) (Benson, Thomas) (Entered: 11/18/2010)

11/18/2010	59	MOTION for Leave to File Exhibits under Seal and to Withdraw Prior Motions by United States. (Benson, Thomas) (Entered: 11/18/2010)
11/18/2010	60	SEALED EXHIBIT 13-E Economizer Presentation re 58 Reply to Response to Motion,,, 59 MOTION for Leave to File Exhibits under Seal and to Withdraw Prior Motions by United States. (Benson, Thomas) (Entered: 11/18/2010)
11/18/2010	61	SEALED EXHIBIT 13-F Reheater Presentation re 58 Reply to Response to Motion,,, 59 MOTION for Leave to File Exhibits under Seal and to Withdraw Prior Motions by United States. (Benson, Thomas) (Entered: 11/18/2010)
11/22/2010	62	ORDER granting 54 Motion for Leave to File Excess Pages. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 11/22/2010)
11/22/2010	63	ORDER granting 59 Motion for Leave to File under seal and withdraw motions. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 11/22/2010)
11/23/2010	64	ORDER granting 34 Joint MOTION to Intervene as Plaintiffs filed by Natural Resources Defense Council and Sierra Club. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 11/23/2010)
11/23/2010	65	NOTICE of Appearance by Justin Savage on behalf of United States. (Savage, Justin) (Entered: 11/23/2010)
11/24/2010	66	MOTION for Protective Order and Brief in Support by All Defendants. (Attachments: # 1 Index of Exhibits Index of Exhibits, # 2 Exhibit Exhibit A: E-mail from Benson to Bierbower 8/17/10, # 3 Exhibit Exhibit B: EPA's First Set of Discovery, # 4 Exhibit Exhibit C: Letter from Benson to Bierbower 11/5/10, # 5 Exhibit Exhibit D: Detroit Edison's Objections & Responses to EPA's First Set of Discovery, # 6 Exhibit Exhibit E: Letter from Benson to Bierbower 11/15/10, # 7 Exhibit Exhibit F: Subpoenas and Deposition Notices, # 8 Exhibit Exhibit G: Detroit Edison's First Set of Interrogatories and Requests for Production) (Brownell, F.) (Entered: 11/24/2010)
11/30/2010	67	NOTICE of Appearance by Kristin M Furrie on behalf of United States. (Furrie, Kristin) (Entered: 11/30/2010)
11/30/2010		Minute Entry - Telephone Conference held on 11/30/2010, Set Hearings:(Telephone Conference set for 1/10/2011 02:00 PM before District Judge Bernard A Friedman) before District Judge Bernard A Friedman. (Court Reporter Carol Sapala) (CMul) (Entered: 11/30/2010)
12/02/2010	68	RESPONSE to 66 MOTION for Protective Order and Brief in Support filed by United States. (Furrie, Kristin) (Entered: 12/02/2010)
12/10/2010	69	REPLY to Response re 66 MOTION for Protective Order and Brief in Support filed by All Defendants. (Attachments: # 1 Exhibit Exhibit A: Excerpts from Plaintiffs' Proposed Conclusions of Law (Remedy Phase), filed in U.S. v. Cinergy (S.D. Ind.)) (Brownell, F.) (Entered: 12/10/2010)
12/27/2010	70	ORDER granting 66 Defendants' Motion for Protective Order. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 12/27/2010)
01/06/2011	71	STIPULATION re 39 Protective Order by Natural Resources Defense Council, Sierra Club (Bressett - NOT SWORN, Holly) (Entered: 01/06/2011)
01/10/2011	72	ERRATA Sheet re: 58 Reply to Response to Motion,,, filed by United States. by United States (Furrie, Kristin) (Entered: 01/10/2011)
01/10/2011		Minute Entry - Status Telephone Conference held on 1/10/2011 before District Judge Bernard A Friedman. (FMos) (Entered: 01/11/2011)
01/11/2011	73	ORDER. Signed by District Judge Bernard A Friedman. (FMos) (Entered: 01/11/2011)
01/12/2011	74	NOTICE of Appearance by Lucinda M. Langworthy - NOT SWORN on behalf of DTE Energy, Detroit Edison Company. (Langworthy - NOT SWORN, Lucinda) (Entered: 01/12/2011)
01/14/2011	75	ORDER allowing Defendant's to bring two laptops into the Courthouse. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 01/14/2011)
01/19/2011		Minute Entry - Motion Hearing held on 1/19/2011 re 8 MOTION for Preliminary Injunction filed by United States before District Judge Bernard A Friedman. Disposition: held in abeyance pending expedited trial(Court Reporter Joan Morgan) (CMul) (Entered: 01/27/2011)
01/19/2011		Minute Entry - Scheduling Conference held on 1/19/2011 before District Judge Bernard A Friedman. (CMul) (Entered: 01/27/2011)
01/27/2011	76	SCHEDULING ORDER: Final Pretrial Tele-Conference set for 5/3/2011 01:00 PM to be initiated by Defendants; Jury Selection, if necessary set for 5/10/2011 at 9:00 a.m. and Jury/Bench Trial set for 5/11/2011 09:00 AM before District Judge Bernard A Friedman Signed by District Judge Bernard A Friedman. (Refer to image for additional dates) (CMul) (Entered: 01/27/2011)
01/28/2011	77	NOTICE of Appearance by James A Lofton on behalf of United States. (Lofton, James) (Entered: 01/28/2011)

01/28/2011	78	ORDER denying 8 Motion for Preliminary Injunction. Signed by District Judge Bernard A Friedman. (CMul) (Entered: 01/28/2011)
02/17/2011		Set Deadlines/Hearings: Telephone Conference set for 2/22/2011 at 1:00 PM before District Judge Bernard A Friedman (FMos) (Entered: 02/17/2011)
02/22/2011		Minute Entry - Telephone Conference held on 2/22/2011 before District Judge Bernard A Friedman. Disposition: held(Court Reporter: Joan Morgan) (DOpa) (Entered: 02/22/2011)
03/01/2011	79	SCHEDULING ORDER: Substantive Motion Cut-off set for 6/1/2011 Final Pretrial Conference set for 9/6/2011 01:00 PM before District Judge Bernard A. Friedman Bench Trial set for 9/12/2011 09:00 AM before District Judge Bernard A. Friedman Signed by District Judge Bernard A. Friedman. (Refer to image for additional dates) (CMul) (Entered: 03/01/2011)
03/21/2011	80	Joint MOTION to Amend/Correct Scheduling Order by All Parties. (Rosser, Brent) (Entered: 03/21/2011)
03/23/2011	81	MOTION for Protective Order by DTE Energy, Detroit Edison Company. (Attachments: # 1 Index of Exhibits, # 2 Exhibit 1 - Notice of Violation, # 3 Exhibit 2 - Monroe Power Plant Unit #2 Periodic Outage Preparation Status Report, # 4 Exhibit 3 - Excerpts of January 19, 2011 Hearing Transcript, # 5 Exhibit 4(a) - Plaintiff's First Set of Interrogatories, # 6 Exhibit 4(b) - Plaintiff's First Set of Document Requests, # 7 Exhibit 5 - Letter from Thomas Benson, # 8 Exhibit 6 - Letter from Brent Rosser, # 9 Exhibit 7 - EKPC Order, # 10 Exhibit 8 - Notice of Intent (TVA), # 11 Exhibit 9 - Notice of Violation (TVA), # 12 Exhibit 10 - Cinergy Order, # 13 Exhibit 11 - Glossary of Acronyms Referenced in Brief) (Brownell, F.) (Entered: 03/23/2011)
03/23/2011	82	AMENDED SCHEDULING ORDER re 80 Joint Motion: Final Pretrial Conference set for 9/6/2011 01:00 PM before District Judge Bernard A. Friedman. Bench Trial set for 9/12/2011 09:00 AM before District Judge Bernard A. Friedman. Signed by District Judge Bernard A. Friedman. (Refer to image for additional dates) (DOpa) (Entered: 03/24/2011)
03/30/2011	83	NOTICE of hearing on 81 MOTION for Protective Order. Motion Hearing set for Wednesday, 4/20/2011 02:00 PM before District Judge Bernard A. Friedman. Parties may arrange to participate by telephone. (CMul) (Entered: 03/30/2011)
04/06/2011	84	NOTICE of Appearance by Harry M. Johnson - NOT SWORN on behalf of DTE Energy, Detroit Edison Company. (Johnson - NOT SWORN, Harry) (Entered: 04/06/2011)
04/06/2011	85	RESPONSE to 81 MOTION for Protective Order filed by United States. (Attachments: # 1 Index of Exhibits, # 2 Ex. 1, June 1, 2010 Solo Letter, # 3 Ex. 2, June 15, 2010 Solo Letter, # 4 Ex. 3, February 15, 1989 Clay Letter, # 5 Ex. 4, November 6, 1987 Howekamp Letter, # 6 Ex. 5, Preliminary Injunction Hearing Transcript Excerpts, # 7 Ex. 6, DTE Preliminary Injunction Hearing Demonstrative, # 8 Ex. 7, January 31, 2011 Bierbower Letter) (Benson, Thomas) (Entered: 04/06/2011)
04/07/2011	86	ATTORNEY APPEARANCE: George P. Sibley - NOT SWORN appearing on behalf of DTE Energy, Detroit Edison Company (Sibley - NOT SWORN, George) (Entered: 04/07/2011)
04/08/2011	87	MOTION to Compel Plaintiff's Compliance with Rules 33 and 34 of the Federal Rules of Civil Procedure by DTE Energy, Detroit Edison Company. (Attachments: # 1 Index of Exhibits Index of Exhibits, # 2 Exhibit Ex. A: U.S.' First Set of Document Requests, # 3 Exhibit Ex. B: Hearing Transcript Excerpts 1/19/01, # 4 Exhibit Ex. C: Defendants' First Set of Interrogatories, # 5 Exhibit Ex. D: Defendants' First Set of Requests for Production, # 6 Exhibit Ex. E: Furrie Letter to Bierbower 2/10/11, # 7 Exhibit Ex. F: Smith Letter to Furrie 2/23/11, # 8 Exhibit Ex. G: U.S.' Responses and Objections to Defendants' First Set of Requests for Production, # 9 Exhibit Ex. H: U.S.' Responses and Objections to Defendants' First Set of Interrogatories, # 10 Exhibit Ex. I: First Production Inventory, # 11 Exhibit Ex. J: Second Production Inventory, # 12 Exhibit Ex. K: Walinskas Letter to Smith 3/14/11, # 13 Exhibit Ex. L: Rosser Letter to Benson 3/18/11, # 14 Exhibit Ex. M: Benson Letter to Rosser 3/24/11, # 15 Exhibit Ex. N: Furrie Letter to Smith 2/28/11, # 16 Exhibit Ex. O: Rosser Letter to Benson 3/31/11, # 17 Exhibit Ex. P: Furrie Letter to Rosser 4/4/11, # 18 Exhibit Ex. Q: Duke Energy Order 12/13/01, # 19 Exhibit Ex. R: Duke Energy Order 2/5/02, # 20 Exhibit Ex. S: Illinois Power Order 10/23/01, # 21 Exhibit Ex. T: U.S.' First Set of Interrogatories, # 22 Exhibit Ex. U: Furrie Email to Rosser et al. 4/6/11, # 23 Exhibit Ex. V: Illinois Power Order 1/10/01) (Rosser, Brent) (Entered: 04/08/2011)
04/08/2011	88	MOTION to Expedite Briefing and Consideration of Motion to Compel Plaintiffs' Compliance with Rules 33 and 34 of the Federal Rules of Civil Procedure by DTE Energy, Detroit Edison Company. (Rosser, Brent) (Entered: 04/08/2011)
04/11/2011	89	RESPONSE to 88 MOTION to Expedite Briefing and Consideration of Motion to Compel Plaintiffs' Compliance with Rules 33 and 34 of the Federal Rules of Civil Procedure filed by United States. (Furrie, Kristin) (Entered: 04/11/2011)
04/13/2011	90	REPLY to Response re 88 MOTION to Expedite Briefing and Consideration of Motion to Compel Plaintiffs' Compliance with Rules 33 and 34 of the Federal Rules of Civil Procedure filed by DTE Energy, Detroit Edison Company. (Rosser, Brent) (Entered: 04/13/2011)
04/13/2011	91	STIPULATION re 71 Stipulation, 39 Protective Order Stipulated Disclosure Agreement Regarding Section 114 Documents by DTE Energy, Detroit Edison Company, Natural Resources Defense Council, Sierra Club (Rosser, Brent) (Entered: 04/13/2011)

Released via FOIA EPA-2019-008216

04/15/2011	92	REPLY to Response re 81 MOTION for Protective Order filed by All Defendants. (Attachments: # 1 Exhibit 12 - 1993 EPA Memo) (Sibley - NOT SWORN, George) (Entered: 04/15/2011)
04/18/2011		TEXT-ONLY ORDER granting 88 MOTION to Expedite Briefing and Consideration of Motion to Compel Plaintiffs' Compliance with Rules 33 and 34 of the Federal Rules of Civil Procedure by DTE Energy, Detroit Edison Company. Signed by District Judge Bernard A. Friedman. (SJa) (Entered: 04/18/2011)
04/18/2011	93	NOTICE of hearing on 81 MOTION for Protective Order and 87 MOTION to Compel Plaintiff's Compliance with Rules 33 and 34 of the Federal Rules of Civil Procedure. Motion Hearing set for 5/3/2011 01:45 PM before District Judge Bernard A. Friedman. (SJa) (Entered: 04/18/2011)
04/22/2011	94	MOTION for Protective Order by United States. (Furrie, Kristin) (Entered: 04/22/2011)
04/22/2011	95	RESPONSE to 87 MOTION to Compel Plaintiff's Compliance with Rules 33 and 34 of the Federal Rules of Civil Procedure filed by United States. (Attachments: # 1 Index of Exhibits, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 2-A, # 5 Exhibit 2-B, # 6 Exhibit 2-C, # 7 Exhibit 2-D, # 8 Exhibit 2-E, # 9 Exhibit 2-F, # 10 Exhibit 2-G Part 1, # 11 Document Continuation 2-G Part 2, # 12 Exhibit 2-H, # 13 Exhibit 2- I, # 14 Exhibit 2-J, # 15 Exhibit 2-K, # 16 Exhibit 2-L, # 17 Exhibit 3, # 18 Exhibit 4, # 19 Exhibit 5, # 20 Exhibit 6, # 21 Exhibit 7, # 22 Exhibit 8, # 23 Exhibit 9, # 24 Exhibit 10, # 25 Exhibit 11) (Furrie, Kristin) (Entered: 04/22/2011)
04/22/2011	96	NOTICE of Appearance by James W. Beers, Jr on behalf of United States. (Beers, James) (Entered: 04/22/2011)
04/25/2011	97	NOTICE of Hearing on 94 MOTION for Protective Order, 81 MOTION for Protective Order, 87 MOTION to Compel Plaintiff's Compliance with Rules 33 and 34 of the Federal Rules of Civil Procedure. Motion Hearing set for 5/3/2011 01:45 PM before District Judge Bernard A. Friedman. (SJa) (Entered: 04/25/2011)
04/29/2011	98	Ex Parte MOTION for Leave to File Exhibits in the Traditional Manner by All Defendants. (Johnson - NOT SWORN, Harry) (Entered: 04/29/2011)
04/29/2011	99	REPLY to Response re 87 MOTION to Compel Plaintiff's Compliance with Rules 33 and 34 of the Federal Rules of Civil Procedure filed by All Defendants. (Attachments: # 1 Index of Exhibits, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Exhibit F (Placeholder for CD-ROM to be filed traditionally if leave granted), # 8 Exhibit G (Placeholder for CD-ROM to be filed traditionally if leave granted)) (Johnson - NOT SWORN, Harry) (Entered: 04/29/2011)
04/29/2011	100	RESPONSE to 94 MOTION for Protective Order filed by DTE Energy, Detroit Edison Company. (Attachments: # 1 Index of Exhibits, # 2 Exhibit A - US Opposition to Def. Mot. to Compel Disc. (Illinois Power), # 3 Exhibit B - US Response to EKPC Motion for Part. Summ. Judgment (EKPC)) (Rosser, Brent) (Entered: 04/29/2011)
05/02/2011	101	ORDER granting 98 Ex Parte Motion for Leave to File Exhibits in the Traditional Manner. Signed by District Judge Bernard A. Friedman. (SJa) (Entered: 05/02/2011)
05/02/2011	102	NOTICE by DTE Energy, Detroit Edison Company of Filing Exhibits in the Traditional Manner (Johnson - NOT SWORN, Harry) (Entered: 05/02/2011)
05/03/2011	103	ORDER denying as moot 88 MOTION to Expedite Briefing and Consideration of Motion to Compel Plaintiffs' Compliance with Rules 33 and 34 of the Federal Rules of Civil Procedure filed by Detroit Edison Company, DTE Energy . Signed by District Judge Bernard A. Friedman. (SJa) (Entered: 05/03/2011)
05/03/2011	104	ORDER granting 81 Defendant's Motion for Protective Order. Signed by District Judge Bernard A. Friedman. (SJa) (Entered: 05/03/2011)
05/03/2011	105	ORDER denying defendant's 87 Motion to Compel Plaintiff's Compliance with Rules 33 and 34 of the Federal Rules of Civil Procedure. Signed by District Judge Bernard A. Friedman. (SJa) (Entered: 05/03/2011)
05/03/2011	106	ORDER denying as moot 94 Plaintiff's Motion for Protective Order. Signed by District Judge Bernard A. Friedman. (SJa) (Entered: 05/03/2011)
05/03/2011		Minute Entry - Motion Hearing held on 5/3/2011 re 88 MOTION to Expedite Briefing and Consideration of Motion to Compel Plaintiffs' Compliance with Rules 33 and 34 of the Federal Rules of Civil Procedure filed by Detroit Edison Company, DTE Energy, 94 MOTION for Protective Order filed by United States, 81 MOTION for Protective Order filed by Detroit Edison Company, DTE Energy, 87 MOTION to Compel Plaintiff's Compliance with Rules 33 and 34 of the Federal Rules of Civil Procedure filed by Detroit Edison Company, DTE Energy before District Judge Bernard A. Friedman. (Court Reporter Joan Morgan) (SJa) Modified on 5/6/2011 (CMul). (Entered: 05/04/2011)
06/09/2011	107	MOTION for Summary Judgment by DTE Energy, Detroit Edison Company. (Attachments: # 1 Index of Exhibits Appendix A: Index of Exhibits, # 2 Exhibit Exhibit 1: Boyd Declaration, # 3 Exhibit Exhibit 2: Usitalo Declaration) (Brownell, F.) (Entered: 06/09/2011)
06/23/2011	108	NOTICE of determination on briefs re 107 MOTION for Summary Judgment. (CMul) (Entered: 06/23/2011)

06/29/2011	109	NOTICE of Appearance by Elias L. Quinn on behalf of United States. (Quinn, Elias) (Entered: 06/29/2011)
06/29/2011	110	MOTION for Extension of Time to File Response/Reply to Defendant's Motion for Summary Judgment Based on the 2002 NSR Reform Rules by United States. (Attachments: # 1 Proposed Order) (Quinn, Elias) (Entered: 06/29/2011)
06/30/2011	111	ORDER granting 110 Motion for Extension of Time to File Response/Reply. Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 06/30/2011)
07/07/2011	112	MOTION for Leave to File Brief and Exhibits under Seal (Unopposed Motion) by United States. (Benson, Thomas) (Entered: 07/07/2011)
07/08/2011	113	ORDER Granting 112 Motion for Leave to File. Signed by District Judge Bernard A. Friedman. (DOpa) (Entered: 07/08/2011)
07/08/2011	114	RESPONSE to 107 MOTION for Summary Judgment filed by United States. (Attachments: # 1 Index of Exhibits, # 2 Exhibit Ex. 3 -- Monroe 2 Outage Facts, # 3 Exhibit Ex. 4 -- Fessler Email, # 4 Exhibit Ex. 5 -- Notice Letter, # 5 Exhibit Ex. 6 -- 2005 Notice Letter, # 6 Exhibit Ex. 9 -- NSR TSD Excerpts, # 7 Exhibit Ex. 12 -- Northampton Letter, # 8 Exhibit Ex. 13 -- Columbia Generating) (Benson, Thomas) (Entered: 07/08/2011)
07/08/2011	115	SEALED EXHIBIT re 114 Response to Motion, by United States. (Attachments: # 1 Exhibit Ex. 1 -- Dep. Ex. 92, # 2 Exhibit Ex. 2 -- Monroe 2 Short Form Report, # 3 Exhibit Ex. 7 -- Rugenstein Deposition Excerpts, # 4 Exhibit Ex. 8 -- Boyd 30(b)(6) Deposition Excerpts Vol. 2, # 5 Exhibit Ex. 10 -- Boyd Personal Deposition Excerpts, # 6 Exhibit Ex. 11 -- Boyd 30(b)(6) Deposition Excerpts Vol. 1) (Benson, Thomas) (Entered: 07/08/2011)
07/18/2011	116	MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) by DTE Energy, Detroit Edison Company. (Attachments: # 1 Index of Exhibits Index of Exhibits, # 2 Exhibit Exhibit 1: S. Rep. No. 91-1196, # 3 Exhibit Exhibit 2: 40 CFR section 60.14(1)(1) (1976), # 4 Exhibit Exhibit 3: WEPCo NSR Applicability Determination (9/9/1988), # 5 Exhibit Exhibit 4: Final WEPCo Determination (10/14/1988), # 6 Exhibit Exhibit 5: Revised WEPCo Determination (2/15/1989), # 7 Exhibit Exhibit 6: GAO Report (1990), # 8 Exhibit Exhibit 7: Tiber Memo (4/10/1990), # 9 Exhibit Exhibit 8: Dingell Letter (10/9/1990), # 10 Exhibit Exhibit 9: Rosenberg Letter (6/19/1991), # 11 Exhibit Exhibit 10: Nichols Letter w/ Attachment (May 1995), # 12 Exhibit Exhibit 11: DOJ Press Release (11/3/1999), # 13 Exhibit Exhibit 12: Alabama Power Order (2/25/2008), # 14 Exhibit Exhibit 13: Declaration of Regina McCarthy (1/31/2011)) (Brownell, F.) (Entered: 07/18/2011)
07/18/2011	117	MOTION for Partial Summary Judgment on the Legal Standards in this Case by United States. (Attachments: # 1 Index of Exhibits, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 3-A, # 6 Exhibit 3-B, # 7 Exhibit 3-C, # 8 Exhibit 3-D, # 9 Exhibit 3-E, # 10 Exhibit 3-F, # 11 Exhibit 3-G, # 12 Exhibit 3-H, # 13 Exhibit 3-I, # 14 Exhibit 3-J, # 15 Exhibit 3-K, # 16 Exhibit 3-L, # 17 Exhibit 4, # 18 Exhibit 5, # 19 Exhibit 6, # 20 Exhibit 7, # 21 Exhibit 8, # 22 Exhibit 9, # 23 Proposed Order) (Quinn, Elias) (Entered: 07/18/2011)
07/22/2011	118	MOTION for Leave to File Excess Pages by All Defendants. (Attachments: # 1 Exhibit Proposed Order) (Sibley - NOT SWORN, George) (Entered: 07/22/2011)
07/25/2011	119	REPLY to Response re 107 MOTION for Summary Judgment filed by DTE Energy, Detroit Edison Company. (Attachments: # 1 Index of Exhibits, # 2 Exhibit Exhibit 3: Letter from NRG to EPA (3/10/2005), # 3 Exhibit Exhibit 4: Letter from EPA to NRG (5/16/2005)) (Brownell, F.) (Entered: 07/25/2011)
07/25/2011	120	NOTICE of Change of Address/Contact Information by Mark B Bierbower on behalf of DTE Energy, Detroit Edison Company. (Bierbower, Mark) (Entered: 07/25/2011)
07/25/2011	121	NOTICE of Change of Address/Contact Information by Lucinda M. Langworthy on behalf of DTE Energy, Detroit Edison Company. (Langworthy, Lucinda) (Entered: 07/25/2011)
07/25/2011		Attorney James W Rubin is discontinued from receiving Notices of Electronic Filing. Reason: no longer with Hunton & Williams LLP. (Rubin, James) (Entered: 07/25/2011)
07/26/2011	122	NOTICE of Change of Address/Contact Information by Makram B Jaber on behalf of DTE Energy, Detroit Edison Company. (Jaber, Makram) (Entered: 07/26/2011)
07/26/2011	123	NOTICE of Change of Address/Contact Information by F. William Brownell on behalf of DTE Energy, Detroit Edison Company. (Brownell, F.) (Entered: 07/26/2011)
07/26/2011	124	ORDER granting 118 Motion for Leave to File Excess Pages. Signed by District Judge Bernard A. Friedman. (MWil) (Entered: 07/26/2011)
07/28/2011	125	RESPONSE to 116 MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) filed by Natural Resources Defense Council, Sierra Club. (Attachments: # 1 Exhibit, # 2 Exhibit) (Bressett - NOT SWORN, Holly) (Entered:

		07/28/2011)
08/01/2011	126	RESPONSE to 116 MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) filed by United States. (Attachments: # 1 Index of Exhibits, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5) (Quinn, Elias) (Entered: 08/01/2011)
08/01/2011	127	RESPONSE to 117 MOTION for Partial Summary Judgment on the Legal Standards in this Case Defendants' Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment filed by DTE Energy, Detroit Edison Company. (Attachments: # 1 Index of Exhibits Index of Exhibits, # 2 Exhibit Exhibit 1: Letter from Rosenberg to Dingell (6/19/1991), # 3 Exhibit Exhibit 2: U.S. Resp. & Objections to Detroit Edison's First Set of Req. for Admis. (excerpts), # 4 Exhibit Exhibit 3: Transcript of 30(b)(6) Deposition of Michael Sewell, U.S. v. Ky. Utilities (excerpts)) (Brownell, F.) (Entered: 08/01/2011)
08/01/2011	128	MOTION for Leave to File Exhibit Under Seal by DTE Energy, Detroit Edison Company. (Brownell, F.) (Entered: 08/01/2011)
08/01/2011	129	SEALED EXHIBIT Exhibit 4 - Supplemental Expert Report of J. Golden (June 3, 2011) (excerpt) (Confidential) re 128 MOTION for Leave to File Exhibit Under Seal, 127 Response to Motion,, 117 MOTION for Partial Summary Judgment on the Legal Standards in this Case by DTE Energy, Detroit Edison Company. (Brownell, F.) (Entered: 08/01/2011)
08/04/2011	130	ORDER for Additional Briefing., (Brief due by 8/8/2011) Signed by District Judge Bernard A. Friedman. (MWil) (Entered: 08/04/2011)
08/05/2011	131	ORDER granting 128 Motion for Leave to File. Signed by District Judge Bernard A. Friedman. (MWil) (Entered: 08/05/2011)
08/05/2011	132	MOTION in Limine to Strike Defendants' Experts' Sur-Rebuttal Reports by United States. (Benson, Thomas) (Entered: 08/05/2011)
08/05/2011	133	ORDER REFERRING MOTION to Magistrate Judge R. Steven Whalen: 132 MOTION in Limine to Strike Defendants' Experts' Sur-Rebuttal Reports filed by United States. Signed by District Judge Bernard A. Friedman. (MWil) (Entered: 08/05/2011)
08/05/2011	134	MOTION in Limine to Exclude the Opinions of Edward Rothman by DTE Energy, Detroit Edison Company. (Attachments: # 1 Index of Exhibits Index of Exhibits, # 2 Exhibit Exhibit 4: Rothman Spreadsheet) (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	135	MOTION for Leave to File Exhibits Under Seal [Rothman] by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	136	SEALED EXHIBIT 1: Deposition Transcript of Edward Rothman (7/20/2011) re 135 MOTION for Leave to File Exhibits Under Seal [Rothman], 134 MOTION in Limine to Exclude the Opinions of Edward Rothman by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	137	SEALED EXHIBIT 2: Expert Report of Dr. Edward Rothman (4/22/2011) re 135 MOTION for Leave to File Exhibits Under Seal [Rothman], 134 MOTION in Limine to Exclude the Opinions of Edward Rothman by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	138	SEALED EXHIBIT 3: Expert Report of Philip Hayet (4/22/2011) re 135 MOTION for Leave to File Exhibits Under Seal [Rothman], 134 MOTION in Limine to Exclude the Opinions of Edward Rothman by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	139	SEALED EXHIBIT 5: Rebuttal & Supplemental Expert Report of Philip Hayet (7/5/2011 revised) re 135 MOTION for Leave to File Exhibits Under Seal [Rothman], 134 MOTION in Limine to Exclude the Opinions of Edward Rothman by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	140	SEALED EXHIBIT 6: Surrebuttal Expert Report of Mike King (8/1/2011) re 135 MOTION for Leave to File Exhibits Under Seal [Rothman], 134 MOTION in Limine to Exclude the Opinions of Edward Rothman by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	141	MOTION in Limine to Exclude the Opinions of Robert H. Koppe and Ranajit Sahu by DTE Energy, Detroit Edison Company. (Attachments: # 1 Index of Exhibits Index of Exhibits, # 2 Exhibit Exhibit 1: U.S. v. Ala. Power Co. (3/14/2011), # 3 Exhibit Exhibit 2: GADS Data Reporting Instructions, # 4 Exhibit Exhibit 4: U.S. v. Cinergy Trial Transcript Vol. 3 (5/13/2009), # 5 Exhibit Exhibit 5: U.S. v. Cinergy Trial Transcript Vol. 7 (5/13/2008), # 6 Exhibit Exhibit 6: U.S. v. Cinergy Order (12/29/2010), # 7 Exhibit Exhibit 7: U.S. v. Ala Power Co. Final Judgment Order (3/15/2011)) (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	142	MOTION for Leave to File Exhibits Under Seal [Koppe/Sahu] by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)

08/05/2011	143	SEALED EXHIBIT 3: Expert Report of Ranajit (Ron) Sahu (Apr. 22, 2011) re 141 MOTION in Limine to Exclude the Opinions of Robert H. Koppe and Ranajit Sahu, 142 MOTION for Leave to File Exhibits Under Seal [Koppe/Sahu] by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	144	SEALED EXHIBIT 8: Expert Report of Robert Koppe (Apr. 22, 2011) re 141 MOTION in Limine to Exclude the Opinions of Robert H. Koppe and Ranajit Sahu, 142 MOTION for Leave to File Exhibits Under Seal [Koppe/Sahu] by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	145	SEALED EXHIBIT 9: Supplemental Expert Report of Mike King (June 3, 2011) re 141 MOTION in Limine to Exclude the Opinions of Robert H. Koppe and Ranajit Sahu, 142 MOTION for Leave to File Exhibits Under Seal [Koppe/Sahu] by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	146	SEALED EXHIBIT 10: Deposition of Paul Fessler (June 8, 2011) re 141 MOTION in Limine to Exclude the Opinions of Robert H. Koppe and Ranajit Sahu, 142 MOTION for Leave to File Exhibits Under Seal [Koppe/Sahu] by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	147	SEALED EXHIBIT 11: Rebuttal and Supplemental Expert Report of Robert Koppe (July 6, 2011) re 141 MOTION in Limine to Exclude the Opinions of Robert H. Koppe and Ranajit Sahu, 142 MOTION for Leave to File Exhibits Under Seal [Koppe/Sahu] by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	148	MOTION in Limine to Exclude the Opinions of Philip Hayet by DTE Energy, Detroit Edison Company. (Attachments: # 1 Index of Exhibits) (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	149	MOTION for Leave to File Exhibits Under Seal [Hayet] by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	150	SEALED EXHIBIT 1: Expert Report of Philip Hayet (4/22/2011) re 148 MOTION in Limine to Exclude the Opinions of Philip Hayet, 149 MOTION for Leave to File Exhibits Under Seal [Hayet] by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	151	SEALED EXHIBIT 2: Rebuttal and Supplemental Expert Report of Philip Hayet (July 5, 2011 revised) re 148 MOTION in Limine to Exclude the Opinions of Philip Hayet, 149 MOTION for Leave to File Exhibits Under Seal [Hayet] by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/05/2011	152	SEALED EXHIBIT 3: Deposition of Philip Hayet (7/15/2011) (excerpts) re 148 MOTION in Limine to Exclude the Opinions of Philip Hayet, 149 MOTION for Leave to File Exhibits Under Seal [Hayet] by DTE Energy, Detroit Edison Company. (Johnson, Harry) (Entered: 08/05/2011)
08/08/2011	153	RESPONSE to 130 Order, Set Deadlines/Hearings Joint Response to Order for Additional Briefing Entered August 4, 2011 by DTE Energy, Detroit Edison Company, Natural Resources Defense Council, Sierra Club, United States. (Johnson, Harry) (Entered: 08/08/2011)
08/10/2011	154	MOTION for Leave to File Certain Exhibits Under Seal, MOTION for Leave to File Excess Pages on Reply in Support of Plaintiff's Motion for Partial Summary Judgment on the Legal Standards at Issue in This Case by United States. (Quinn, Elias) (Entered: 08/10/2011)
08/10/2011	155	REPLY to Response re 117 MOTION for Partial Summary Judgment on the Legal Standards in this Case filed by United States. (Attachments: # 1 Index of Exhibits, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4) (Quinn, Elias) (Entered: 08/10/2011)
08/10/2011	156	SEALED EXHIBIT S 1, 5, and 6 re 155 Reply to Response to Motion by United States. (Attachments: # 1 Exhibit Sealed Exhibit 1 to ECF No. 155, # 2 Exhibit Sealed Exhibit 5 to ECF No. 155, # 3 Exhibit Sealed Exhibit 6 to ECF No. 155) (Quinn, Elias) (Entered: 08/10/2011)
08/10/2011	157	REPLY to Response re 116 MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) filed by DTE Energy, Detroit Edison Company. (Attachments: # 1 Index of Exhibits Index of Exhibits, # 2 Exhibit Exhibit 1: Stipulation of Dismissal in U.S. v. Duke Energy (M.D.N.C.), # 3 Exhibit Exhibit 2: Complaint in U.S. v. Duke Energy (M.D.N.C.), # 4 Exhibit Exhibit 3: Slip Opinion in Sierra Club v. TVA (N.D. Ala.)) (Brownell, F.) (Entered: 08/10/2011)
08/10/2011	158	REPLY to Response re 116 MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) MOTION To Establish Correct Legal Standard on the Issue of Routine Maintenance, Repair and Replacement (RMRR) Reply in Response to Intervenor-Plaintiffs' Opposition filed by DTE Energy, Detroit Edison Company. (Attachments: # 1 Exhibit Exhibit

		1: BNA article (5/10/2004) (excerpt)) (Brownell, F.) (Entered: 08/10/2011)
08/18/2011	159	ORDER Staying Deadlines. Signed by District Judge Bernard A. Friedman. (MWil) (Entered: 08/18/2011)
08/23/2011	160	MEMORANDUM OPINION and ORDER granting 107 Defendants' MOTION for Summary Judgment Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 08/23/2011)
08/23/2011	161	JUDGMENT in favor of Defendants against Plaintiff Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 08/23/2011)
10/20/2011	162	NOTICE OF APPEAL by United States. Fee Status: No Fee Paid. (Benson, Thomas) (Entered: 10/20/2011)
10/21/2011	163	CERTIFICATE OF SERVICE re 162 Notice of Appeal. (DPer) (Entered: 10/21/2011)
03/28/2013	164	JUDGMENT from U.S. Court of Appeals - Sixth Circuit re 162 Notice of Appeal filed by United States - Disposition: The judgment of the district court is REVERSED, and the case is REMANDED for further proceedings consistent with the opinion of this court. [Appeal Case Number 11-2328] (KKra) (Entered: 04/08/2013)
05/20/2013	167	MANDATE from U.S. Court of Appeals - Sixth Circuit as to 162 Notice of Appeal filed by United States [Appeal Case Number 11-2328] (KKra) (Entered: 05/23/2013)
05/22/2013	165	MOTION for Leave to File Motion for Summary Judgment and for Scheduling Order by All Defendants. (Attachments: # 1 Index of Exhibits, # 2 Exhibit Ex. 1: U.S. v. DTE Energy Co. (6th Cir. Mar. 28, 2013), # 3 Exhibit Ex. 2: Transcript PI Hearing (E.D. Mich. Jan. 19, 2011) (excerpt)) (Brownell, F.) (Entered: 05/22/2013)
05/22/2013	166	MOTION for Summary Judgment Based on Compliance with Pre-Construction Projection Requirements by All Defendants. (Attachments: # 1 Index of Exhibits, # 2 Exhibit Ex. 1: EPA, Notice and Finding of Violation (June 4, 2010), # 3 Exhibit Ex. 2: Declaration of Skiles Boyd (Nov. 3, 2010), # 4 Exhibit Ex. 3: Notification Letter (Mar. 12, 2010), # 5 Exhibit Ex. 4: Supplemental Declaration of Skiles Boyd (May 20, 2013), # 6 Exhibit Ex. 5: Transcript of Usitalo 30(b)(6) Deposition (excerpt)) (Brownell, F.) (Entered: 05/22/2013)
05/24/2013	168	MOTION Requesting Status Conference by United States. (Attachments: # 1 Exhibit P.I. Hearing Transcript Excerpt) (Quinn, Elias) (Entered: 05/24/2013)
05/28/2013	169	NOTICE TO APPEAR : Status/Scheduling Conference set for 6/5/2013 01:00 PM before District Judge Bernard A. Friedman (CMul) (Entered: 05/28/2013)
06/03/2013	170	STIPULATION AND ORDER re 169 Notice to Appear (Status/ Scheduling Conference reset for Thursday, 6/20/2013 01:00 PM before District Judge Bernard A. Friedman) Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 06/03/2013)
06/12/2013	171	ATTORNEY APPEARANCE: Nicholas J. Schroeck appearing on behalf of Natural Resources Defense Council, Sierra Club (Schroeck, Nicholas) (Entered: 06/12/2013)
06/13/2013	172	DTE's Report in Advance of Status Conference REPORT by All Defendants (Attachments: # 1 Exhibit P.I. Hearing Transcript 1/19/2011 (excerpt)) (Brownell, F.) (Entered: 06/13/2013)
06/14/2013	173	NOTICE of Appearance by Shannon W. Fisk on behalf of Sierra Club. (Fisk, Shannon) (Entered: 06/14/2013)
06/20/2013		Minute Entry for proceedings held before District Judge Bernard A. Friedman: Motion Hearing held on 6/20/2013 re 165 MOTION for Leave to File Motion for Summary Judgment and for Scheduling Order filed by Detroit Edison Company, DTE Energy Disposition: Motion granted and briefing dates established.(Court Reporter Joan Morgan) (CMul) (Entered: 06/20/2013)
07/03/2013	174	ORDER granting 165 Motion for Leave to File. Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 07/03/2013)
07/03/2013	175	ORDER on briefing re 166 MOTION for Summary Judgment Based on Compliance with Pre-Construction Projection Requirements filed by Detroit Edison Company, DTE Energy. Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 07/03/2013)
07/03/2013	176	NOTICE TO APPEAR BY TELEPHONE: Status Conference set for 10/9/2013 02:00 PM before District Judge Bernard A. Friedman (CMul) (Entered: 07/03/2013)
08/01/2013	177	MOTION for Leave to File Opposition Brief and Supporting Documents Under Seal by United States. (Attachments: # 1 Proposed Order) (Quinn, Elias) (Entered: 08/01/2013)
08/02/2013	178	SEALED RESPONSE re 166 Motion for Summary Judgment,, regarding DTE's Preconstruction Compliance by United States. (Attachments: # 1 Index of Exhibits, # 2 Exhibit A - Project Authorization Documents, # 3 Exhibit B - Capital Plan Summary, # 4 Exhibit C - DTE RFA Responses, # 5 Exhibit D - Final ROR Inputs, # 6 Exhibit E - White Email, # 7 Exhibit F - Reliability Improvement Study, # 8 Exhibit G - Hayett Report, # 9 Exhibit H - Fessler Depo Excerpt) (Quinn, Elias) (Entered: 08/02/2013)
08/02/2013	179	RESPONSE to 166 MOTION for Summary Judgment Based on Compliance with Pre-Construction Projection Requirements - Opposition to Motion filed by Sierra Club. (Fisk, Shannon) (Entered: 08/02/2013)
08/06/2013	180	ORDER granting 177 Motion for Leave to File. Signed by District Judge Bernard A. Friedman.

		(CMul) (Entered: 08/06/2013)
08/16/2013	181	NOTICE by United States re 178 Sealed Response to Motion,, of Redacted Filing (Attachments: # 1 U.S. Opposition Brief, # 2 Index of Exhibits, # 3 Exhibit A (redacted), # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Exhibit G (redacted), # 8 Exhibit H) (Quinn, Elias) (Entered: 08/16/2013)
08/19/2013	182	MOTION for Leave to File Excess Pages for Reply Brief in Support of Defendants' Motion for Summary Judgment by All Defendants. (Sibley - NOT SWORN, George) (Entered: 08/19/2013)
08/23/2013	183	REPLY to Response re 166 MOTION for Summary Judgment Based on Compliance with Pre-Construction Projection Requirements filed by DTE Energy, Detroit Edison Company. (Attachments: # 1 Exhibit Ex. 1 - Complaint in U.S. v. OGE, No. 13-690 (W.D. Okla.)) (Brownell, F.) (Entered: 08/23/2013)
09/03/2013	184	MOTION for Leave to File First Amended Complaint by United States. (Attachments: # 1 Index of Exhibits, # 2 Att. 1 (Proposed Amended Complaint), # 3 Att. 2 (Excerpts of Preliminary Injunction Transcript), # 4 Att. 3 (3.September 19, 2007 Letter, W. Rugenstein to W. Presson), # 5 Att. 4 (4.March 6, 2007 Letter, W. Rugenstein to L. Fiedler), # 6 Att. 5 (5.February 26, 2010 Letter, K. Guertin to T. Seidel)) (Benson, Thomas) (Entered: 09/03/2013)
09/06/2013	185	STIPULATION of Dismissal of Natural Resources Defense Council's Claims in Intervention Pursuant to FRCP 41(A)(1) by Natural Resources Defense Council, Sierra Club (Schroeck, Nicholas) (Entered: 09/06/2013)
09/06/2013	186	MOTION for Leave to File a First Amended Complaint by Sierra Club. (Attachments: # 1 Exhibit First Amended Complaint) (Fisk, Shannon) (Entered: 09/06/2013)
09/20/2013	187	RESPONSE to 184 MOTION for Leave to File First Amended Complaint filed by DTE Energy, Detroit Edison Company. (Attachments: # 1 Index of Exhibits Index of Exhibits, # 2 Exhibit Ex. 1: 2009 NOV, # 3 Exhibit Ex. 2: MDEQ PSD Workbook (Oct. 2003) (excerpt), # 4 Exhibit Ex. 3: Letter to EPA (June 23, 2010), # 5 Exhibit Ex. 4: Boyd Declaration (Nov. 3, 2010), # 6 Exhibit Ex. 5: DTE Presentation (July 23, 2007), # 7 Exhibit Ex. 6: DTE Presentation (Apr. 23, 2008), # 8 Exhibit Ex. 7: 2008 NSR Emissions Report for Trenton Channel (Feb. 21, 2009)) (Brownell, F.) (Entered: 09/20/2013)
09/20/2013	188	STIPULATION of Parties Extending the Dealines to File Reply Briefs in Support of Motions to Amend the Complaint by Sierra Club, United States (Furrie, Kristin) (Entered: 09/20/2013)
09/23/2013	189	RESPONSE to 186 MOTION for Leave to File a First Amended Complaint filed by DTE Energy, Detroit Edison Company. (Brownell, F.) (Entered: 09/23/2013)
10/01/2013	190	MOTION to Stay the Briefing Schedule and Reschedule the Status Conference due to a Lack in Appropriations by United States. (Furrie, Kristin) (Entered: 10/01/2013)
10/02/2013		TEXT-ONLY NOTICE: Hearing on October 9, 2013 is Cancelled (CMul) (Entered: 10/02/2013)
10/03/2013	191	ORDER granting 190 Motion to Stay. Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 10/03/2013)
10/18/2013	192	NOTICE by United States of Restored Appropriations and Stipulated Order Extending Deadlines for Reply Briefs (Quinn, Elias) (Entered: 10/18/2013)
10/21/2013	193	STIPULATION AND ORDER LIFTING STAY and establishing briefing deadlines Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 10/21/2013)
10/25/2013	194	REPLY to Response re 184 MOTION for Leave to File First Amended Complaint filed by United States. (Furrie, Kristin) (Entered: 10/25/2013)
10/25/2013	195	REPLY to Response re 186 MOTION for Leave to File a First Amended Complaint filed by Sierra Club. (Fisk, Shannon) (Entered: 10/25/2013)
03/03/2014	196	OPINION AND ORDER granting 166 Motion for Summary Judgment. Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 03/03/2014)
03/04/2014	197	Notice of E-mail Delivery Failure as to attorney Justin Savage. Bounced NEF for 196 Order on Motion for Summary Judgment. (SSch) (Entered: 03/04/2014)
03/11/2014	198	Ex Parte MOTION for Withdrawal of Attorney Justin Savage by United States. (Benson, Thomas) (Entered: 03/11/2014)
03/11/2014	199	ORDER granting 198 Motion to Withdraw as Attorney.. Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 03/11/2014)
04/02/2014	200	MOTION for Leave to File Any Rule 54(b) Motion by June 30, 2014 by United States. (Benson, Thomas) (Entered: 04/02/2014)
04/02/2014	201	MOTION Certification of Partial Final Judgment by Sierra Club. (Attachments: # 1 Index of Exhibits, # 2 Exhibit A, # 3 Exhibit B) (Fisk, Shannon) (Entered: 04/02/2014)
04/09/2014	202	ORDER granting 184 Motion for Leave to File;and granting 186 Motion for Leave to File Amended Complaints. Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 04/09/2014)

04/09/2014	203	AMENDED COMPLAINT filed by United States against DTE Energy, Detroit Edison Company. NO NEW PARTIES ADDED. (Benson, Thomas) (Entered: 04/09/2014)
04/11/2014	204	RESPONSE to 201 MOTION Certification of Partial Final Judgment , 200 MOTION for Leave to File Any Rule 54(b) Motion by June 30, 2014 filed by DTE Energy, Detroit Edison Company. (Brownell, F.) (Entered: 04/11/2014)
04/11/2014	205	MOTION for Reconsideration re 202 Order on Motion for Leave to File, Motion for Reconsideration or Clarification by DTE Energy, Detroit Edison Company. (Brownell, F.) (Entered: 04/11/2014)
04/16/2014	206	NOTICE of Appearance by Susan L. Williams on behalf of Sierra Club. (Williams, Susan) (Entered: 04/16/2014)
04/18/2014	207	(STRICKEN 4/23/2014) RESPONSE to 205 MOTION for Reconsideration re 202 Order on Motion for Leave to File, Motion for Reconsideration or Clarification filed by Sierra Club. (Fisk, Shannon) Modified on 4/23/2014 (CMul). (Entered: 04/18/2014)
04/23/2014	208	NOTICE TO APPEAR BY TELEPHONE: Tele/Status Conference set for 5/13/2014 01:00 PM before District Judge Bernard A. Friedman Plaintiff to initiate call/ or circulate call-in number. (CMul) (Entered: 04/23/2014)
04/23/2014	209	ORDER to Strike 207 Response to Motion filed by Sierra Club. Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 04/23/2014)
04/24/2014	210	MOTION for Leave to File Response to Defendants' Motion for Reconsideration or Clarification by Sierra Club. (Attachments: # 1 Exhibit A) (Fisk, Shannon) (Entered: 04/24/2014)
04/24/2014	211	MOTION for Extension of Time to File Answer re 203 Amended Complaint by DTE Energy, Detroit Edison Company. (Brownell, F.) (Entered: 04/24/2014)
04/30/2014	212	NOTICE of Appearance by Mary M. Whittle on behalf of Sierra Club. (Whittle, Mary) (Entered: 04/30/2014)
05/13/2014	213	ORDER granting 200 Motion for Leave to File; and stay ruling on 201 intervenor-plaintiffs motion for certification ofpartial final judgment. Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 05/13/2014)
05/13/2014		Minute Entry for proceedings held before District Judge Bernard A. Friedman: Telephonic Status Conference held on 5/13/2014 Disposition: Motion for leave to file response to reconsideration is granted. Motion for reconsideration is granted. Motion for extension of time to answer amended complaint is granted.(Court Reporter Joan Morgan) (CMul) (Entered: 05/14/2014)
05/22/2014	214	AMENDED COMPLAINT filed by Sierra Club against DTE Energy, Detroit Edison Company. NO NEW PARTIES ADDED. (Fisk, Shannon) (Entered: 05/22/2014)
05/27/2014	215	MOTION for Extension of Time to File Answer re 214 Amended Complaint by DTE Energy, Detroit Edison Company. (Brownell, F.) (Entered: 05/27/2014)
06/17/2014	216	ORDER granting 215 Motion for Extension of Time to Answer. Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 06/17/2014)
06/30/2014	217	ORDER granting in part 205 Motion for Reconsideration ; granting 210 Motion for Leave to File; and granting 211 Motion for Extension of Time to Answer All Defendants.. Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 06/30/2014)
06/30/2014	218	MOTION for Judgment Pursuant to Rule 54(b) by United States. (Benson, Thomas) (Entered: 06/30/2014)
06/30/2014	219	MOTION to Stay District Court Proceedings Pending Resolution of Appeals by DTE Energy, Detroit Edison Company. (Brownell, F.) (Entered: 06/30/2014)
08/05/2014	220	ORDER granting 201 Motion for partial summary judgment; granting 218 Motion for partial summary judgment; and granting 219 Motion to Stay pending appeals. Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 08/05/2014)
10/03/2014	221	NOTICE OF APPEAL by United States. Fee Status: No Fee Paid. (Benson, Thomas) (Entered: 10/03/2014)
10/03/2014	222	NOTICE OF APPEAL by Sierra Club re 196 Order on Motion for Summary Judgment, 220 Order on Motion - Free, Order on Motion for Judgment, Order on Motion to Stay. Receipt No: 0645-4843691 - Fee: $ 505 - Fee Status: Fee Paid. (Fisk, Shannon) (Entered: 10/03/2014)
10/03/2014	223	Certificate of Service re 221 Notice of Appeal. (KKra) (Entered: 10/03/2014)
10/03/2014	224	Certificate of Service re 222 Notice of Appeal,. (KKra) (Entered: 10/03/2014)
10/15/2014		Court Reporter Acknowledgment of Transcript Order Form received on October 13, 2014. Transcript for court proceeding held on: June 20, 2013; May 13, 2014. Estimated transcript completion date: Sept. 22, 2014. Estimated number of pages: 50. Payment arrangements were made on October 13, 2014. (Morgan, J) (Entered: 10/15/2014)
10/21/2014	225	TRANSCRIPT of Telephonic Conference held on May 13, 2014. (Court Reporter/Transcriber:

		Joan L. Morgan) (Number of Pages: 6) (Appeal Purposes) The parties have 21 days to file with the court and Court Reporter/Transcriber a Redaction Request of this transcript. If no request is filed, the transcript may be made remotely electronically available to the public without redaction after 90 days. Redaction Request due 11/12/2014. Redacted Transcript Deadline set for 11/21/2014. Release of Transcript Restriction set for 1/20/2015. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date, the transcript is publicly available. (Morgan, J) (Entered: 10/21/2014)
10/21/2014	226	TRANSCRIPT of Telephonic Conference held on June 20, 2013. (Court Reporter/Transcriber: Joan L. Morgan) (Number of Pages: 20) (Appeal Purposes) The parties have 21 days to file with the court and Court Reporter/Transcriber a Redaction Request of this transcript. If no request is filed, the transcript may be made remotely electronically available to the public without redaction after 90 days. Redaction Request due 11/12/2014. Redacted Transcript Deadline set for 11/21/2014. Release of Transcript Restriction set for 1/20/2015. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date, the transcript is publicly available. (Morgan, J) (Entered: 10/21/2014)
10/24/2014		Court Reporter Acknowledgment of Transcript Order Form received on October 22, 2014. Transcript for court proceeding held on: June 20, 2013, May 13, 2014. Estimated transcript completion date: on file. Estimated number of pages: 26. Payment arrangements were made on October 22, 204. (Morgan, J) (Entered: 10/24/2014)
11/18/2014	227	Letter from Thomas A. Benson (CMul) (Entered: 11/18/2014)
01/10/2017	228	OPINION and JUDGMENT from U.S. Court of Appeals - Sixth Circuit re 222 Notice of Appeal, filed by Sierra Club, 221 Notice of Appeal filed by United States [Appeal Case Number 14-2274/14-2275] (Ahmed, N) Modified on 1/10/2017 (Ahmed, N). (Entered: 01/10/2017)
03/07/2017	229	ATTORNEY APPEARANCE: Andrea E. Hayden appearing on behalf of DTE Energy, Detroit Edison Company (Hayden, Andrea) (Entered: 03/07/2017)
05/16/2017	230	ORDER from U.S. Court of Appeals - Sixth Circuit re 222 Notice of Appeal, filed by Sierra Club, 221 Notice of Appeal filed by United States [Appeal Case Number 14-2274/14-2275] (Ahmed, N) (Entered: 05/16/2017)
08/02/2017	231	Ex Parte MOTION for Withdrawal of Attorney Mary M. Whittle by Sierra Club. (Fisk, Shannon) (Entered: 08/02/2017)
08/03/2017	232	(VACATED 8/4/17)ORDER granting 231 Motion to Withdraw as Attorney.. Signed by District Judge Bernard A. Friedman. (CMul) Modified on 8/4/2017 (CMul). (Entered: 08/03/2017)
08/04/2017	233	ORDER granting 231 Ex Parte MOTION for Withdrawal of Attorney Mary M. Whittle filed by Sierra Club. Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 08/04/2017)
08/04/2017		TEXT-ONLY ORDER vacating 232 Order on Motion to Withdraw as Attorney. (Wrong image attached). Signed by District Judge Bernard A. Friedman. (CMul) (Entered: 08/04/2017)
08/07/2017	234	LETTER from the US Supreme Court that a petition for writ of certiorari was filed on 7/31/2017. [Supreme Court Case Number: 17-170] [Court of Appeals Case Number: 14-2274, 14-2275] (Ahmed, N) (Entered: 08/07/2017)
12/14/2017	235	LETTER from the US Supreme Court denying the petition for writ of certiorari [Supreme Court Case Number: 17-170] [Court of Appeals Case Number: 14-2274, 14-2275] (DWor) (Entered: 12/14/2017)
12/14/2017	236	MANDATE from U.S. Court of Appeals - Sixth Circuit as to 222 Notice of Appeal, filed by Sierra Club, 230 Appeal Order/Opinion/Judgment, 221 Notice of Appeal filed by United States [Appeal Case Number 14-2275/14-2274] (DWor) (Entered: 12/14/2017)
01/24/2018	237	NOTICE TO APPEAR: Status Conference set for 2/7/2018 01:00 PM before District Judge Bernard A. Friedman (JCur) (Entered: 01/24/2018)
02/01/2018	238	Joint MOTION to Stay Pending Settlement Negotiations by All Defendants. (Johnson, Harry) (Entered: 02/01/2018)
02/02/2018	239	ORDER granting 238 Joint Motion to Stay for 120 Days Pending Settlement Negotiations. Signed by District Judge Bernard A. Friedman. (JCur) (Entered: 02/02/2018)
02/02/2018		TEXT-ONLY NOTICE: Status Conference on 2/7/2018 is Cancelled 237 . (JCur) (Entered: 02/02/2018)
04/11/2018	240	NOTICE of Change of Address/Contact Information by F. William Brownell on behalf of DTE Energy, Detroit Edison Company. (Brownell, F.) (Entered: 04/11/2018)
06/11/2018	241	Joint MOTION Stay of Litigation by All Parties by United States. (Benson, Thomas) (Entered: 06/11/2018)
06/14/2018	242	ORDER granting 241 Joint Motion to Stay Case 180 days pending settlement negotiations. Signed by District Judge Bernard A. Friedman. (JCur) (Entered: 06/14/2018)
12/12/2018	243	Joint MOTION to Stay Litigation on Behalf of All Parties by United States. (Benson, Thomas) (Entered: 12/12/2018)

12/13/2018	244	ORDER granting 243 Joint Motion to Stay the Case for Six Months. Signed by District Judge Bernard A. Friedman. (JCur) (Entered: 12/13/2018)

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EXHIBIT B

Search documents in this case: Search

No. 17-170

Title:	**DTE Energy Company, et al., Petitioners** **v.** **United States, et al.**
Docketed:	August 2, 2017
Lower Ct:	United States Court of Appeals for the Sixth Circuit
Case Numbers:	(14-2274, 14-2275)
Decision Date:	January 10, 2017
Rehearing Denied:	May 1, 2017

DATE	PROCEEDINGS AND ORDERS
Jul 31 2017	Petition for a writ of certiorari filed. (Response due September 1, 2017)
Aug 22 2017	Order extending time to file response to petition to and including October 2, 2017, for all respondents.
Aug 31 2017	Brief amici curiae of The Electric Reliability Corrdinating Council, et al. filed.
Sep 26 2017	Order further extending time to file response to petition to and including November 1, 2017, for all respondents.

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Nov 01 2017	Brief of respondent United States in opposition filed.
Nov 01 2017	Brief of respondent Sierra Club in opposition filed.
Nov 15 2017	Reply of petitioners DTE Energy Company, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2017	DISTRIBUTED for Conference of 12/8/2017.
Dec 08 2017	Letter received from counsel for petitioners December 8, 2017. (Distributed)
Dec 11 2017	Petition DENIED.

NAME	ADDRESS	PHONE
Attorneys for Petitioners		
F. William Brownell Counsel of Record	Hunton & Williams LLP 2200 Pennsylvania Avenue, NW Washington, DC 20037 bbrownell@hunton.com	(202) 955-1500
Party name: DTE Energy Company, et al.		
Attorneys for Respondents		

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Noel Francisco Counsel of Record	Solicitor General United States Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-0001 SupremeCtBriefs@USDOJ.gov	202-514-2217
Party name: United States		
Michael Soules Counsel of Record	Earthjustice 1625 Massachusetts Avenue NW Suite 702 Washington , DC 20036 msoules@earthjustice.org	2026674500
Party name: Sierra Club		
Other		
Scott Howard Segal Counsel of Record	Bracewell, LLP 2001 M Street, NW Suite 900 Washington, DC 20036 scott.segal@bracewell.com	(202)-828-5845
Party name: The Electric Reliability Corrdinating Council, et al.		

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EXHIBIT C

Mr. Kevin S. Minoli
Designated Agency Ethics Official
U.S. EPA (2310A)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Mr. Minoli:

The purpose of this letter is to describe the steps that I will take to avoid any actual or apparent conflict of interest in the event that I am confirmed for the position of Assistant Administrator for the Office of Air and Radiation of the United States Environmental Protection Agency.

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

Upon confirmation, I will resign from my position with the law firm of with Hunton & Williams LLP. I currently have a capital account with the firm, and I will receive a refund of that account after my resignation. Until I have received this refund, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of the firm to pay this refund, unless I first obtain a written waiver, pursuant to 18 U.S.C. 208(b)(1). I will continue to receive my monthly draw at the current rate until I resign from the law firm. I will not qualify for any additional partnership payments. If the law firm decides to pay me a discretionary partnership distribution for work I performed during the firm's fiscal year ending March 31, 2018, I will not accept that distribution and will forfeit it, unless I receive it before I assume the duties of the position of Assistant Administrator for the Office of Air and Radiation. If I receive the discretionary partnership distribution, I will not participate personally and substantially in any particular matter involving specific parties in which I know the law firm is a party or represents a party for a period of two years from the date on which I receive the distribution. If I do not receive the distribution, I will not participate personally and substantially in any particular matter involving specific parties in which I know the firm is a party or represents a party for a period of one year from the date of my resignation, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know a former client of mine is a party or represents a party for a period of one year after I last provided service to that client, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

If I have a managed account or otherwise use the services of an investment professional during my appointment, I will ensure that the account manager or investment professional obtains my prior approval on a case-by-case basis for the purchase of any assets other than cash, cash equivalents, investment funds that qualify for the exemption at 5 C.F.R. § 2640.201(a), obligations of the United States, or municipal bonds.

I will meet in person with you during the first week of my service in the position of Assistant Administrator in order to complete the initial ethics briefing required under 5 C.F.R. § 2638.305. Within 90 days of my confirmation, I will document my compliance with this ethics agreement by notifying you in writing when I have completed the steps described in this ethics agreement.

I understand that as an appointee I will be required to sign the Ethics Pledge (Exec. Order No. 13770) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this ethics agreement.

I have been advised that this ethics agreement will be posted publicly, consistent with 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with ethics agreements of other Presidential nominees who file public financial disclosure reports.

Sincerely yours,

William L. Wehrum

8-28-17

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EXHIBIT D

MEMORANDUM

SUBJECT: Recusal Statement

FROM: William L. Wehrum
Assistant Administrator

9-17-18

TO: Andrew R. Wheeler
Acting Administrator

I have previously consulted with the Office of General Counsel/Ethics (OGC/Ethics) and been advised about my ethics obligations. This memorandum formally notifies you of my continuing obligations to recuse myself from participating personally and substantially in certain matters in which I have a financial interest, or a personal or business relationship. I also understand that I have obligations pursuant to Executive Order 13770 and the Trump Ethics Pledge that I signed, as well as my own bar obligations.

FINANCIAL CONFLICTS OF INTEREST

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

I have consulted with OGC/Ethics and been advised that I do not currently have any financial conflicts of interest but will remain vigilant and notify OGC/Ethics immediately should my financial situation change.

OBLIGATIONS UNDER EXECUTIVE ORDER 13770

Pursuant to Section 1, Paragraph 6 of the Executive Order, I understand that I am prohibited from participating in any particular matter involving specific parties in which my former employer, **Hunton & Williams LLP** (now Hunton Andrews Kurth LLP), or any former client to whom I provided legal services during the past two years, is a party or represents a party. I understand that my recusal lasts for two years from the date that I joined federal service.

I have been advised by OGC/Ethics that, for the purposes of this pledge obligation, the term "particular matters involving specific parties" is broadened to include any meetings or other communication relating to the performance of my official duties, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties. I am further advised that the term "open to all interested parties" means five or more parties.

RECUSAL LIST In effect until November 12, 2019	
FORMER EMPLOYER: Hunton & Williams LLP (now Hunton Andrews Kurth LLP)	
FORMER CLIENTS:[1]	
Agrium Inc.; Agrium U.S. Inc.; Nu-West Industries, Inc. American Forest & Paper Association American Fuel & Petrochemical Manufacturers American Petroleum Institute B10 Litigation Coalition Brick Industry Association CEMEX USA, Inc. Champion Power Equipment, Inc. Chemical Safety Advocacy Group (CSAG) Chevron Corporation Diageo Dominion Resources Services, Inc. Duke Energy Corporation Enbridge, Inc. Evonik Corporation[2] ExxonMobil Corporation Flint Hills Resources, LP GPA Midstream Association (formally known as Gas Processors Association)	General Electric Company Georgia-Pacific LLC Kinder Morgan, Inc. Koch Companies Public Sector, LLC Koch Industries, Inc. Lehigh Hanson, Inc. Lowe's Companies, Inc. National Stone, Sand and Gravel Association Pfizer Inc. Phillips 66 Company Portland Cement Association Prinoth Ltd. Salt River Project Spectra Energy Corp. Sunflower Electric Power Corporation, Inc. Tile Council of North America Utility Air Regulatory Group Utility Water Act Group Whitaker Greer Company

[1] Two confidential clients are not listed. Both clients have a written confidentiality agreement expressly prohibiting disclosure.

[2] Includes but not limited to an ongoing settlement negotiation.

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ATTORNEY BAR OBLIGATIONS

Pursuant to my obligations under my bar rules, I recognize that I am obliged to protect the confidences of my former clients. I also understand that I cannot participate in any matter that is the same as or substantially related to the same specific party matter that I participated in personally and substantially while in private practice, unless my bar provides for and I first obtain informed consent and notify OGC/Ethics. Attached is a list of cases I am recused from given my participation at Hunton Andrews Kurth LLP.

SCREENING ARRANGEMENT

In order to ensure that I do not participate in matters relating to any of the entities listed above or matters identified in the Attachment, I will instruct Josh Lewis, Chief of Staff, and Mandy Gunasekara, Principal Deputy Assistant Administrator, to assist in screening EPA matters directed to my attention that involve those entities. All inquiries and comments involving the entities or matters on my recusal list should be directed to Josh and Mandy without my knowledge or involvement until after my recusal period ends.

If Josh or Mandy determine that a particular matter will directly involve any of the entities or matters listed on my "specific party" recusal list, then they will refer it for action or assignment to another, without my knowledge or involvement. In the event that they are unsure whether an issue is a particular matter from which I am recused, then they will consult with OGC/Ethics for a determination. I will provide a copy of this memorandum to my principal subordinates with a copy to Justina Fugh, Senior Counsel for Ethics.

UPDATE AS NECESSARY

In consultation with OGC/Ethics, I will revise and update my recusal statement whenever warranted by changed circumstances, including changes in my financial interests, changes in my personal or business relationships, or any changes to my EPA duties. In the event of any changes to my recusal or screening arrangement, I will provide a copy of the revised recusal statement to OGC/Ethics.

Attachment

cc: Matthew Z. Leopold, General Counsel
Ryan Jackson, Chief of Staff
Mandy Gunesakara, Deputy Assistant Administrator
Clint Woods, Deputy Assistant Administrator
Elizabeth Shaw, Deputy Assistant Administrator
David Harlow, Senior Counsel
Josh Lewis, Chief of Staff
Kevin Minoli, Designated Agency Ethics Official
Justina Fugh, Senior Counsel for Ethics

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William L. Wehrum RECUSAL LIST – ATTORNEY BAR OBLIGATIONS	
CASE NAME:	CITATION:
American Petroleum Institute v. EPA	No. 08-1277 (D.C. Cir.)
Environmental Integrity Project v. EPA	No. 08-1281 (D.C. Cir.) (consolidated with No. 08-1277)
Kinder Morgan CO2 Co., LP v. EPA	No. 09-1332 (D.C. Cir.)
Gas Processors Association v. EPA	No. 11-1023 (D.C. Cir.)
American Petroleum Institute, *et al.* v. EPA	No. 11-1309 (D.C. Cir.)
National Rural Electric Coop. v. EPA	No. 12-1208 (D.C. Cir.) (consolidated with No. 12-1163)
National Rural Electric Coop. v. EPA	No. 12-1352 (D.C. Cir.) (consolidated with No. 12-1346)
American Petroleum Institute v. EPA	No. 12-1405 (D.C. Cir.)
Gas Processors Association v. EPA	No. 12-1406 (D.C. Cir.) (consolidated with No. 12-1405)
American Petroleum Institute, *et al.* v. EPA	No. 12-1442 (D.C. Cir.)
American Petroleum Institute v. EPA	No. 13-1063 (D.C. Cir.) (consolidated with No. 11-1309)
American Petroleum Institute v. EPA	No. 13-1108 (D.C. Cir.)
Conservation Law Foundation, *et al.* v. EPA	No. 13-1233 (D.C. Cir.)
Sierra Club, *et al.* v. EPA	No. 13-1256 (D.C. Cir.) (consolidated with No. 16-1021)
American Petroleum Institute v. EPA	No. 13-1289 (D.C. Cir.) (consolidated with No. 13-1108)
PSEG Power LLC, *et al.* v. EPA	No. 14-1199 (D.C. Cir.) (consolidated with No. 13-1233)
Georgia-Pacific LLC v. EPA	No. 14-1267 (D.C. Cir.)
Gas Processors Association v. EPA	No. 15-1021 (D.C. Cir.) (consolidated with No. 15-1020)
American Petroleum Institute v. EPA	No. 15-1044 (D.C. Cir.) (consolidated with No. 13-1108)
American Petroleum Institute v. EPA	No. 15-1197 (D.C. Cir.)
Gas Processors Association v. EPA	No. 15-1473 (D.C. Cir.)
Sierra Club, *et al.* v. EPA, *et al.*	No. 15-1487 (D.C. Cir.)
Brick Industry Association v. EPA	No. 15-1492 (D.C. Cir.) (consolidated with No. 15-1487)
Sierra Club, *et al.* v. EPA, *et al.*	No. 16-1021 (D.C. Cir.)
American Fuel & Petrochemical, *et al.* v. EPA	No. 16-1033 (D.C. Cir.)
Air Alliance Houston, *et al.* v. EPA, *et al.*	No. 16-1035 (D.C. Cir.) (consolidated with No. 16-1033)
Brick Industry Association v. EPA	No. 16-1179 (D.C. Cir.) (consolidated with No. 15-1487)

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American Petroleum Institute v. EPA	No. 16-1270 (D.C. Cir.) (consolidated with No. 13-1108)
American Petroleum Institute v. EPA	No. 16-1271 (D.C. Cir.)
American Petroleum Institute v. EPA	No. 16-1345 (D.C. Cir.) (consolidated with No. 16-1344)
Natural Resources Defense Council v. EPA	No. 16-1425 (D.C. Cir.)
Utility Air Regulatory Group v. EPA	No. 17-1088 (D.C. Cir.) (consolidated with No. 17-1085)

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EXHIBIT E

To: Jackson, Ryan[jackson.ryan@epa.gov]
From: Wehrum, William L.
Sent: Fri 8/11/2017 2:28:01 PM
Subject: David Harlow

Ryan – Following up:

dharlow@hunton.com

cell: [redacted]

HUNTON & WILLIAMS **Bill Wehrum**

Partner

wwehrum@hunton.com
p 202.955.1637

bio | vCard | blog | LinkedIn

Hunton & Williams LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037

hunton.com

EXHIBIT F

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Executive Branch Personnel
Public Financial Disclosure Report (OGE Form 278e)

Filer's Information

Harlow, David

Senior Counsel to the Assistant Administrator for Air and Radiation, Environmental Protection Agency

Date of Appointment: 10/01/2017

Other Federal Government Positions Held During the Preceding 12 Months:
None

Electronic Signature - I certify that the statements I have made in this form are true, complete and correct to the best of my knowledge.

/s/ Harlow, David [electronically signed on 10/28/2017 by Harlow, David in Integrity.gov]

Agency Ethics Official's Opinion - On the basis of information contained in this report, I conclude that the filer is in compliance with applicable laws and regulations (subject to any comments below).
/s/ Fugh, Justina, Certifying Official [electronically signed on 12/18/2017 by Fugh, Justina in Integrity.gov]

Other review conducted by

U.S. Office of Government Ethics Certification

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Data Revised 12/07/2017

Data Revised 11/17/2017

Data Revised 11/13/2017

Data Revised 11/12/2017

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1. Filer's Positions Held Outside United States Government

#	ORGANIZATION NAME	CITY, STATE	ORGANIZATION TYPE	POSITION HELD	FROM	TO
1	Hunton & Williams, LLP	Washington, District of Columbia	Law Firm	Counsel	8/1986	9/2017

2. Filer's Employment Assets & Income and Retirement Accounts

#	DESCRIPTION	EIF	VALUE	INCOME TYPE	INCOME AMOUNT
1	Hunton & Williams, LLP (law firm)	N/A		Salary	$421,189
2	Fidelity 401(k)				
2.1	Neuberger Berman Genesis Fund Class R6 (NRGSX)	Yes	$100,001 - $250,000		None (or less than $201)
2.2	Dodge & Cox Stock Fund (DODGX)	Yes	$100,001 - $250,000		None (or less than $201)
2.3	Fidelity Puritan Fund (FPURX)	Yes	$100,001 - $250,000		None (or less than $201)
2.4	Fidelity Managed Income Portfolio Class 1	Yes	$50,001 - $100,000		None (or less than $201)
2.5	Fidelity Diversified International Fund Class K (FDIKX)	Yes	$15,001 - $50,000		None (or less than $201)
2.6	Wells Fargo Stable Value Fund Q	Yes	$1,001 - $15,000		None (or less than $201)

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3. Filer's Employment Agreements and Arrangements

#	EMPLOYER OR PARTY	CITY, STATE	STATUS AND TERMS	DATE
1	Hunton & Williams LLP	Richmond, Virginia	I will continue to participate in this defined contribution plan, but the plan sponsor no longer makes contributions.	8/1986

4. Filer's Sources of Compensation Exceeding $5,000 in a Year

#	SOURCE NAME	CITY, STATE	BRIEF DESCRIPTION OF DUTIES
1	Hunton & Williams, LLP	Washington, District of Columbia	Provide legal advice and other services to clients.
2	Agrium Inc. & NU-West Industries, Inc.	Bellevue, Washington	Provide legal advice and services.
3	Chevron Corporation	San Ramon, California	Provide legal advice and services.
4	George R. Jarkesy, Jr.	Unknown	Provide legal advice and services.
5	LG&E and KU Energy, LLC	Louisville, Kentucky	Provide legal advice and services.
6	National Stone, Sand & Gravel Association	Alexandria, Virginia	Provide legal advice and services.
7	Sunflower Electric Power Corp.	Hays, Kansas	Provide legal services and services.
8	Utility Air Regulatory Group	Washington, District of Columbia	Provide legal advice and services.

5. Spouse's Employment Assets & Income and Retirement Accounts

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#	DESCRIPTION	EIF	VALUE	INCOME TYPE	INCOME AMOUNT
1	American Century Heritage TWHIX IRA	Yes	$50,001 - $100,000		None (or less than $201)

6. Other Assets and Income

#	DESCRIPTION	EIF	VALUE	INCOME TYPE	INCOME AMOUNT
1	American Century Ultra Fund Investor Class (TWCUX)	Yes	$15,001 - $50,000		$1,001 - $2,500
2	Charles Schwab Brokerage Account	No	$15,001 - $50,000		None (or less than $201)
2.1	Cash/Money Market Account	N/A	$15,001 - $50,000		None (or less than $201)
3	Merrill Lynch AXA	No	$500,001 - $1,000,000		None (or less than $201)
3.1	AXA Large Cap Growth Managed Vola	Yes	$50,001 - $100,000		None (or less than $201)
3.2	AXA Large Cap Value Managed Vol	Yes	$50,001 - $100,000		None (or less than $201)
3.3	EQ/Core Bond In	Yes	$50,001 - $100,000		None (or less than $201)
3.4	AXA Large Cap Core Managed Vol	Yes	$15,001 - $50,000		None (or less than $201)
3.5	Multimanager Technot	Yes	$15,001 - $50,000		None (or less than $201)
3.6	EQ/International Equity Index	Yes	$15,001 - $50,000		None (or less than $201)
3.7	EQ/Quality Bond PLUS	Yes	$50,001 - $100,000		None (or less than $201)

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#	DESCRIPTION	EIF	VALUE	INCOME TYPE	INCOME AMOUNT
3.8	AXA Moderate Allocation	Yes	$15,001 - $50,000		None (or less than $201)
3.9	AXA International Core Managed Volatility	Yes	$15,001 - $50,000		None (or less than $201)
3.10	AXA Mid Cap Value Managed Volatility	Yes	$15,001 - $50,000		None (or less than $201)
3.11	EQ/Mid Cap Index	Yes	$15,001 - $50,000		None (or less than $201)
3.12	AXA 2000 Managed Volati	Yes	$15,001 - $50,000		None (or less than $201)
3.13	AXA/AB Short Duration Government Bond	Yes	$15,001 - $50,000		None (or less than $201)
4	Invesco IRA	Yes	$15,001 - $50,000		None (or less than $201)
4.1	Invesco American Franchise Fund - Class A	Yes	$15,001 - $50,000		None (or less than $201)
4.2	Invesco Developing Markets Fund - Class A	Yes	$15,001 - $50,000		None (or less than $201)
4.3	Invesco Mid Cap Growth Fund - Class A	Yes	$1,001 - $15,000		None (or less than $201)

7. Transactions

(N/A) - Not required for this type of report

8. Liabilities

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#	CREDITOR NAME		TYPE	AMOUNT	YEAR INCURRED	RATE	TERM
1	Bank of America		Exercised Line of Credit	$50,001 - $100,000	2015	5.285	240 months
2	USAA Savings Bank	See Endnote	Credit Card	$15,001 - $50,000	2017	7.9	N/A
3	USAA Savings Bank	See Endnote	Credit Card	$15,001 - $50,000	2016	7.9	N/A
4	Bank of America	See Endnote	Credit Card	$10,001 - $15,000	2017	11.24	N/A
5	Bank of America	See Endnote	Credit Card	$10,001 - $15,000	2016	11.24	N/A

9. Gifts and Travel Reimbursements

(N/A) - Not required for this type of report

Endnotes

PART	#	ENDNOTE
8.	2	The outstanding balance on this card occasionally exceeded the specified amount during the calendar year.
8.	3	The outstanding balance on this card occasionally exceeded the specified amount during the calendar year.
8.	4	The outstanding balance on this card occasionally exceeded the specified amount during the calendar year.
8.	5	The outstanding balance on this card occasionally exceeded the specified amount during the calendar year.

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Summary of Contents

1. Filer's Positions Held Outside United States Government

Part 1 discloses positions that the filer held at any time during the reporting period (excluding positions with the United States Government). Positions are reportable even if the filer did not receive compensation.

This section does not include the following: (1) positions with religious, social, fraternal, or political organizations; (2) positions solely of an honorary nature; (3) positions held as part of the filer's official duties with the United States Government; (4) mere membership in an organization; and (5) passive investment interests as a limited partner or non-managing member of a limited liability company.

2. Filer's Employment Assets & Income and Retirement Accounts

Part 2 discloses the following:

- Sources of earned and other non-investment income of the filer totaling more than $200 during the reporting period (e.g., salary, fees, partnership share, honoraria, scholarships, and prizes)
- Assets related to the filer's business, employment, or other income-generating activities that (1) ended the reporting period with a value greater than $1,000 or (2) produced more than $200 in income during the reporting period (e.g., equity in business or partnership, stock options, retirement plans/accounts and their underlying holdings as appropriate, deferred compensation, and intellectual property, such as book deals and patents)

This section does not include assets or income from United States Government employment or assets that were acquired separately from the filer's business, employment, or other income-generating activities (e.g., assets purchased through a brokerage account). Note: The type of income is not required if the amount of income is $0 - $200 or if the asset qualifies as an excepted investment fund (EIF).

3. Filer's Employment Agreements and Arrangements

Part 3 discloses agreements or arrangements that the filer had during the reporting period with an employer or former employer (except the United States Government), such as the following:

- Future employment
- Leave of absence
- Continuing payments from an employer, including severance and payments not yet received for previous work (excluding ordinary salary from a current employer)
- Continuing participation in an employee welfare, retirement, or other benefit plan, such as pensions or a deferred compensation plan
- Retention or disposition of employer-awarded equity, sharing in profits or carried interests (e.g., vested and unvested stock options, restricted stock, future share of a company's profits, etc.)

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4. Filer's Sources of Compensation Exceeding $5,000 in a Year

Part 4 discloses sources (except the United States Government) that paid more than $5,000 in a calendar year for the filer's services during any year of the reporting period.

The filer discloses payments both from employers and from any clients to whom the filer personally provided services. The filer discloses a source even if the source made its payment to the filer's employer and not to the filer. The filer does not disclose a client's payment to the filer's employer if the filer did not provide the services for which the client is paying.

5. Spouse's Employment Assets & Income and Retirement Accounts

Part 5 discloses the following:

- Sources of earned income (excluding honoraria) for the filer's spouse totaling more than $1,000 during the reporting period (e.g., salary, consulting fees, and partnership share)
- Sources of honoraria for the filer's spouse greater than $200 during the reporting period
- Assets related to the filer's spouse's employment, business activities, other income-generating activities that (1) ended the reporting period with a value greater than $1,000 or (2) produced more than $200 in income during the reporting period (e.g., equity in business or partnership, stock options, retirement plans/accounts and their underlying holdings as appropriate, deferred compensation, and intellectual property, such as book deals and patents)

This section does not include assets or income from United States Government employment or assets that were acquired separately from the filer's spouse's business, employment, or other income-generating activities (e.g., assets purchased through a brokerage account). Note: The type of income is not required if the amount of income is $0 - $200 or if the asset qualifies as an excepted investment fund (EIF). Amounts of income are not required for a spouse's earned income (excluding honoraria).

6. Other Assets and Income

Part 6 discloses each asset, not already reported, that (1) ended the reporting period with a value greater than $1,000 or (2) produced more than $200 in investment income during the reporting period. For purposes of the value and income thresholds, the filer aggregates the filer's interests with those of the filer's spouse and dependent children.

This section does not include the following types of assets: (1) a personal residence (unless it was rented out during the reporting period); (2) income or retirement benefits associated with United States Government employment (e.g., Thrift Savings Plan); and (3) cash accounts (e.g., checking, savings, money market accounts) at a single financial institution with a value of $5,000 or less (unless more than $200 of income was produced). Additional exceptions apply. Note: The type of income is not required if the amount of income is $0 - $200 or if the asset qualifies as an excepted investment fund (EIF).

7. Transactions

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Part 7 discloses purchases, sales, or exchanges of real property or securities in excess of $1,000 made on behalf of the filer, the filer's spouse or dependent child during reporting period.

This section does not include transactions that concern the following: (1) a personal residence, unless rented out; (2) cash accounts (e.g., checking, savings, CDs, money market accounts) and money market mutual funds; (3) Treasury bills, bonds, and notes; and (4) holdings within a federal Thrift Savings Plan account. Additional exceptions apply.

8. Liabilities

Part 8 discloses liabilities over $10,000 that the filer, the filer's spouse or dependent child owed at any time during the reporting period.

This section does not include the following types of liabilities: (1) mortgages on a personal residence, unless rented out (limitations apply for PAS filers); (2) loans secured by a personal motor vehicle, household furniture, or appliances, unless the loan exceeds the item's purchase price; and (3) revolving charge accounts, such as credit card balances, if the outstanding liability did not exceed $10,000 at the end of the reporting period. Additional exceptions apply.

9. Gifts and Travel Reimbursements

This section discloses:

- Gifts totaling more than $375 that the filer, the filer's spouse, and dependent children received from any one source during the reporting period.
- Travel reimbursements totaling more than $375 that the filer, the filer's spouse, and dependent children received from any one source during the reporting period.

For purposes of this section, the filer need not aggregate any gift or travel reimbursement with a value of $150 or less. Regardless of the value, this section does not include the following items: (1) anything received from relatives; (2) anything received from the United States Government or from the District of Columbia, state, or local governments; (3) bequests and other forms of inheritance; (4) gifts and travel reimbursements given to the filer's agency in connection with the filer's official travel; (5) gifts of hospitality (food, lodging, entertainment) at the donor's residence or personal premises; and (6) anything received by the filer's spouse or dependent children totally independent of their relationship to the filer. Additional exceptions apply.

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Privacy Act Statement

Title I of the Ethics in Government Act of 1978, as amended (the Act), 5 U.S.C. app. § 101 et seq., as amended by the Stop Trading on Congressional Knowledge Act of 2012 (Pub. L. 112-105) (STOCK Act), and 5 C.F.R. Part 2634 of the U. S. Office of Government Ethics regulations require the reporting of this information. The primary use of the information on this report is for review by Government officials to determine compliance with applicable Federal laws and regulations. This report may also be disclosed upon request to any requesting person in accordance with sections 105 and 402(b)(1) of the Act or as otherwise authorized by law. You may inspect applications for public access of your own form upon request. Additional disclosures of the information on this report may be made: (1) to any requesting person, subject to the limitation contained in section 208(d)(1) of title 18, any determination granting an exemption pursuant to sections 208(b)(1) and 208(b)(3) of title 18; (2) to a Federal, State, or local law enforcement agency if the disclosing agency becomes aware of violations or potential violations of law or regulation; (3) to another Federal agency, court or party in a court or Federal administrative proceeding when the Government is a party or in order to comply with a judge-issued subpoena; (4) to a source when necessary to obtain information relevant to a conflict of interest investigation or determination; (5) to the National Archives and Records Administration or the General Services Administration in records management inspections; (6) to the Office of Management and Budget during legislative coordination on private relief legislation; (7) to the Department of Justice or in certain legal proceedings when the disclosing agency, an employee of the disclosing agency, or the United States is a party to litigation or has an interest in the litigation and the use of such records is deemed relevant and necessary to the litigation; (8) to reviewing officials in a new office, department or agency when an employee transfers or is detailed from one covered position to another; (9) to a Member of Congress or a congressional office in response to an inquiry made on behalf of an individual who is the subject of the record; (10) to contractors and other non-Government employees working on a contract, service or assignment for the Federal Government when necessary to accomplish a function related to an OGE Government-wide system of records; and (11) on the OGE Website and to any person, department or agency, any written ethics agreement filed with OGE by an individual nominated by the President to a position requiring Senate confirmation. See also the OGE/GOVT-1 executive branch-wide Privacy Act system of records.

Public Burden Information

This collection of information is estimated to take an average of three hours per response, including time for reviewing the instructions, gathering the data needed, and completing the form. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Program Counsel, U.S. Office of Government Ethics (OGE), Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917.

Pursuant to the Paperwork Reduction Act, as amended, an agency may not conduct or sponsor, and no person is required to respond to, a collection of information unless it displays a currently valid OMB control number (that number, 3209-0001, is displayed here and at the top of the first page of this OGE Form 278e).

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EXHIBIT G

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
AIR AND RADIATION

MEMORANDUM

SUBJECT: Recusal Statement

FROM: David S. Harlow
Senior Counsel

TO: William L. Wehrum
Assistant Administrator

DATE: December 28, 2017

I have previously consulted with the Office of General Counsel/Ethics (OGC/Ethics) and been advised about my ethics obligations. This memorandum formally notifies you of my continuing obligations to recuse myself from participating personally and substantially in certain matters in which I have a financial interest, or a personal or business relationship. I also understand that I have obligations pursuant to Executive Order 13770 and the Trump Ethics Pledge that I signed, as well as my own bar obligations.

FINANCIAL CONFLICTS OF INTEREST

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

I have consulted with OGC/Ethics and been advised that I do not currently have any financial conflicts of interest but will remain vigilant and notify OGC/Ethics immediately should my financial situation change.

OBLIGATIONS UNDER EXECUTIVE ORDER 13770

Pursuant to Section 1, Paragraph 6 of the Executive Order, I understand that I am

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prohibited from participating in any particular matter involving specific parties in which my former employer, **Hunton & Williams LLP**, or any former client to whom I provided legal services during the past two years is a party or represents a party. I understand that my recusal lasts for two years from the date that I joined federal service.

I have been advised by OGC/Ethics that, for the purposes of this pledge obligation, the term "particular matters involving specific parties" is broadened to include any meetings or other communication relating to the performance of my official duties, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties. I am further advised that the term "open to all interested parties" means five or more parties. Set forth below are my former clients identified in consultation with OGC/Ethics that have or may have environmental interests that could potentially arise with respect to my duties here at EPA.[1]

RECUSAL LIST In effect until October 1, 2019	
FORMER EMPLOYER: Hunton & Williams LLP	
FORMER CLIENTS:[2] Agrium Inc.; Nu-West Industries, Inc. Chevron Corporation DTE Energy Company LG&E and KU Energy, LLC	 National Stone, Sand and Gravel Association Sunflower Electric Power Corporation, Inc. Utility Air Regulatory Group

ATTORNEY BAR OBLIGATIONS

Pursuant to my obligations under my bar rules, I recognize that I am obliged to protect the confidences of my former clients. I also understand that I cannot participate in any matter that is the same as or substantially related to the same specific party matter that I participated in personally and substantially while in private practice, unless my bar provides for and I first obtain informed consent and notify OGC/Ethics. Attached is a list of cases I am recused from given my participation at Hunton & Williams LLP.

SCREENING ARRANGEMENT

In order to ensure that I do not participate in matters relating to any of the entities listed above, I will instruct Josh Lewis, Chief of Staff, and Mandy Gunasekara, Principal Deputy

[1] For my former clients who are not listed, I understand that I am personally obliged not to participate in specific party matters for the duration of my ethics obligations.
[2] One confidential client is not listed. This client has a written confidentiality agreement expressly prohibiting disclosure.

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Assistant Administrator, to assist in screening EPA matters directed to my attention that involve these entities. All inquiries and comments involving the entities on my recusal list should be directed to Josh and Mandy without my knowledge or involvement until after my recusal period ends.

If Josh or Mandy determine that a particular matter will directly involve any of the entities listed on my "specific party" recusal list, then he/she will refer it for action or assignment to another, without my knowledge or involvement. In the event that he/she is unsure whether an issue is a particular matter from which I am recused, then he/she will consult with OGC/Ethics for a determination. I will provide a copy of this memorandum to my principal subordinates with a copy to Justina Fugh, Senior Counsel for Ethics.

UPDATE AS NECESSARY

In consultation with OGC/Ethics, I will revise and update my recusal statement whenever warranted by changed circumstances, including changes in my financial interests, changes in my personal or business relationships, or any changes to my EPA duties. In the event of any changes to my recusal or screening arrangement, I will provide a copy of the revised recusal statement to you and OGC/Ethics.

David S. Harlow
Senior Counsel

cc: Elizabeth Shaw, Deputy Assistant Administrator
Justina Fugh, Senior Counsel for Ethics

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David S. Harlow RECUSAL LIST – ATTORNEY BAR OBLIGATIONS	
CASE NAME:	CITATION:
Utility Air Regulatory Group v. EPA	No. 12-1166 (D.C. Cir.) (consolidated with No. 12-1100)
American Petroleum Institute v. EPA	No. 13-1063 (D.C. Cir.) (consolidated with No. 11-1309)
Utility Air Regulatory Group v. EPA	No. 15-1370 (D.C. Cir.) (consolidated with No. 15-1363)
LG&E and KU Energy v. EPA	No. 15-1418 (D.C. Cir.)
Utility Air Regulatory Group v. EPA	No. 17-1018 (D.C. Cir.) (consolidated with No. 17-1015)

EXHIBIT H

E. SCOTT PRUITT
ADMINISTRATOR

December 7, 2017

MEMORANDUM

SUBJECT: New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected-Actual Applicability Test in Determining Major Modification Applicability

FROM: E. Scott Pruitt

TO: Regional Administrators

I. Introduction and Purpose of Memorandum

In accordance with presidential priorities for streamlining regulatory permitting requirements for manufacturing and other types of facilities, the U.S. Environmental Protection Agency is conducting a review of the agency's implementation of the preconstruction permitting requirements under the Clean Air Act, which are generally known as the New Source Review program. This review will involve an assessment of opportunities for the EPA to make improvements by clarifying or revising the EPA regulations implementing the NSR program, providing technical support and oversight to the states that administer the program and evaluating the agency's enforcement of the NSR requirements. With respect to the latter, there continue to be disputes pending in the United States courts in NSR enforcement cases that began before the EPA initiated the current review of the NSR program. The United States is represented in those matters by the Department of Justice and the Office of Solicitor General. As those cases proceed toward resolution, the EPA continues to have implementation and oversight responsibilities for the NSR program.

Based on an initial assessment, I understand that two recent appellate court decisions[1] in the pending enforcement proceeding against DTE Energy have created uncertainty regarding the applicability of NSR permitting requirements in circumstances where the owner or operator of an existing major stationary source projects that proposed construction will not cause an increase in actual emissions that triggers NSR requirements. As we begin the EPA's current review of the

[1] These appellate decisions are *U.S. v. DTE Energy Co.*, 711 F.3d 643 (6th Cir. 2013) and *U.S. v. DTE Energy Co.*, 845 F.3d 735 (6th Cir. 2017).

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NSR program, this memorandum communicates how the EPA intends to apply and enforce certain aspects of the applicability provisions of the NSR regulations that have been addressed in these appellate decisions.

In particular, this memorandum addresses the EPA's intended approach concerning the procedures contained in the NSR Reform Rules[2] (and approved state regulations that reflect the content of those rules) for sources that have used or intend to use "projected actual emissions" in determining NSR applicability and the associated pre- and post-project source obligations. While this memorandum describes our current intended approach for future matters, decisions about how to proceed in ongoing enforcement matters will be made on a case-by-case basis. We believe this memorandum is necessary to provide greater clarity for sources and states implementing the NSR regulations. The guidance is also generally consistent with the NSR Reform Rules and with EPA objectives and ongoing efforts to clarify and streamline the NSR program requirements and reduce burden on regulated sources in accordance with recent Presidential actions.[3]

The remainder of this memorandum is organized into two sections. Section II contains relevant CAA, regulatory and litigation background. Section III contains a discussion of the issues raised by the DTE litigation and addresses the EPA's current intended approach concerning the following specific topics: 1) consideration of post-project emissions management in determining NSR applicability; 2) the role of post-project actual emissions in major modification applicability; 3) the EPA oversight and enforcement of pre-project NSR applicability analyses involving the actual-to-projected-actual applicability test; and 4) the role of EPA-approved state and local NSR programs in implementing NSR requirements.

This memorandum explains how the EPA intends to apply and enforce certain requirements of the NSR regulations as we begin review of that program. This document is not a rule or regulation, and the guidance it contains may not apply to a particular situation based upon the individual facts and circumstances. This memorandum does not change or substitute for any law, regulation or other legally binding requirement and is not legally enforceable. This memorandum is not final agency action, but merely clarifies the EPA's current understanding regarding certain elements of the NSR regulations.

II. Background on CAA and Regulatory Provisions and DTE Litigation

A. Relevant CAA and EPA Regulatory Provisions

The NSR provisions of the CAA and of the EPA's implementing regulations require new major stationary sources and major modifications at existing major stationary sources to, among other things, obtain an air quality permit before beginning construction. This permitting process for major stationary sources is required whether the major source or major modification is planned for an area where the national ambient air quality standards (NAAQS) are exceeded

[2] In 2002, the EPA issued a final rule that revised the regulations governing the major NSR program. 67 FR 80186. We refer generally to these rule provisions as "NSR Reform."

[3] *See e.g.*, Presidential Memorandum: Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing (January 24, 2017); Executive Order 13777: Enforcing the Regulatory Reform Agenda (February 24, 2017).

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(nonattainment areas) or an area where the NAAQS have not been exceeded (attainment and unclassifiable areas). In general, permits for sources in attainment areas and for other pollutants regulated under the major source program are referred to as prevention of significant deterioration (PSD) permits, while permits for major sources emitting nonattainment pollutants and located in nonattainment areas are referred to as nonattainment NSR (NNSR) permits. The entire preconstruction permitting program, which includes the PSD and the NNSR permitting programs, is referred to as the NSR program.[4]

The CAA defines a "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4). A "major modification" is defined in the regulations as "any physical change in or change in the method of operation of a major stationary source that would result in: a significant emissions increase (as defined in paragraph (b)(40) of this section) of a regulated NSR pollutant (as defined in paragraph (b)(50) of this section); and a significant net emissions increase of that pollutant from the major stationary source." 40 C.F.R. § 52.21(b)(2)(i).

The NSR applicability procedures in the regulations reaffirm the role of the "project" emissions increase[5] and "net emissions increase"[6] in determining major modification applicability: "...a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases – a significant emissions increase (as defined in paragraph (b)(40) of this section), and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(*a*).

Prior to beginning construction of a project the owner or operator of the major stationary source must calculate the emissions increases that it projects will be caused by the project and potentially the net emissions increase to determine if NSR permitting is required. The procedure for calculating whether a significant emissions increase will occur as a result of a modification is emission unit specific and depends upon whether the emissions unit is new or existing. For new emissions units, increases are calculated using the "actual-to-potential" test, and for existing emissions units, increases are calculated using the "actual-to-projected-actual" applicability test.

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[4] The CAA requirements for PSD programs set forth under at 42 U.S.C. §§ 7470-7479 are implemented by the EPA's PSD regulations found at 40 C.F.R. § 51.166 (minimum requirements for an approvable PSD State Implementation Plan) and 40 C.F.R. § 52.21 (PSD permitting program for permits issued under the EPA's federal permitting authority). The CAA sets forth requirements for state implementation plans for nonattainment areas at 42 U.S.C. §§ 7501-7515, and the general provisions include NNSR permitting requirements at 42 U.S.C. §§ 7502(c)(5) and 7503. The CAA's NNSR permitting requirements are implemented by the EPA's NNSR regulations found at 40 C.F.R. § 51.165, § 52.24 and part 51 of Appendix S. This memorandum cites certain definitions and requirements in the federal PSD regulations at 40 C.F.R. § 52.21. However, the other NSR regulations identified contain analogous definitions and requirements, and the statements in this memorandum also apply to those analogous provisions.

[5] A "project" is defined as "a physical change in, or change in the method of operation of, an existing major stationary source." 40 C.F.R § 52.21(b)(52).

[6] The net emissions increase is calculated as the sum of the project emissions increase, calculated pursuant to 40 C.F.R. § 52.21(a)(2)(iv), and any other increases and decreases in actual emissions at the major stationary source that are contemporaneous and otherwise creditable. *See* 40 C.F.R. § 52.21(b)(3).

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See 40 C.F.R § 52.21(a)(2)(iv). Under both applicability tests, pre-project actual emissions are established using "baseline actual emissions," which are defined specifically for existing electric utility steam generating units and separately for all other existing emissions units. *See* 40 C.F.R § 52.21(b)(48). Under the actual-to-potential test, an emissions increase is calculated as the difference between the potential to emit (as defined at 40 C.F.R § 52.21(b)(4)) following completion of the project and the baseline actual emissions. Under the actual-to-projected-actual applicability test, an emissions increase is calculated as the difference between the projected actual emissions (as defined at 40 C.F.R § 52.21(b)(41)) and the baseline actual emissions.[7]

The focus of this memorandum is on the actual-to-projected-actual applicability test and associated requirements in the NSR regulations. "Projected actual emissions" is defined as "the maximum annual rate, in tons per year, at which an existing emissions unit is projected to emit a regulated NSR pollutant in any one of the 5 years following the date the unit resumes regular operation after the project, or in any one of the 10 years following that date, if the project involves increasing the emissions unit's design capacity or its potential to emit that regulated NSR pollutant and full utilization of the unit would result in a significant emissions increase or a significant net emissions increase at the major stationary source." 40 C.F.R § 52.21(b)(41)(i). In making a projection, the owner or operator "[s]hall consider all relevant information, including but not limited to, historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, the company's filings with the State or Federal regulatory authorities, and compliance plans under the approved State Implementation Plan." 40 C.F.R § 52.21(b)(41)(ii)(*a*). In order to determine the projected increase that results from the particular change consistent with the definition of "major modification," the owner or operator "[s]hall exclude, in calculating any increase in emissions that results from the particular project, that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions under paragraph (b)(48) of this section and that are also unrelated to the particular project, including any increased utilization due to product demand growth."[8] 40 C.F.R § 52.21(b)(41)(ii)(*c*). Finally, the rules contain objective calculation requirements (e.g. for electric utility steam generating units, baseline actual emissions must be based on a consecutive 24-month period in the 5-year period immediately preceding the project, and in order not to trigger NSR permitting requirements, the calculated emissions increase may not equal or exceed numerical "significance" thresholds). *See* 40 C.F.R. §52.21(b)(23). (48).

With respect to the role of post-project actual emissions in the major modification applicability provisions, the regulations state the following: "Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(*b*). In addition, the regulations contain specific recordkeeping, monitoring and reporting provisions set forth at 40 C.F.R. § 52.21(r)(6) that apply in circumstances where there is a "reasonable

[7] In lieu of using projected actual emissions, owners or operators may use potential to emit. *See* 40 C.F.R § 52.21(b)(41)(ii)(*d*).

[8] This provision is sometimes referred to as the "demand growth exclusion," when used in the context of utilities or the "independent factors exclusion," when used in the context of other manufacturing operations, and qualifying emissions are sometimes referred to as "excludable emissions." There is no presumption that an emissions increase following that change was caused by the change, but rather, this is the analysis required under §52.21(b)(41)(ii)(c).

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possibility," as that term is defined at 40 C.F.R. § 52.21(r)(6)(vi), that a project that is not projected to cause a significant emissions increase may nevertheless result in an actual significant emissions increase of a regulated NSR pollutant.[9] Depending on the reasonable possibility criteria applicable to a project and the type of emissions unit(s) involved, owners or operators must comply with one or more of the following requirements: 1) document and maintain a pre-project record of the NSR applicability information identified at 40 C.F.R. §52.21(r)(6)(i); 2) for electric utility steam generating units only, submit the information set out in paragraph (r)(6)(i); 3) monitor and record emissions, on a calendar-year basis, for a period of five or 10 years after the unit resumes regular operations after the change (depending on whether there is an increase in the design capacity or potential to emit); 4) for electric utility steam generating units only, submit a report of annual emissions for each year that monitoring is required; and 5) for all other units, submit a report if annual emissions exceed the baseline actual emissions by a significant amount and if such emissions differ from the pre-construction projection. *See* 40 C.F.R. § 52.21(r)(6)(i) - (v). For projects subject to 5-year post-change emissions tracking, the EPA indicated in the NSR Reform rule preamble that it would "presume that any increases that occur after 5 years are not associated with the physical or operational changes."[10]

B. DTE Litigation

Since 2010, the EPA has been involved in an enforcement action and litigation concerning a construction project at the DTE Monroe, Michigan power plant. At issue in that litigation has been a dispute between the EPA and DTE on the relationship between the requirements in the regulations that govern pre-project NSR emission projections and the role of post-project emissions monitoring.

The DTE litigation has resulted in two separate decisions by the same panel of three judges on the U.S. Court of Appeals for the Sixth Circuit. Neither of these decisions were unanimous, and in the second decision, each judge wrote a separate opinion. In the first decision, two of the three judges agreed that the EPA could pursue enforcement based solely on a claim that the source had failed to properly project, in accordance with the regulations, future emissions, even though actual emissions from the source had not increased after the construction was completed and the source resumed operation. *See U.S. v. DTE Energy Co.*, 711 F.3d 643, 649-650, 652 (6th Cir. 2013). In allowing enforcement based solely on violations of EPA regulations governing future emission projections, the majority opinion cautioned against EPA "second guessing" a projection. The third judge dissented based on her view that there was no enforceable violation of the EPA's projection regulations when there was no post-construction emissions increase. *See id.* at 652-53. After the case reached the Sixth Circuit for the second time, the two judges who had agreed in the first case (that the EPA could pursue enforcement based solely on an allegedly improper projection) were unable to agree on the extent to which the EPA could "second guess" such a projection. *United States v. DTE Energy Co.*, 845 F.3d 735 (6th Cir. 2017). One of these two judges concluded that DTE had satisfied the basic requirements for making projections and the other concluded DTE had not. *Compare id.* at 738-740 *with id.* at 751-55. The third judge (the same one who dissented in the first case) concluded that she was required to follow the majority holding in the first case that the EPA could pursue enforcement based solely on an improper projection and then sided with the

[9] These provisions are sometimes referred to as the "reasonable possibility" rule provisions.
[10] 67 FR 80197 (December 31, 2002).

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judge who found DTE had not adequately justified its projection (while declining to support the parts of her colleague's opinion that could be read to expand the majority opinion in the first case). *See id.* at 742.

The matters at issue in the DTE litigation are complex, and the appellate court decisions have left ambiguity regarding the scope of the applicable regulations and what sources must do to comply. Further, the Supreme Court has been asked to review the second appellate court opinion. Considering this uncertainty, the EPA believes it would be helpful to explain to stakeholders how the EPA plans to proceed in implementing and exercising its authority under those regulations pending further review of these issues by the EPA.

III. Discussion

As described previously, the NSR regulations require owners or operators to perform a pre-construction applicability analysis to determine whether a proposed project would result in a significant emissions increase and a significant net emissions increase, thus triggering the requirement to obtain an NSR permit. The regulations also specify the information used in that analysis that, when certain criteria in the "reasonable possibility" rule provisions are met, shall be documented, maintained and in certain cases submitted to the reviewing authority prior to beginning construction. *See* 40 C.F.R. §§ 52.21(a)(2), 52.21(r)(6)(i), (ii). If required, the pre-project record must contain: 1) a description of the project; 2) identification of the emissions unit(s) whose emissions of a regulated NSR pollutant could be affected by the project; and 3) a description of the applicability test used to determine that the project is not a major modification for any regulated NSR pollutant, including the baseline actual emissions, the projected actual emissions, the amount of emissions excluded under paragraph (b)(41)(ii)(c) and an explanation for why such amount was excluded and any netting calculations,[11] if applicable. *See* 40 C.F.R. § 52.21(r)(6)(i).

One issue that has arisen with respect to determining projected actual emissions resulting from a proposed project is whether it is permissible under the regulations for an owner or operator to factor into the projection an intent to actively manage future emissions from the project on an ongoing basis to prevent a significant emissions increase or a significant net emissions increase from occurring. The EPA notes that the rule language specifically provides that "all relevant information" shall be considered in making a projection. *See* 40 C.F.R § 52.21(b)(41)(ii)(*a*). Pending further review of the issues described above by the EPA, the EPA intends to apply the NSR regulations in accordance with this language such that the intent of an owner or operator to manage emissions from a unit in that manner after a project is completed represents relevant information in the context of projecting future actual emissions from that unit that could be considered along with other relevant information in making an emissions projection, as provided in the NSR regulations.

In finalizing the 2002 NSR rule revisions, the EPA explained that owners or operators "will not be required to make the projected actual emissions projection through a permitting action" and

[11] The term "netting" refers to determining the net emissions increase. The net emissions increase is calculated as the sum of the projected emissions increase, calculated pursuant to 40 C.F.R. § 52.21(a)(2)(iv), and any other increases and decreases in actual emissions at the major stationary source that are contemporaneous and otherwise creditable. *See* 40 C.F.R. § 52.21(b)(3).

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that it "also believe[d] that it is not necessary to make … future projections enforceable in order to adequately enforce the major NSR requirements. The Act provides ample authority to enforce the major NSR requirements if … physical or operational change results in a significant net emissions increase at [a] major stationary source." 68 FR 80204 (December 31, 2002). Moreover, the regulations are clear that owners or operators need not obtain approval of their pre-project NSR applicability analyses from the reviewing authority before construction.[12]

As the EPA explained in 2002, a key objective of the projected actual emissions provisions was to avoid the need for permitting authority review of NSR applicability determinations prior to implementation of a project. The rules instruct the affected source to consider "all relevant information," (as defined in 40 C.F.R. §52.21(b)(41)(ii)) in making an applicability determination. They also include specific instructions as to when and how actual emissions projections must be documented and when post-project emissions monitoring and reporting is required. If an affected source complies with those requirements, it has satisfied the source obligations that are required under our NSR rules.

The NSR rules instruct the source to exclude from a projection those emissions that both could have been accommodated during the baseline period and that are unrelated to the project. Because increased emissions may be caused by multiple factors, the EPA has recognized that the source must exercise judgement to exclude increases for which the project is not the "predominant cause." 45 Fed. Reg. 32,327 (1992). The NSR rules provide no mechanism for agency review of procedurally compliant emission projections. To infer the existence of such a mechanism would be tantamount to inferring agency authority to require pre-approval of emissions projections. Such an outcome is inconsistent with the text of the EPA rules and with the agency's clearly stated intent in adopting those rules.

Consistent with these regulations, the EPA intends to focus on the fact that it is the obligation of source owners or operators to perform pre-project NSR applicability analyses and document and maintain records of such analyses as required by the regulations. It also intends to focus on the fact that the post-project monitoring, recordkeeping and reporting requirements provide a means to evaluate a source's pre-project conclusion that NSR does not apply and that the NSR applicability procedures make clear that post-project actual emissions can ultimately be used to determine major modification applicability. This is reflected in the following sentence: "Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase." 40 C.F.R. § 52.21(a)(2)(iv)(*b*). In addition, the post-project monitoring and recordkeeping requirements under the "reasonable possibility" rule provisions described previously further confirm the important role that actual post-project emissions data play in determining NSR applicability.

Based on the foregoing, and while further review of these issues by the EPA is pending, the EPA intends to implement and exercise its authority under the NSR provisions to clarify that

[12] With respect to existing electric utility steam generating unit(s), for which submittal of the pre-project record is required before beginning actual construction, the regulations explicitly state: "Nothing in this paragraph … shall be construed to require the owner or operator or such a unit to obtain any determination from the Administrator before beginning actual construction." 40 C.F.R. § 52.21(r)(6)(ii). For all other emissions unit categories, there is no requirement to submit the pre-project applicability record before construction.

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when a source owner or operator performs a pre-project NSR applicability analysis in accordance with the calculation procedures in the regulations, and follows the applicable recordkeeping and notification requirements in the regulations, that owner or operator has met the pre-project source obligations of the regulations, unless there is clear error (e.g. the source applies the wrong significance threshold). The EPA does not intend to substitute its judgement for that of the owner or operator by "second guessing" the owner or operator's emissions projections.

Furthermore, when an owner or operator projects that a project will result in an emission increase or a net emissions increase less than the significant emissions rate in accordance with the NSR regulations, the EPA intends to focus on the level of actual emissions during the 5- or 10-year recordkeeping or reporting period after the project for purposes of determining whether to exercise its enforcement discretion and pursue an enforcement action. That is, the EPA does not presently intend to initiate enforcement in such future situations unless post-project actual emissions data indicate that a significant emissions increase or a significant net emissions increase did in fact occur. Although the majority in the first DTE opinion held that the EPA may pursue enforcement of its projection regulation where a source owner or operator has failed to perform a required pre-project applicability analysis or has failed to follow the objective calculation requirements of the regulations regardless of the level of post-project emissions, the court decision does not compel the EPA to pursue enforcement in such situations. The EPA has substantial discretion regarding prosecution of violations of the CAA and the first DTE opinion does not limit the EPA's discretion to consider whether prosecution of other sources is warranted in similar circumstances. Thus, pending further review of these issues by the courts and the EPA, the agency does not intend to pursue new enforcement cases in circumstances such as those presented in the DTE matter.

Finally, the EPA notes that while this memorandum refers to federal NSR regulations at 40 C.F.R. § 52.21, in states with EPA-approved NSR programs, the state and local regulations that the EPA has approved into the SIP are the governing federal law. To be approvable, the NSR requirements in a state plan must be at least as stringent as the federal rule requirements in 40 C.F.R. §§ 51.165 and 51.166 for NNSR and PSD programs, respectively, but may be more stringent at the state's discretion. The implementation of the NSR program is one example of cooperative federalism under the CAA under which the state regulations have primacy once they are approved by the EPA. However, if it is later determined that the NSR program approved into the SIP is deficient, the EPA has the authority under 42 U.S.C. § 7410(k)(5) to call for a state to revise its regulations. In the absence of such a SIP call, it is the EPA-approved state regulations that govern NSR applicability.

cc: Ryan Jackson
Mandy Gunasekara

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EXHIBIT I

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,*	No. 11-2328
v.	>
DTE ENERGY COMPANY; DETROIT EDISON COMPANY, *Defendants-Appellees.*	

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 2:10-cv-13101—Bernard A. Friedman, District Judge.

Argued: November 27, 2012

Decided and Filed: March 28, 2013

Before: BATCHELDER, Chief Judge; DAUGHTREY and ROGERS, Circuit Judges.

COUNSEL

ARGUED: Thomas A. Benson, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. F. William Brownell, HUNTON & WILLIAMS LLP, Washington, D.C., for Appellees.

ON BRIEF: Thomas A. Benson, Sambhav N. Sankar, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. F. William Brownell, Mark B. Bierbower, Makram B. Jaber, HUNTON & WILLIAMS LLP, Washington, D.C., Harry M. Johnson III, George P. Sibley III, HUNTON & WILLIAMS LLP, Richmond, Virginia, Michael J. Solo, DTE ENERGY COMPANY, Detroit, Michigan, for Appellees. William L. Wehrum, HUNTON & WILLIAMS LLP, Washington, D.C., Jessie J. Rossman, NATURAL RESOURCES DEFENSE COUNCIL, Chicago, Illinois, for Amici Curiae.

ROGERS, J., delivered the opinion of the court, in which DAUGHTREY, J., joined. BATCHELDER, C. J. (pp. 14–16), delivered a separate dissenting opinion.

OPINION

ROGERS, Circuit Judge. Environmental Protection Agency regulations implementing the Clean Air Act require owners and operators of any major pollutant emitting source who plan construction projects at the source to make a preconstruction projection of whether and to what extent emissions from the source will increase following construction. That projection determines whether the project constitutes a "major modification" and thus requires a permit. This appeal raises a single question: can EPA challenge that projection before there is post-construction data to prove or disprove it? The district court held that it cannot and granted summary judgment to

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EXHIBIT J

CERTIFICATION OF ETHICS AGREEMENT COMPLIANCE

Senate Confirmed Presidential Appointee

1. Appointee's Information	a. Appointee's Name:	to be completed by OGE William L. Wehrum
	b. Position Title:	to be completed by OGE Assistant Administrator for the Office of Air and Radiation
	c. Agency:	to be completed by OGE U.S. Environmental Protection Agency
	d. Date Ethics Agreement Signed:	to be completed by OGE August 28, 2017
	e. Date Confirmed:	to be completed by OGE November 9, 2017
	f. Due Date for Certification of Ethics Agreement Compliance:	to be completed by OGE **February 14, 2018**
2. Resignations	*I completed all of the resignations indicated in my ethics agreement before I assumed the duties of my current government position.*	☒ Yes ☐ No ☐ N/A
3. Divestitures	a. *I have completed all of the divestitures indicated in my ethics agreement. I also understand that I may not repurchase these assets during my appointment without OGE's prior approval.*	☐ Yes ☐ No ☒ N/A
	b. *I have filed a period transaction report, or periodic transaction reports, (OGE Form 278-T) to disclose the completion of these agreed upon divestitures.*	☐ Yes ☐ No ☒ N/A Filing Date(s) of OGE Form 278-T Report(s):
4. Managed Accounts	*If I have a managed account or use the services of an investment professional, I have notified the manager or professional of the limitations indicated in my ethics agreement. In addition, I am continuing to monitor purchases.*	☐ Yes ☐ No ☒ N/A
5. Interim Recusals	*I complied with my interim recusal obligations pending the divestitures required by my ethics agreement.*	☐ Yes ☐ No ☒ N/A

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William L. Wehrum

6. Recusals *(Note: These factual statements describe the appointee's current status. They are not intended to modify ethics agreement commitments or create new recusal obligations.)*	a. *I am recusing from particular matters in which I know I have a personal or imputed financial interest directly and predictably affected by the matter, unless I have received a waiver or qualify for a regulatory exemption.*	○ Yes ○ No ☒ N/A
	b. *I am recusing from particular matters in which any former employer or client I served in the past year is a party or represents a party, unless I have been authorized under 5 C.F.R. § 2635.502(d).*	☒ Yes ○ No ○ N/A
	c. *I am recusing from particular matters in which any former employer or client I served in the two years prior to my appointment is a party or represents a party, unless I have received a waiver under Exec. Order 13770.*	☒ Yes ○ No ○ N/A
7. Waivers and Authorizations	a. *I received a waiver pursuant to 18 U.S.C. § 208.* If yes, indicate the date of the waiver and indicate the financial interest covered by the waiver.	○ Yes ☒ No Date: Financial interest:
	b. *I received a waiver pursuant to Executive Order 13770.* If yes, indicate the date of the waiver and the subject of the waiver (i.e., applicable paragraph of the ethics pledge, parties, particular matters, specific issue areas, as applicable).	○ Yes ☒ No Date: Subject:
	c. *I received an authorization pursuant to 5 C.F.R. § 2635.502(d).* If yes, indicate date of authorization and identify the covered person(s) as to whom you have been authorized (e.g., former employer, former client, spouse's employer, spouse's current client, etc.).	○ Yes ☒ No Date: Covered person(s):
	d. *I received a waiver pursuant to 5 C.F.R. § 2635.503(c).* If yes, indicate the date of the waiver and identify the former employer or payer.	○ Yes ☒ No Date: Former employer or payer:

WW 12/19/17

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William L. Wehrum

8. Payments, Accelerations, or Divestitures Required to be Completed Prior to Entering Government Service	Mark this box if not applicable: ☐	a. *If I committed that I would forfeit a financial interest or payment, unless it was received or accelerated prior to my assumption of the duties of the government position:*	☒ *I received it (or it was accelerated) prior to my assumption of the duties of the position.* ○ *I received it (or it was accelerated) after my assumption of the duties of the position.* ○ *I forfeited it.*
		b. Financial interest or payment at issue:	
9. Requirements for Regular Appointees	*I have completed my initial ethics briefing, pursuant to 5 C.F.R. § 2638.305.* If you are a Special Government Employee (SGE) or career Foreign Service Officer (FSO), select N/A.		☒ Yes ○ No ○ N/A
	I have signed the ethics pledge pursuant to Executive Order 13770. If you are a SGE or career FSO or previously signed the pledge, select N/A.		☒ Yes ○ No ○ N/A
10. Additional Ethics Agreement Requirements	to be completed by OGE		to be completed by appointee *I am complying with these requirements as described in the adjacent box.* ○ Yes ○ No ☒ N/A
11. Comments of Appointee			

Any intentionally false or misleading statement or response provided in this certification is a violation of law punishable by a fine or imprisonment, or both, under 18 U.S.C. § 1001.

I certify that the information I have provided is complete and accurate.	Appointee's Signature:	Date: 12-7-17

THIS CERTIFICATION WILL BE POSTED FOR PUBLIC VIEWING ON OGE'S WEBSITE. 3

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EXHIBIT K

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

SEP 29 2016

The Honorable Sheldon Whitehouse
United States Senate
Washington, D.C. 20510

Dear Senator Whitehouse:

On behalf of the U.S. Environmental Protection Agency (EPA), I am writing in response to your letters of April 25, 2018 and September 4, 2018, in which you sought information regarding the recusal statement of EPA's Assistant Administrator for Air and Radiation, William L. Wehrum.

I want to assure you that EPA has taken diligent steps to ensure that Mr. Wehrum has been advised of his ethics obligations. Following Mr. Wehrum's initial ethics training on November 14, 2017, my staff in the Ethics Law Office in the Office of General Counsel (OGC/Ethics) and I have met with Mr. Wehrum in person, communicated with him via email correspondence and the telephone, and coordinated with his staff about his ethics obligations. As part of these discussions and consistent with our responsibilities found at 5 C.F.R. §§ 2638.305(f)(2) and (3), OGC/Ethics explained his recusal obligations, the importance of a recusal statement, and the other commitments contained in Mr. Wehrum's ethics agreement. OGC/Ethics also counseled Mr. Wehrum about his ethics obligations pursuant to Executive Order 13770 and the Trump Ethics Pledge, which he signed on November 14, 2017. Our counsel included guidance on paragraph 6 of the Pledge, which states that he cannot "participate in any particular matter involving specific parties that is directly and substantially related to [his] former employer or former clients, including regulations and contracts." We have provided him with advice consistent with that offered by the Office of Government Ethics (OGE), including OGE Advisories DO-09-011 (3/26/09) and DO-09-020 (5/26/09), which apply to Exec. Order 13770 pursuant to OGE Legal Advisories LA-17-02 & LA-17-03 (3/20/17).

Since he re-joined EPA, OGC/Ethics has worked with Mr. Wehrum and his staff on a written recusal statement. In my role as the Designated Agency Ethics Official, I personally communicated with Mr. Wehrum about the importance of signing a recusal statement. Mr. Wehrum initially chose to use other tools that he deemed effective in helping him comply with the ethics requirements, such as use of a screening official. OGC/Ethics continued to work with him and his staff and recently Mr. Wehrum completed and signed the enclosed recusal statement. His statement formally memorializes Mr. Wehrum's understanding of his obligation to recuse himself from certain matters involving his former employer or former clients.

To date, Mr. Wehrum has not received any waivers or authorizations issued pursuant to Executive Order 13770, 18 U.S.C. § 207(b)(1), or 5 C.F.R. § 2635.502(d). As described in his

recusal statement, for meetings or invitations involving his former employer or former clients, Mr. Wehrum's staff coordinates with OGC/Ethics, particularly when paragraph 6 of the Ethics Pledge might be implicated. When OGC/Ethics is consulted by Mr. Wehrum or his staff on meetings involving his former employer or former clients, we provide appropriate counsel and case-specific advice based on the subject matter of the meeting, the attendees, the location, the purpose, the capacity under which the individuals or entities are present, and any other relevant information.

Mr. Wehrum filed a Certification of Ethics Agreement Compliance with the OGE dated December 7, 2017. Originally, he answered "no" in response to the form's query on recusals related to financial conflicts of interest. He made a clarifying edit to the form on December 19, 2017, changing his response from "no" to "N/A." Enclosed is a further-updated version of that form that includes a comment Mr. Wehrum added on September 27, 2018, explaining that at the time he signed the form he did not have any financial conflicts of interest from which to recuse, so he did not believe that answering "no" was sufficient to explain his situation. Because he has no existing financial conflicts, nor does he expect to have any in the future, he explains that his answer meant that this question does not apply to his individual situation. My staff provided the recently-updated form to OGE.

With respect to the documents that you requested, EPA has a centralized search currently underway that it expects to yield documents responsive to your request. The agency anticipates releasing those documents to you on a rolling basis, as they become available.

Finally, I have resigned from EPA and my role as the Designated Agency Ethics Official, effective September 30, 2018, to pursue a career transition to the private sector. If I can be of assistance after that date, however, you may contact me through the agency's Office of Congressional and Intergovernmental Affairs. I appreciate your sustained interest in, and support of, a strong ethics program at EPA. If you have further questions for EPA, please contact Kristien Knapp in the Office of Congressional and Intergovernmental Relations at (202) 564-3277 or Knapp.Kristien@epa.gov.

Sincerely,

Kevin S. Minoli
Designated Agency Ethics Official &
Principal Deputy General Counsel

Enclosures

cc: The Honorable John Barrasso
Chairman, Senate Environment and Public Works Committee

EXHIBIT L

CERTIFICATION OF ETHICS AGREEMENT COMPLIANCE

Senate Confirmed Presidential Appointee

1. Appointee's Information	a. Appointee's Name:	(to be completed by OGE) William L. Wehrum
	b. Position Title:	(to be completed by OGE) Assistant Administrator for the Office of Air and Radiation
	c. Agency:	(to be completed by OGE) U.S. Environmental Protection Agency
	d. Date Ethics Agreement Signed:	(to be completed by OGE) August 28, 2017
	e. Date Confirmed:	(to be completed by OGE) November 9, 2017
	f. Due Date for Certification of Ethics Agreement Compliance:	(to be completed by OGE) **February 14, 2018**
2. Resignations	*I completed all of the resignations indicated in my ethics agreement before I assumed the duties of my current government position.*	☒ Yes ☐ No ☐ N/A
3. Divestitures	a. *I have completed all of the divestitures indicated in my ethics agreement. I also understand that I may not repurchase these assets during my appointment without OGE's prior approval.*	☐ Yes ☐ No ☒ N/A
	b. *I have filed a period transaction report, or periodic transaction reports, (OGE Form 278-T) to disclose the completion of these agreed upon divestitures.*	☐ Yes ☐ No ☒ N/A Filing Date(s) of OGE Form 278-T Report(s):
4. Managed Accounts	*If I have a managed account or use the services of an investment professional, I have notified the manager or professional of the limitations indicated in my ethics agreement. In addition, I am continuing to monitor purchases.*	☐ Yes ☐ No ☒ N/A
5. Interim Recusals	*I complied with my interim recusal obligations pending the divestitures required by my ethics agreement.*	☐ Yes ☐ No ☒ N/A

THIS CERTIFICATION WILL BE POSTED FOR PUBLIC VIEWING ON OGE'S WEBSITE.

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William L. Wehrum

6. Recusals *(Note: These factual statements describe the appointee's current status. They are not intended to modify ethics agreement commitments or create new recusal obligations.)*	a. *I am recusing from particular matters in which I know I have a personal or imputed financial interest directly and predictably affected by the matter, unless I have received a waiver or qualify for a regulatory exemption.*	◯ Yes ◯ No ☒ N/A
	b. *I am recusing from particular matters in which any former employer or client I served in the past year is a party or represents a party, unless I have been authorized under 5 C.F.R. § 2635.502(d).*	◯ Yes ◯ No ◯ N/A
	c. *I am recusing from particular matters in which any former employer or client I served in the two years prior to my appointment is a party or represents a party, unless I have received a waiver under Exec. Order 13770.*	◯ Yes ◯ No ◯ N/A
7. Waivers and Authorizations	a. *I received a waiver pursuant to 18 U.S.C. § 208.* If yes, indicate the date of the waiver and indicate the financial interest covered by the waiver.	◯ Yes ◯ No Date: Financial interest:
	b. *I received a waiver pursuant to Executive Order 13770.* If yes, indicate the date of the waiver and the subject of the waiver (i.e., applicable paragraph of the ethics pledge, parties, particular matters, specific issue areas, as applicable).	◯ Yes ◯ No Date: Subject:
	c. *I received an authorization pursuant to 5 C.F.R. § 2635.502(d).* If yes, indicate date of authorization and identify the covered person(s) to whom you have been authorized (e.g., former employer, former client, spouse's employer, spouse's former client, etc.).	◯ Yes ◯ No Date: Covered person(s):
	d. *I received a waiver pursuant to 5 C.F.R. § 2635.503(c).* If yes, indicate the date of the waiver and identify the former employer or payer.	◯ Yes ◯ No Date: Former employer or payer:

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William L. Wehrum

8. Payments, Accelerations, or Divestitures Required to be Completed Prior to Entering Government Service	Mark this box if not applicable: ☐	a. *If I committed that I would forfeit a financial interest or payment, unless it was received or accelerated prior to my assumption of the duties of the government position:*	☒ *I received it (or it was accelerated) prior to my assumption of the duties of the position.* ○ *I received it (or it was accelerated) after my assumption of the duties of the position.* ○ *I forfeited it.*
		b. Financial interest or payment at issue:	
9. Requirements for Regular Appointees	*I have completed my initial ethics briefing, pursuant to 5 C.F.R. § 2638.305.*		☒ Yes ○ No ○ N/A
	I have signed the ethics pledge pursuant to Executive Order 13770.		☒ Yes ○ No ○ N/A
10. Additional Ethics Agreement Requirements	[illegible]	[illegible] *I am complying with these requirements as described in the adjacent box.*	○ Yes ○ No ☒ N/A
11. Comments of Appointee	I answered "N/A" to No. 6 because I have no existing conflicts and I do not expect to have any in the future, so this question does not apply to my situation. 9.27.18		

Any intentionally false or misleading statement or response provided in this certification is a violation of law punishable by a fine or imprisonment, or both, under 18 U.S.C. § 1001.

I certify that the information I have provided is complete and accurate.	Appointee's Signature:	Date: 12-7-17

THIS CERTIFICATION WILL BE POSTED FOR PUBLIC VIEWING ON OGE'S WEBSITE. 3

OGE STATEMENT REGARDING
CERTIFICATION OF ETHICS AGREEMENT COMPLIANCE
Senate Confirmed Presidential Appointee

Appointee's Information	Appointee's Name:	William l. Wehrum
	Position Title:	Assistant Administrator for the Office of Air and Radiation
	Agency:	U.S. Environmental Protection Agency
	Date Ethics Agreement Signed:	August 28, 2017
	Date Confirmed:	November 9, 2017
	Due Date for Certification of Ethics Agreement Compliance:	February 14, 2018

Statement

OGE received the Assistant Administrator's original Certification of Ethics Agreement Compliance (Certification) on January 16, 2018. The Assistant Administrator submitted a revised Certification on September 27, 2018. The only revision to the Certification was the Assistant Secretary's comment in Box 11, Comments of Appointee.

Date of Statement: October 10, 2018

EXHIBIT M

To: Lewis, Josh[Lewis.Josh@epa.gov]
From: Gunasekara, Mandy
Sent: Mon 12/4/2017 3:19:06 PM
Subject: Fwd: NSR Memo
NSR policy memo_draft_2017.12.2.edits.docx
ATT00001.htm

FYI

Sent from my iPhone

Begin forwarded message:

From: "Gunasekara, Mandy" <Gunasekara.Mandy@epa.gov>
Date: December 4, 2017 at 9:02:53 AM EST
To: "Bodine, Susan" <bodine.susan@epa.gov>, "Patrick Traylor (traylor.patrick@epa.gov)" <traylor.patrick@epa.gov>
Cc: "Jackson, Ryan" <jackson.ryan@epa.gov>, "Dravis, Samantha" <dravis.samantha@epa.gov>, "Schwab, Justin" <schwab.justin@epa.gov>
Subject: NSR Memo

Good Morning –

Attached is the latest version of the NSR Memo pertaining to the issues at issue in the DTE case. I thought we may have more time, but know now that the cert hearing is planned for Wednesday. This memo needs to go out before. I'd like to send it with the Administrator this evening for him to review and then follow-up tomorrow with a meeting/discussion if necessary. I gave Hayley a heads up and she said we can work in time. Please run the traps on this from your end. I apologize for the short notice, but will move items around and make myself available to discuss this afternoon if necessary.

Thanks,

Mandy

Mandy M. Gunasekara

Principal Deputy Assistant Administrator

EXHIBIT N

To: Dravis, Samantha[dravis.samantha@epa.gov]
Cc: Jackson, Ryan[jackson.ryan@epa.gov]; White, Elizabeth[white.elizabeth@epa.gov]; Lewis, Josh[Lewis.Josh@epa.gov]
Sent: Thur 12/7/2017 3:47:45 PM
Subject: RE: NSR Memo

Thanks, Sam.

Elizabeth and Josh – do either of you need anything else to get this done? Give me a c

From: Dravis, Samantha
Sent: Thursday, December 7, 2017 10:46 AM
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>
Cc: Jackson, Ryan <jackson.ryan@epa.gov>; White, Elizabeth <white.elizabeth@epa.gov>; Lewis, Josh <Lewis.Josh@epa.gov>
Subject: Re: NSR Memo

Let's get this autopenned thank you

Sent from my iPhone

On Dec 7, 2017, at 10:15 AM, Gunasekara, Mandy <Gunasekara.Mandy@epa.gov> wrote:

> Attached is the final version of the NSR memo discussed with the Administrator yesterday. He would like to get this out today. Can we go ahead with auto-pen, since he's at the hearing? Once this is signed, we can send it out to the RAs and post to the website. I'm cc'ing Josh Lewis who is helping to coordinate.

Mandy M. Gunasekara

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

<NSR policy memo_FINAL for Admin Signature 2017 12 07.docx>

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EXHIBIT O

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
From: Lewis, Josh
Sent: Thur 12/7/2017 6:09:38 PM
Subject: RE: Signed NSR Memo

Got it, and will do

From: Gunasekara, Mandy
Sent: Thursday, December 07, 2017 12:36 PM
To: Lewis, Josh <Lewis.Josh@epa.gov>
Subject: Fwd: Signed NSR Memo

Hold tight until after the energy and comment hearing. Please have this ready for posting online once the hearing wraps up.

Sent from my iPhone

Begin forwarded message:

From: "Hope, Brian" <Hope.Brian@epa.gov>
To: "Jackson, Ryan" <jackson.ryan@epa.gov>, "Gunasekara, Mandy" <Gunasekara.Mandy@epa.gov>
Cc: "White, Elizabeth" <white.elizabeth@epa.gov>
Subject: Signed NSR Memo

Let me know if you need anything else. Thanks.

- Brian

Brian T. Hope

Deputy Director

Office of the Executive Secretariat

Office of the Administrator

(202) 564-8212

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EXHIBIT P

To: Bodine, Susan[bodine.susan@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]
From: Schwab, Justin
Sent: Sat 12/9/2017 6:48:59 PM
Subject: Fwd: NSR DTE case - Petitioners sent letter to Supreme Court on EPA memo
LetterWithNSRguidance-c.pdf
ATT00001.htm

ICYMI

Sent from my iPhone

Begin forwarded message:

From: "Doster, Brian" <Doster.Brian@epa.gov>
To: "Schwab, Justin" <Schwab.Justin@epa.gov>, "Schmidt, Lorie" <Schmidt.Lorie@epa.gov>, "Srinivasan, Gautam" <Srinivasan.Gautam@epa.gov>
Cc: "Williams, Melina" <Williams.Melina@epa.gov>
Subject: NSR DTE case - Petitioners sent letter to Supreme Court on EPA memo

FYI, DTE's counsel sent the attached to the Supreme Court enclosing EPA's NSR memo.

ED_001598_00025376

HUNTON&
WILLIAMS

HUNTON & WILLIAMS LLP
2200 PENNSYLVANIA AVENUE, NW
WASHINGTON, D.C. 20037-1701

TEL 202 • 955 • 1500
FAX 202 • 778 • 2201

F. WILLIAM BROWNELL
DIRECT DIAL: 202 • 955 • 1355
EMAIL: bbrownell@hunton.com

FILE NO: 55748.000042

December 8, 2017

By Hand

The Honorable Scott S. Harris
Clerk of the Supreme Court
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543-0002

Re: Case No. 17-170, *DTE Energy Company, et al. v. United States*

Dear Mr. Harris:

In its brief in opposition in the above-captioned case, the United States states that "the EPA is currently reviewing its New Source Review policies and regulations" and that "[t]hat review may result in changes." Br. for the United States in Opp'n at 17 (Nov. 1, 2017). A memorandum released by EPA late yesterday addressing the initial results of that review is enclosed.

Sincerely,

F. William Brownell
Counsel of Record for Petitioners
DTE Energy Company and Detroit Edison Company

Enclosure

cc: Noel J. Francisco
Michael Soules
Cynthia Rapp, Deputy Clerk

ED_001598_00025378

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Page 609 of 701

EXHIBIT Q

Released via FOIA EPA-2019-008216

To: Wehrum, Bill[Wehrum.Bill@epa.gov]; Harlow, David[harlow.david@epa.gov]
Cc: Dominguez, Alexander[dominguez.alexander@epa.gov]; Schwab, Justin[schwab.justin@epa.gov]
From: Gunasekara, Mandy
Sent: Tue 12/5/2017 1:06:07 PM
Subject: NSR Memo
NSR Memo_Redacted Version 2017.12.04.pdf

Hi Bill and David,

Attached is a memo pertinent to tomorrow's NSR discussion. I have redacted the potentially offending language given your recusal issues and had Justin double check to ensure I got everything out. What you will see is our clarification of the actual-to-projected actual applicability test in determining major modification applicability, which has been a key point of discussion surrounding NSR reform efforts.

Bill – I'll look to call you closer to 9 pm to download on RTBT.

Have a good night!

Mandy

Mandy M. Gunasekara

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

EXHIBIT R

Released via FOIA EPA-2019-008216

To: Doster, Brian[Doster.Brian@epa.gov]; Burke, Marcella[burke.marcella@epa.gov]
Cc: Srinivasan, Gautam[Srinivasan.Gautam@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]
From: Schwab, Justin
Sent: Tue 12/5/2017 1:56:00 PM
Subject: RE: Meeting today with Wehrum on NSR - May address [redacted]

Thank you, Brian. Please forward me the invitation.

From: Doster, Brian
Sent: Tuesday, December 5, 2017 8:48 AM
To: Schwab, Justin <Schwab.Justin@epa.gov>; Burke, Marcella <burke.marcella@epa.gov>
Cc: Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>
Subject: Meeting today with Wehrum on NSR - May address [redacted]

I am writing to let you know about a late-breaking meeting today with Bill Wehrum at 1 p.m. on New Source Review. I understand that the purpose of the meeting is to begin talking about the NSR reform initiatives OAR wants to pursue, and one of those includes [Ex. 5 - Deliberative Process] [redacted] Another is [Ex. 5 - Deliberative Process] I have heard about 3 other NSR topics that are on OAR's list and we may hear more about Bill's goals for those areas today.

Ex. 5 - Deliberative Process; Attorney-Client Communications

The meeting information is below. If you'd like to put this on your calendar, let me know and I'll forward the meeting invite so you can accept it.

-----Original Appointment-----
From: Wehrum, Bill
Sent: Monday, December 04, 2017 4:32 PM
To: Wehrum, Bill; Gunasekara, Mandy; Harlow, David; Bodine, Susan; Traylor, Patrick; Lewis, Josh; Page, Steve; Koerber, Mike; Harnett, Bill; Wood, Anna; Kornylak, Vera S.; Santiago,

Juan; Wayland, Richard; Dunham, Sarah; Harvey, Reid; Krieger, Jackie; Vetter, Cheryl; Rao, Raj; Srinivasan, Gautam; Schmidt, Lorie; Doster, Brian
Cc: Brooks, Phillip; Chapman, Apple; Kelley, Rosemarie; Schwab, Justin
Subject: NSR Discussion
When: Tuesday, December 05, 2017 1:00 PM-1:45 PM (UTC-05:00) Eastern Time (US & Canada).
Where: WJC-N 5400 + 1-866-299-3188; Participant Code: 202-256-4000

To: Wehrum, Bill; Harlow, David; Gunasekara, Mandy; Lewis, Josh; Page, Steve; Koerber, Mike; Hamett, Bill; Wood, Anna; Kornylak, Vera S.; Santiago, Juan; Wayland, Richard; Dunham, Sarah; Harvey, Reid; Krieger, Jackie; Vetter, Cheryl; Rao, Raj; Doster, Brian; Schmidt, Lorie; Srinivasan, Gautam

Released via FOIA EPA-2019-008216

EXHIBIT S

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
Cc: Schwab, Justin[Schwab.Justin@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]; Wehrum, Bill[Wehrum.Bill@epa.gov]
From: Bodine, Susan
Sent: Thur 12/7/2017 5:24:37 PM
Subject: RE: NSR Memo

At a minimum the first two of the three sentences Ex. 5 - Deliberative Process/Attorney Client Privilege

Ex. 5 - Deliberative Proces/Attorney Client Privilege

From: Bodine, Susan
Sent: Thursday, December 7, 2017 12:10 PM
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>
Cc: Wehrum, Bill <Wehrum.Bill@epa.gov>; Schwab, Justin <schwab.justin@epa.gov>; Patrick Traylor (traylor.patrick@epa.gov) <traylor.patrick@epa.gov>
Subject: RE: NSR Memo
Importance: High

Ex. 5 - Deliberative Proces/Attorney Client Privilege

From: Gunasekara, Mandy
Sent: Thursday, December 7, 2017 12:06 PM
To: Bodine, Susan <bodine.susan@epa.gov>
Subject: NSR Memo

Attached is final. Circling back on this Ex. 5 - Deliberative Proces/Attorney Client Privilege

Ex. 5 - Deliberative Proces/Attorney Client Privilege

ED_001598_00006112

EXHIBIT T

To: Wehrum, Bill[Wehrum.Bill@epa.gov]; Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
Cc: Traylor, Patrick[traylor.patrick@epa.gov]
From: Bodine, Susan
Sent: Fri 12/8/2017 3:46:19 PM
Subject: NSR memo

I spoke to SP about Ex. 5 - Deliberative Process/Attorney Client He suggested Ex. 5 - Deliberative Process/Attorney Client Ex. 5 - Deliberative Process/Attorney Client

My recommendation remains **Ex. 5 - Deliberative Process/Attorney Client**

ED_001598_00006321

EXHIBIT U

Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>	Required
Baptist, Erik <baptist.erik@epa.gov>	Required
Bennett, Tate <Bennett.Tate@epa.gov>	Required
Jackson, Ryan <jackson.ryan@epa.gov>	Required

Saturday, December 09, 2017

Time 11:30 AM – 1:45 PM
Subject Western Caucus Foundation Panel
Location Wynn Encore Hotel
Show Time As Busy
Categories Green Category

Time 2:00 PM – 2:30 PM
Subject Cab to the Airport
Show Time As Busy
Categories Orange Category

Time 2:30 PM – 3:00 PM
Subject TSA Security
Show Time As Busy
Categories Orange Category

Time 3:00 PM – 3:35 PM
Subject Boarding
Show Time As Busy
Categories Orange Category

Time 3:35 PM – 9:01 PM
Subject American Airlines Flight#2536 from Las Vegas to DCA
Location Locator: [redacted]
Show Time As Busy
Categories Orange Category

Monday, December 11, 2017

Time 7:30 AM – 9:14 AM
Subject Delta Flight #1731 from DCA to Detroit
Location Locator [redacted]
Show Time As Busy
Original and reissued ticket attached
Categories Orange Category

Time 9:30 AM – 10:30 AM
Subject Transportation from Detroit (DTW) Airport to Ann Arbor Lab- - Michigan Green Transportation (Confirmation: RES-1FBNFPN)
Location Baggage Claim Area Pick-up
Show Time As Busy
Michigan Green Transportation 1 877-476-8294
Categories Orange Category

Released via FOIA EPA-2019-008216

Time 10:30 AM – 3:30 PM
Subject On Travel || AA Day Trip
Show Time As Busy
Categories Blue Category

Time 1:00 PM – 2:00 PM
Subject Agency-wide Sr. Staff Meeting
Location Alma Room
Show Time As Busy

Time 3:30 PM – 4:00 PM
Subject DOJ/EPA Weekly
Location 4020A
Show Time As Tentative

Time 3:30 PM – 4:30 PM
Subject Transportation from Ann Arbor Lab to Detroit (DTW) Airport - - Michigan Green Transportation
Location Confirmation: [redacted]
Show Time As Busy
Michigan Green Transportation 1 877-476-8294
Categories Orange Category

Time 4:30 PM – 5:00 PM
Subject NSR Memo, conference line, [redacted], code [redacted]
Location 3204WJC-South
Show Time As Busy
To: Bodine, Susan; Traylor, Patrick; Bowman, Liz; Wehrum, Bill; Harlow, David; Gunasekara, Mandy; Lewis, Josh; Schwab, Justin

Attendees

Name <E-mail>	Attendance
Bodine, Susan <bodine.susan@epa.gov>	Organizer
Traylor, Patrick <traylor.patrick@epa.gov>	Required
Bowman, Liz <Bowman.Liz@epa.gov>	Required
Wehrum, Bill <Wehrum.Bill@epa.gov>	Required
Harlow, David <harlow.david@epa.gov>	Required
Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>	Required
Lewis, Josh <Lewis.Josh@epa.gov>	Required
Schwab, Justin <Schwab.Justin@epa.gov>	Required

Time 4:45 PM – 5:30 PM
Subject TSA Security / Boarding
Show Time As Busy
Categories Orange Category

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EXHIBIT V

To: Jackson, Ryan[jackson.ryan@epa.gov]
From: Gunasekara, Mandy
Sent: Thur 12/7/2017 10:57:21 PM
Subject: NSR Memo Email to RAs
NSR Policy Memo.12.7.17.pdf
ATT00001.txt

Memo is attached. There is a "Regional Administrators" list in outlook to send this to all 10. Please cc me (since Bill is recused), Susan, Minoli and Justin. I'd suggest simply stating:

Dear Regional Administrators:
Please see attached for a memo regarding New Source Review the Administrator signed today.
Best,
Ryan

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EXHIBIT W

To: Harlow, David[harlow.david@epa.gov]
From: Dominguez, Alexander
Sent: Fri 10/6/2017 2:26:09 PM
Subject: Fwd: NSR Policy Memo
OGC NSR DTE issue options analysis 10-4 am draft.docx
ATT00001.htm
NSR policy memo_draft_10-4-17PSLrev.docx
ATT00002.htm

Sent from my iPhone

Begin forwarded message:

From: "Lewis, Josh" <Lewis.Josh@epa.gov>
Date: October 5, 2017 at 12:42:01 PM EDT
To: "Gunasekara, Mandy" <Gunasekara.Mandy@epa.gov>
Cc: "Dominguez, Alexander" <dominguez.alexander@epa.gov>, "Dunham, Sarah" <Dunham.Sarah@epa.gov>
Subject: Fwd: NSR Policy Memo

Ahead of our weekly meeting tomorrow at 9, wanted to send the latest draft NSR policy memo. The other attachment is a document prepared by OGC which is an analysis of options for addressing NSR issues raised by DTE Ex. 5 - Deliberative Process
Ex. 5 - Deliberative Process

Concerning the policy memo, Ex. 5 - Deliberative Process

Ex. 5 - Deliberative Process

OGC staff attorneys have reviewed this draft. The draft will go shortly to Justin, Lorie, and Gautam for review. Ex. 5 - Deliberative Process
Ex. 5 - Deliberative Process

We can talk more tomorrow about this, including next steps.

ED_001598_00003543

EXHIBIT X

Released via FOIA EPA-2019-008216

To: Harlow, David[harlow.david@epa.gov]; Dominguez, Alexander[dominguez.alexander@epa.gov]
From: Gunasekara, Mandy
Sent: Mon 11/27/2017 2:15:43 PM
Subject: NSR Reform Memo
NSR policy memo_draft_10-4-17PSLrev.docx

First one attached.

Mandy M. Gunasekara

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

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EXHIBIT Y

Time	5:15 PM – 5:45 PM
Subject	FL/GA Media Interviews re: Hurricane Preparedness
Location	Administrator's Office
Reminder	15 minutes
Show Time As	Busy
	POC: Liz/Amy

Attendees	**Name <E-mail>**	**Attendance**
	[redacted] <[redacted]	Organizer
	Bowman, Liz <Bowman.Liz@epa.gov>	Required
	Graham, Amy <graham.amy@epa.gov>	Required
	Lincoln Ferguson (ferguson.lincoln@epa.gov) <ferguson.lincoln@epa.gov>	Required

Friday, September 8, 2017

Time	8:30 AM – 9:15 AM
Subject	Radio Interviews re: Hurricane Preparedness
Location	Administrator's Office
Reminder	15 minutes
Show Time As	Busy

Attendees	**Name <E-mail>**	**Attendance**
	[redacted] <[redacted]	Organizer
	Bowman, Liz <Bowman.Liz@epa.gov>	Required
	Abboud, Michael <abboud.michael@epa.gov>	Required
	Hewitt, James <hewitt.james@epa.gov>	Required

Time	9:15 AM – 10:15 AM
Subject	Briefing: (ESA) Endangered Species Act
Location	Administrator's Office
Reminder	15 minutes
Show Time As	Busy

Attendees	**Name <E-mail>**	**Attendance**
	[redacted] <[redacted]	Organizer
	Beck, Nancy <Beck.Nancy@epa.gov>	Required
	Dravis, Samantha <dravis.samantha@epa.gov>	Required
	Baptist, Erik <baptist.erik@epa.gov>	Required
	Bolen, Brittany <bolen.brittany@epa.gov>	Required

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Time	10:15 AM – 11:00 AM
Subject	Briefings
Location	Administrator's Office
Reminder	15 minutes
Show Time As	Busy
	Topics to cover will include the following: Philadelphia Energy Solutions Fiat Chrysler Colorado Springs DTE Energy

Attendees	**Name <E-mail>**	**Attendance**
	[redacted] <[redacted]>	Organizer
	Traylor, Patrick <traylor.patrick@epa.gov>	Required
	Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>	Required
	Schwab, Justin <schwab.justin@epa.gov>	Required
	Baptist, Erik <baptist.erik@epa.gov>	Optional
	Bodine, Susan <bodine.susan@epa.gov>	Optional

Time	11:00 AM – 11:05 AM
Subject	Call with Governor of Puerto Rico
Location	Administrator's Office
Reminder	15 minutes
Show Time As	Busy
	POC: Troy

Attendees	**Name <E-mail>**	**Attendance**
	[redacted] <[redacted]>	Organizer
	Lyons, Troy <lyons.troy@epa.gov>	Required
	Lincoln Ferguson (ferguson.lincoln@epa.gov) <ferguson.lincoln@epa.gov>	Required
	Cory, Preston (Katherine) <Cory.Preston@epa.gov>	Required

Time	11:15 AM – 11:45 AM
Subject	HOLD: Media Interviews
Location	Administrator's Office
Reminder	15 minutes
Show Time As	Busy

Attendees	**Name <E-mail>**	**Attendance**
	[redacted] <[redacted]>	Organizer
	Hewitt, James <hewitt.james@epa.gov>	Required

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EXHIBIT Z

To: Lewis, Josh[Lewis.Josh@epa.gov]; Sarah Dunham (Dunham.Sarah@epa.gov)[Dunham.Sarah@epa.gov]
From: Gunasekara, Mandy
Sent: Tue 9/12/2017 5:57:16 PM
Subject: NSR Memo
Emissions Projection Rule_Outline_DRAFT.docx

Following up from Friday, attached are a few points regarding the NSR memo I mentioned. This should get things started.

Mandy M. Gunasekara

Senior Policy Advisor for Office of Air and Radiation

Office of the Administrator

US Environmental Protection Agency

EXHIBIT AA

To: Bodine, Susan[bodine.susan@epa.gov]
From: Gunasekara, Mandy
Sent: Fri 9/22/2017 5:54:06 PM
Subject: NSR Memo
Emissions Projection Rule_Outline_DRAFT.DOCX

Attached is what I sent to program folks last Tuesday.

Mandy M. Gunasekara

Senior Policy Advisor for Office of Air and Radiation

Office of the Administrator

US Environmental Protection Agency

EXHIBIT BB

To: Koerber, Mike[Koerber.Mike@epa.gov]
From: South, Peter
Sent: Tue 10/3/2017 12:44:59 PM
Subject: ONGOING ISSUES
Ongoing OAQPS issues 9_25_17.docx

ED_001598_00012898

confirming)—Done for now

Texas Regional Haze – NFRM by Region 6 (CD deadline of Sept 30)
Summary: Region 6 developed final rule which includes a FIP. Texas will not be supportive.

NSR DTE Memo—deliver draft memo on DTE by end of Sept/early Oct
Summary: Ongoing OECA issue relating to NSR applicability.
On 9/27, OGC requested more time to review.
Steve asked Sarah if OK to request ext to 10/4. [redacted]

Woodheaters Report to Congress – draft report under development (due date is early November)
Summary: OID working on Woodheater RTC. OID will be meeting via call with OCFO on Sept 26. Chebryll on point.
Adam reported it was a quick meeting. We agreed to provide a cover letter and short report, possibly only 1-4 pages, to the appropriations committee. Most of the meeting we discussed format and what to include in an appendix. OID plans to have draft to Martin by 9/29.

RELATED: OID met with our RWH NSPS attorneys, Scott Jordan (OGC) and Simi Bhat (DOJ), late last week. See Chebryll's summary of meeting. Simi communicated that she needs a decision from EPA on the PFI-related questions by October 6th if possible. This would give her time to communicate EPA's positions to PFI, negotiate if appropriate, while still giving them time to prepare their legal briefs by the Nov 20 deadline if talks break down. Simi also indicated that she is prepared to brief up to the DOJ politicals so they can prod the EPA politicals, if we haven't heard any definitive response by mid-October and we think it will help the situation.

1-on-1 Follow-ups

- Update to SIP backlog—Mike sent SIP paper to Sarah on 9/18 (updated paper that we used to brief Ryan J in June)—[redacted]
- CISWI/OSWI—Mike gave Sarah heads up at 9/18 1-on-1--Done
  Summary: Sierra Club filed lawsuit in December 2016 claiming EPA failed to promulgate federal plan for CISWI by March 2013, and promulgate federal plan and conduct technology review for OSWI by Dec 2010. Sarah to raise with Mandy—[redacted]
- SIP backlog issue (okay to issue disapprovals) – Mike raised with Sarah at 9/18 1-on-1, Sarah to raise with Mandy
  - iSIP disapprovals—table of 12: Vera noted on 9/20, not 12 SIP disapprovals—prob more (in process)—Mike said to hold on 9/21
- NAAQS related sanctions—Mike gave Sarah heads up at 9/18 1-on-1—Done for now
  - Oct 18, mandatory offset sanctions in effect for 5 areas—4 in PA and 1 in LA, know more on 10/2 (no real impact—states expected to submit plans soon)
  - [redacted]

- Petition on CAFOs – Sarah to raise with Mandy—Mike sent Sarah one pager—Done for now
- O&G FIP Minor Sources in Indian Country—Mike made edits to Chris's materials and sent to

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EXHIBIT CC

To: Doster, Brian[Doster.Brian@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Srinivasan, Gautam[Srinivasan.Gautam@epa.gov]
Cc: Williams, Melina[Williams.Melina@epa.gov]
From: Schwab, Justin
Sent: Mon 10/9/2017 10:51:45 PM
Subject: RE: For review: Memos related to DTE NSR case
EDIT NSR policy memo_draft_10-4-17PSL.docx

Please find redline/bubbles attached on the "NSR Policy memo_draft" document.

From: Doster, Brian
Sent: Wednesday, October 4, 2017 3:31 PM
To: Schwab, Justin <Schwab.Justin@epa.gov>; Schmidt, Lorie <Schmidt.Lorie@epa.gov>; Srinivasan, Gautam <Srinivasan.Gautam@epa.gov>
Cc: Williams, Melina <Williams.Melina@epa.gov>
Subject: For review: Memos related to DTE NSR case

Attached for review are the current drafts of two memos regarding the issues in the DTE NSR litigation, plus a piece of background information. ARLO would like to discuss this topic at our Hot Issues meeting on Thursday.

The first attachment is the current draft of the memo [redacted]

Ex. 5 - Deliberative Process; Attorney-Client Communications

Ex. 5 - Deliberative Process; Attorney-Client Communications

The draft OGC companion memo also identifies some points to consider in evaluating these options. Per the recommendation of Melina and I, [redacted]

Ex. 5 - Deliberative Process; Attorney-Client Communications

The third attachment is a one-page outline that was provided to OAR as a guide to develop the primary draft memo (first attachment). I have added highlights to the third attachment to show the 4 key points that OAR tried to address in the primary memo.

Ex. 5 - Deliberative Process; Attorney-Client Communications

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Ex. 5 - Deliberative Process; Attorney-Client Communications

Brian

Brian L. Doster

Assistant General Counsel for NSR, Radiation, and Emergency Response

Air and Radiation Law Office

Office of General Counsel

(202) 564-1932

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EXHIBIT DD

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
Cc: Dominguez, Alexander[dominguez.alexander@epa.gov]; Dunham, Sarah[Dunham.Sarah@epa.gov]
From: Lewis, Josh
Sent: Thur 10/5/2017 4:42:01 PM
Subject: Fwd: NSR Policy Memo
OGC NSR DTE issue options analysis 10-4 am draft.docx
ATT00001.htm
NSR policy memo_draft_10-4-17PSLrev.docx
ATT00002.htm

Ahead of our weekly meeting tomorrow at 9, wanted to send the latest draft NSR policy memo. The other attachment is a document prepared by OGC which is an analysis of options for addressing NSR issues raised by DTE (you'll see one of the options is the policy memo)

Concerning the policy memo, we initially drafted a brief document just laying out EPA's

Ex. 5 - Deliberative Process/Attorney-Client

OGC staff attorneys have reviewed this draft. The draft will go shortly to Justin, Lorie, and Gautam for review. Thus far OECA and the Regional Offices have not been engaged.

We can talk more tomorrow about this, including next steps.

Released via FOIA EPA-2019-008216

EXHIBIT EE

To: Traylor, Patrick[traylor.patrick@epa.gov]
Cc: Bodine, Susan[bodine.susan@epa.gov]
From: Gunasekara, Mandy
Sent: Wed 10/25/2017 6:03:32 PM
Subject: RE: NSR Reform
NSR policy memo_draft_10-4-17PSLrev.docx

Yes – see attached. The team sent this to me a couple weeks ago. I have not yet spent significant time on it. Please take a look and let me know your thoughts. Once we get a further down the process, let's plan to meet and discuss.

Best,

Mandy

From: Traylor, Patrick
Sent: Wednesday, October 25, 2017 10:24 AM
To: Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>
Cc: Bodine, Susan <bodine.susan@epa.gov>
Subject: NSR Reform

Mandy:

Would you please include Susan and me at the very earliest opportunity in the distribution for whatever draft memoranda or guidance documents that [redacted] Ex. 5 - Deliberative Process [redacted]? We have your one-page outline.

Thanks,

Patrick

Patrick Traylor

Deputy Assistant Administrator

Office of Enforcement and Compliance Assurance

ED_001598_00006793

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EXHIBIT FF

Show Time As	Busy	
Attendees	**Name <E-mail>**	**Attendance**
	[redacted] <[redacted]	Organizer
	Kelly, Albert <kelly.albert@epa.gov>	Required

Friday, November 17, 2017

Time	11:15 AM – 12:00 PM
Subject	Speaking Engagement: Federalist Society National Lawyers Convention
Location	Mayflower Hotel, 1127 Connecticut Ave NW, WDC
Attachments	EPA Event Request Form.docx Pruitt Invite.pdf (ETHICS) Federalist Convention - Friday, November 17.pdf
Reminder	15 minutes
Show Time As	Busy

Attendees	**Name <E-mail>**	**Attendance**
	[redacted] <[redacted]	Organizer
	Tate Bennett (Bennett.Tate@epa.gov) <Bennett.Tate@epa.gov>	Required
	Bowman, Liz <Bowman.Liz@epa.gov>	Required
	Hewitt, James <hewitt.james@epa.gov>	Required
	Sarah Greenwalt (greenwalt.sarah@epa.gov) <greenwalt.sarah@epa.gov>	Required

---

Time	12:00 PM – 12:30 PM
Subject	HOLD: On the Record Interview
Location	Mayflower Hotel
Reminder	15 minutes
Show Time As	Busy

Time	2:15 PM – 2:45 PM
Subject	Briefing: WOTUS
Location	Administrator's Office
Reminder	15 minutes
Show Time As	Busy

Attendees	**Name <E-mail>**	**Attendance**
	[redacted] <[redacted]	Organizer
	Sarah Greenwalt (greenwalt.sarah@epa.gov) <greenwalt.sarah@epa.gov>	Required
	Forsgren, Lee <Forsgren.Lee@epa.gov>	Required
	Bodine, Susan <bodine.susan@epa.gov>	Required

Released via FOIA EPA-2019-008216

Time	3:00 PM – 3:30 PM
Subject	Briefing: Oil and Gas Proposed Rule
Location	Administrator's Office
Reminder	15 minutes
Show Time As	Busy

Attendees Name <E-mail>	**Attendance**
[redacted] <[redacted]	Organizer
Wehrum, Bill <Wehrum.Bill@epa.gov>	Required
Dravis, Samantha <dravis.samantha@epa.gov>	Required
Schwab, Justin <schwab.justin@epa.gov>	Required
Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>	Required
Ryan Jackson (jackson.ryan@epa.gov) <jackson.ryan@epa.gov>	Required

Time	3:30 PM – 4:00 PM
Subject	Briefing: New Source Review
Location	Administrator's Office
Reminder	15 minutes
Show Time As	Busy

Attendees Name <E-mail>	**Attendance**
[redacted] <[redacted]	Organizer
Wehrum, Bill <Wehrum.Bill@epa.gov>	Required
Ryan Jackson (jackson.ryan@epa.gov) <jackson.ryan@epa.gov>	Required
Dravis, Samantha <dravis.samantha@epa.gov>	Required
Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>	Required
Lincoln Ferguson (ferguson.lincoln@epa.gov) <ferguson.lincoln@epa.gov>	Required

Monday, November 20, 2017

Time	8:30 AM – 9:15 AM
Subject	Briefing: Worker Protection Rule
Location	Administrator's Office
Reminder	15 minutes
Show Time As	Busy

Attendees Name <E-mail>	**Attendance**
[redacted] <[redacted]	Organizer

Released via FOIA EPA-2019-008216

EXHIBIT GG

Time 1:30 PM – 1:50 PM
Subject Call with Tyler Minnich, Toomey's office (Confirmed)
Location Mandy will call Tyler at [redacted]
Show Time As Busy
Categories Blue Category
Attendees

Name <E-mail>	Attendance
Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>	Organizer
Dominguez, Alexander <dominguez.alexander@epa.gov>	Required

Time 2:00 PM – 3:00 PM
Subject Discussion with Alex
Show Time As Busy
Attendees

Name <E-mail>	Attendance
Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>	Organizer
Dominguez, Alexander <dominguez.alexander@epa.gov>	Required

Time 3:15 PM – 4:15 PM
Subject Briefing: SO2
Location Alm Room
Show Time As Busy
To: [redacted] Mathias, Scott; Page, Steve; Wehrum, Bill; Gunasekara, Mandy
Attendees

Name <E-mail>	Attendance
[redacted] <[redacted]scott@epa.gov>	Organizer
Mathias, Scott <Mathias.Scott@epa.gov>	Required
Page, Steve <Page.Steve@epa.gov>	Required
Wehrum, Bill <Wehrum.Bill@epa.gov>	Required
Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>	Required

Thursday, November 30, 2017

Time 8:30 AM – 9:00 AM
Subject Meet with Aaron Flynn and Adrienne Sandoval (Confirmed)
Location Mandy's office
Show Time As Busy
Alex would escort them up from security for this meeting
Categories Blue Category
Attendees

Name <E-mail>	Attendance
Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>	Organizer

Released via FOIA EPA-2019-008216

Dominguez, Alexander <dominguez.alexander@epa.gov>	Required

Time 9:30 AM – 10:30 AM
Subject OTAQ Fuels Weekly
Location WJC-N 5400 + Video with AA + [redacted] Participant Code: [redacted] (b)
Show Time As Busy
Attendees

Name <E-mail>	Attendance
Wehrum, Bill <Wehrum.Bill@epa.gov>	Organizer
Grundler, Christopher <grundler.christopher@epa.gov>	Required
Hengst, Benjamin <Hengst.Benjamin@epa.gov>	Required
Argyropoulos, Paul <Argyropoulos.Paul@epa.gov>	Required
Bunker, Byron <bunker.byron@epa.gov>	Required
Dubois, Roland <Dubois.Roland@epa.gov>	Required
Orlin, David <Orlin.David@epa.gov>	Required
Li, Ryland (Shengzhi) <Li.Ryland@epa.gov>	Required
Lewis, Josh <Lewis.Josh@epa.gov>	Required
Charmley, William <charmley.william@epa.gov>	Required
Machiele, Paul <machiele.paul@epa.gov>	Required
Simon, Karl <Simon.Karl@epa.gov>	Required
Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>	Required
Stewart, Gwen <Stewart.Gwen@epa.gov>	Required
Baptist, Erik <baptist.erik@epa.gov>	Required
Harlow, David <harlow.david@epa.gov>	Required
Le, Madison <Le.Madison@epa.gov>	Required
Stahle, Susan <Stahle.Susan@epa.gov>	Optional
Woods, Clinton <woods.clinton@epa.gov>	Required
Burkholder, Dallas <burkholder.dallas@epa.gov>	Required

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Korotney, David <korotney.david@epa.gov>	Required
Michaels, Lauren <Michaels.Lauren@epa.gov>	Required
Parsons, Nick <Parsons.Nick@epa.gov>	Required
Cohen, Janet <cohen.janet@epa.gov>	Required
Dominguez, Alexander <dominguez.alexander@epa.gov>	Optional

Time 11:00 AM – 11:45 AM

Subject NSR Improvement

Location WJC-N 5400 + Video with OAQPS + [redacted] Participant Code: [redacted]

Show Time As Busy

To: Wehrum, Bill; Harlow, David; Gunasekara, Mandy; Lewis, Josh; Page, Steve; Koerber, Mike; Harnett, Bill; Wood, Anna; Kornylak, Vera; Santiago, Juan; Wayland, Richard; Dunham, Sarah; Harvey, Reid; Krieger, Jackie; Vetter, Cheryl; Rao, Raj

Cc: Alston, Lala; Johnson, Yvonnew; Long, Pam

Attendees

Name <E-mail>	Attendance
Wehrum, Bill <Wehrum.Bill@epa.gov>	Organizer
Harlow, David <harlow.david@epa.gov>	Required
Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>	Required
Lewis, Josh <Lewis.Josh@epa.gov>	Required
Page, Steve <Page.Steve@epa.gov>	Required
Koerber, Mike <Koerber.Mike@epa.gov>	Required
Harnett, Bill <Harnett.Bill@epa.gov>	Required
Wood, Anna <Wood.Anna@epa.gov>	Required
Kornylak, Vera S. <Kornylak.Vera@epa.gov>	Required
Santiago, Juan <Santiago.Juan@epa.gov>	Required
Wayland, Richard <Wayland.Richard@epa.gov>	Required
Dunham, Sarah <Dunham.Sarah@epa.gov>	Required
Harvey, Reid <Harvey.Reid@epa.gov>	Required
Krieger, Jackie <Krieger.Jackie@epa.gov>	Required

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Vetter, Cheryl <Vetter.Cheryl@epa.gov>	Required
Rao, Raj <Rao.Raj@epa.gov>	Required
Alston, Lala <Alston.Lala@epa.gov>	Optional
Johnson, Yvonne W <Johnson.Yvonnew@epa.gov>	Optional
Long, Pam <Long.Pam@epa.gov>	Optional

Time 1:00 PM – 1:30 PM
Subject Prep for AHAM Meeting on 12/5
Location WJC-N 5400
Show Time As Busy
Attendees To: Wehrum, Bill; Gunasekara, Mandy; Harlow, David; Dominguez, Alex; Dunham, Sarah; Snyder, Carolyn; Newberg, Cindy; Bailey, Ann; Maranion, Bella

Name <E-mail>	Attendance
Wehrum, Bill <Wehrum.Bill@epa.gov>	Organizer
Gunasekara, Mandy <Gunasekara.Mandy@epa.gov>	Required
Harlow, David <harlow.david@epa.gov>	Required
Dominguez, Alexander <dominguez.alexander@epa.gov>	Required
Dunham, Sarah <Dunham.Sarah@epa.gov>	Required
Snyder, Carolyn <Snyder.Carolyn@epa.gov>	Required
Newberg, Cindy <Newberg.Cindy@epa.gov>	Required
Bailey, Ann <Bailey.Ann@epa.gov>	Required
Kaplan, Katharine <Kaplan.Katharine@epa.gov>	Optional

Time 1:30 PM – 1:45 PM
Subject Cab to Hunton
Show Time As Busy
Categories Orange Category

Time 1:45 PM – 2:30 PM
Subject Speak on Hunton Meeting Panel - Which Way Does the Wind Blow: Priorities and Developments in Air Quality and Climate Change Regulation (Confirmed)
Location Hunton & Williams Offices, 2200 Pennsylvania Avenue NW - 9th Floor
Show Time As Busy
Categories Green Category

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EXHIBIT HH

From: Traylor, Patrick
Location: WJCS-3216
Importance: Normal
Subject: NSR Memorandum Discussion
Start Date/Time: Mon 12/4/2017 6:00:00 PM
End Date/Time: Mon 12/4/2017 7:00:00 PM

To: Traylor, Patrick; Bodine, Susan; Schwab, Justin; Gunasekara, Mandy
Cc: Atkinson, Emily

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EXHIBIT II

To: Ferguson, Lincoln[ferguson.lincoln@epa.gov]
Cc: Jackson, Ryan[jackson.ryan@epa.gov]
From: Gunasekara, Mandy
Sent: Tue 12/5/2017 12:24:09 AM
Subject: NSR Memo
NSR policy memo_draft_2017 12 2 edits.docx

See attached for SP review.

Mandy M. Gunasekara

Principal Deputy Assistant Administrator

Office of Air and Radiation

US Environmental Protection Agency

ED_001598_00006822

EXHIBIT JJ

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
Cc: Traylor, Patrick[traylor.patrick@epa.gov]; Bodine, Susan[bodine.susan@epa.gov]; Burke, Marcella[burke.marcella@epa.gov]; Schmidt, Lorie[Schmidt.Lorie@epa.gov]; Srinivasan, Gautam[Srinivasan.Gautam@epa.gov]; Doster, Brian[Doster.Brian@epa.gov]; Williams, Melina[Williams.Melina@epa.gov]
From: Schwab, Justin
Sent: Wed 12/6/2017 10:24:02 PM
Subject: NSR memo - OGC comments
NSR policy memo_draft_2017.12.2 edits + mkw bld jls.docx

Dear Mandy,

Please find attached a redline with comment bubbles. Ex. 5 - Deliberative Process/Attorney Work Product/Attorney Client Privilege

Ex. 5 - Deliberative Process/Attorney Work Product/Attorney Client Privilege

Please let me know if you have any questions.

Best,

Justin

ED_001598_00006168

EXHIBIT KK

To: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]
Cc: Bodine, Susan[bodine.susan@epa.gov]; Traylor, Patrick[traylor.patrick@epa.gov]
From: Schwab, Justin
Sent: Thur 12/7/2017 4:52:54 PM
Subject: NSR memo--general OGC thoughts on legal risk

(Expanding on some of the comments on the draft.)

Ex. 5 - Deliberative Process/Attorney Work Product/Attorney Client Privilege

ED_001598_00006139

Ex. 5 - Deliberative Process/Attorney Work Product/Attorney Client Privilege

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EXHIBIT LL

To: Wilcox, Jahan[wilcox.jahan@epa.gov]
Cc: Gunasekara, Mandy[Gunasekara.Mandy@epa.gov]; Jackson, Ryan[jackson.ryan@epa.gov]
From: Bowman, Liz
Sent: Thur 12/7/2017 5:43:38 PM
Subject: FW: Signed NSR Memo
NSR Policy Memo 12.7.17.pdf
ATT00001.htm

Can you please help us get this to a few people who might be interested, after the Hearing concludes? I plan to send it to Mary Kissel on the WSJ editorial page, please send it to the reporters you suggest. The program has indicated they are going to give it to Politico, E&E, etc. as soon as they get a copy, so if you want to provide it some folks after the hearing, that would be appreciated. Background on the issue is below:

Draft Desk Statement

Dec. 7 DTE/NSR Memo

Ex. 5 - Deliberative Process

ED_001598_00006375

EXHIBIT MM

HUNTON & WILLIAMS

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EMAIL: afield@hunton.com

May 12, 2017

Samantha K. Dravis
Regulatory Reform Officer and
Associate Administrator, Office of Policy
U.S. Environmental Protection Agency
Mail Code 1803A
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Submitted via Electronic Mail and via Regulations.gov

Utility Air Regulatory Group's Response to EPA's Request for Comments on Regulations Appropriate for Repeal, Replacement, or Modification Pursuant to Executive Order 13777, 82 Fed. Reg. 17,793 (Apr. 13, 2017): Docket ID No. EPA-HQ-OA-2017-0190

Dear Ms. Dravis:

This letter is submitted in response to the U.S. Environmental Protection Agency's ("EPA" or "Agency") April 13, 2017 *Federal Register* notice[1] seeking input from the public to inform the Agency's evaluation of existing regulations that may meet the criteria outlined in Executive Order 13777[2] for repeal, replacement, or modification. More specifically, the notice asks commenters to identify regulations that, among other things, "are outdated, unnecessary, or ineffective; impose costs that exceed benefits; . . . or . . . derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified,"[3] in accordance with the language of Executive Order 13777.

The Utility Air Regulatory Group ("UARG") recommends that EPA examine whether the regulations identified below meet the criteria of Executive Order 13777. UARG is a not-for-profit association of individual electric generating companies and national trade associations. Since 1977, UARG has participated on behalf of certain of its members collectively in scores of Clean Air Act ("CAA" or "Act") administrative proceedings that affect electric generators and in litigation arising from those proceedings. UARG's 40 years of participation in CAA rulemakings and litigation has provided it unique insight as to which CAA programs are

[1] 82 Fed. Reg. 17,793 (Apr. 13, 2017).
[2] 82 Fed. Reg. 12,285 (Mar. 1, 2017).
[3] 82 Fed. Reg. at 17,793.

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designed and work as Congress intended, which programs are overly burdensome or costly, and which programs are unlawful or unnecessary.

Many of the recommendations set out below are described in greater detail in materials that UARG has previously filed with EPA and reviewing courts. These materials include rulemaking comments, technical expert reports, petitions for reconsideration, and court pleadings concerning Agency actions that UARG believes to be unlawful, unjustified, or unduly burdensome or costly. UARG appreciates the opportunity to provide input on this matter and invites Agency representatives and others in the administration to meet with UARG concerning the information that we are providing today.[4]

[4] Dominion Energy does not join in these comments.

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I. Climate Change-Related Rules

A. Clean Power Plan, 80 Fed. Reg. 64,662 (Oct. 23, 2015), codified at 40 C.F.R. Part 60, Subpart UUUU

EPA has already commenced review of this rule to determine whether it is appropriate to "initiate proceedings to suspend, revise or rescind the Clean Power Plan."[5] Any replacement or revision to the Clean Power Plan under CAA § 111(d) must adhere to the statutory confines of section 111 of the CAA and must: (i) be based on a "best system of emission reduction" that can be applied at the individual electric generating units subject to the rule; (ii) adhere to the requirement of section 111(d) of the CAA and its implementing regulations that states (and EPA when it is acting on behalf of a state) be allowed to prescribe less stringent standards for certain units on an as-needed, case-by-case basis; and (iii) adhere to the requirement of section 111(d) of the CAA that the remaining useful life of the unit be taken into account. Any replacement rule should also allow for compliance flexibility. Likewise, UARG encourages EPA to acknowledge that once it has promulgated emission guidelines for a source category, the CAA does not give the Agency authority to revisit those guidelines and make them more stringent. *See* Section VI.A below.

B. Carbon Dioxide New Source Performance Standards for New, Modified, and Reconstructed Electric Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015), codified at 40 C.F.R. Part 60, Subpart TTTT

EPA has already commenced review of this rule to determine whether it is appropriate to "initiate proceedings to suspend, revise or rescind the Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Generating Units."[6] As part of its comments on EPA's proposed performance standards and its petition for reconsideration of the final standards, UARG engaged experts to prepare numerous technical reports explaining to EPA why the performance standards EPA proposed (and later finalized) were neither based on adequately demonstrated systems of emission reduction nor achievable; these technical reports are available in the rulemaking docket.[7]

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[5] 82 Fed. Reg. 16,329 (Apr. 4, 2017).

[6] 82 Fed. Reg. 16,330 (Apr. 4, 2017).

[7] *See* UARG Comments on Proposed GHG NSPS for New Electric Generating Units ("EGUs") at Attachments 1-3, 5, 9, 11 (May 9, 2014), EPA-HQ-OAR-2013-0495-9666; UARG Comments on Proposed GHG NSPS for Modified and Reconstructed EGUs at Attachments B, C, G, K (Oct. 16, 2014), EPA-HQ-OAR-2013-0603-0215; UARG Petition for Reconsideration of Final GHG NSPS at Exhibit J (Dec. 22, 2015), EPA-HQ-OAR-2013-0495-11894.

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Any replacement or revision to the greenhouse gas ("GHG") standards of performance for new, modified, and reconstructed electric generating units must adhere to the statutory confines of section 111 of the CAA, must be based on a "best system of emission reduction" that has been adequately demonstrated, and must be achievable by the individual electric generating units subject to the rule.

Of particular note, any replacement or revision to these standards of performance cannot, for the purposes of determining the "best system of emission reduction," take into account technology that received funding or tax subsidies under the Energy Policy Act of 2005, as consideration of those technologies for that purpose is prohibited by that Act.

C. Greenhouse Gas Mandatory Reporting Rule ("GHG MRR"), codified at 40 C.F.R. Part 98

Under the fiscal year 2008 Consolidated Appropriations Act, Congress authorized funding for EPA to develop and publish a rule "to require mandatory reporting of greenhouse gas emissions above appropriate thresholds in all sectors of the economy of the United States."[8] The joint explanatory statement accompanying the legislation directed EPA to use its existing authority under the CAA (e.g., authority under CAA § 114) to develop a mandatory GHG reporting rule covering those upstream production and downstream sources the Administrator deems "appropriate," and to determine "appropriate thresholds" and frequency for reporting.[9] Congress also authorized EPA to rely on the "existing reporting requirements for electric generating units under section 821 of the 1990 CAA Amendments."[10]

The reporting program has resulted in facilities expending enormous resources tracking, quality assuring, and reporting vast amounts of information. EPA also continues to spend significant resources for both its own staff and Agency contractors to implement the GHG MRR and its electronic reporting requirements. Since its initial promulgation in October 2009, EPA has revised the regulation dozens of times. Although UARG understands that many of these rule revisions have been directed at correcting errors or simplifying data collection and reporting, the need for so many revisions underscores the complicated nature of the program.

In the past, UARG has questioned the "practical utility"[11] of much of the collected information and offered suggestions for simplification of the program. For example, under

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[8] Pub. L. No. 110–161, 121 Stat. 1844, 2128 (2007).

[9] 74 Fed. Reg. 16,448, 16,454 (Apr. 10, 2009).

[10] *Id.* (internal quotation marks omitted).

[11] EPA's authority to collect information under CAA § 114 is limited by the Paperwork Reduction Act and its implementing regulations. To require a data collection, EPA must

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Subpart C, which covers general "stationary fuel combustion sources," the term is defined simply as a device that combusts fuel and does not require that the device be used for any particular purpose.[12] As a result, facilities with total emissions above the rule's applicability threshold must include in their facility-wide calculation miscellaneous combustion devices, like small gas-fired heaters, stoves, lawn mowers, or even hot water heaters. Reporting GHG emissions from such miscellaneous devices is time consuming and the information is of little value. UARG previously asked EPA either to define more narrowly what type of device triggers reporting or to adopt a *de minimis* threshold for reporting emissions from such devices at a stationary fuel combustion source.[13]

Now that the program has been in place for more than seven years, and EPA has provided Congress the information it sought, EPA should review how all of the information being collected has been used and whether the Agency's assumptions about the information's "practical utility" are correct. EPA should use this information to tailor the program so that it provides a significant "net benefit" consistent with the objectives of Executive Order 13777. At a minimum, UARG encourages EPA to establish a *de minimis* cut-off for reporting emissions from miscellaneous activities and streamline by "auto-populating" any emissions already being reported under another federal regulatory program, such as CO_2 emissions data collected under 40 C.F.R. Part 75.

In addition, as part of the rulemakings discussed in Sections I.A and I.B above, EPA amended Part 98 to impose additional reporting requirements on owners of electric generating units that transfer captured carbon dioxide to sites reporting under Subpart RR, while also requiring units to transfer their captured carbon dioxide to Subpart RR reporting sites if they wish to rely on carbon capture to meet an applicable emission limit or earn emission reduction credits. EPA should reconsider this requirement, which is unduly burdensome, costly, and does not have any environmental benefit.

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demonstrate the "practical utility" of the covered information. 5 C.F.R. § 1320.5(d)(1)(iii). Under 5 C.F.R. § 1320.3(l),

> *Practical utility* means the actual, *not merely the theoretical or potential,* usefulness of information.... In determining whether information will have 'practical utility,' OMB will take into account whether the agency demonstrates *actual timely use* for the information....

(emphases added).

[12] 40 C.F.R § 98.30(a).

[13] *See, e.g.*, UARG Comments on Proposed GHG MRR (June 9, 2009), EPA-HQ-OAR-2008-0508-0493.

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II. Cross-State Air Pollution Rule ("CSAPR") Update Rule

EPA should reconsider and modify certain aspects of the Cross-State Air Pollution Rule Update for the 2008 Ozone National Ambient Air Quality Standards ("NAAQS") (known as the "CSAPR Update Rule").[14] The CSAPR Update Rule establishes stringent "ozone-season" (May-through-September) budgets for additional limits on emissions of nitrogen oxides ("NOx") from fossil fuel-fired electric generating units, beginning this month, in each of 22 states: Alabama, Arkansas, Illinois, Indiana, Iowa, Kansas. Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Virginia, West Virginia, and Wisconsin. The rule is a new regulatory program that imposes costs exceeding any reasonable measure of projected benefits. Indeed, EPA's own modeling showed that the emission reductions required of upwind states under the CSAPR Update Rule are disproportionate to the relatively limited projected reductions in downwind ozone concentrations that the rule's emission limits are estimated to produce.[15] Furthermore, if left unmodified, the CSAPR Update Rule threatens jobs in the energy sector because its stringent emission caps can be expected to have the effect of restricting fuel choice.

UARG filed its petition for reconsideration of the CSAPR Update Rule with EPA on December 23, 2016. At least eight other petitions for reconsideration of the rule are pending before EPA.[16] The CSAPR Update Petition describes several aspects of the rule that EPA should reconsider, including: (i) EPA's reliance on modeling projections to identify downwind areas to be addressed by the rule, in disregard of real-world air quality conditions;[17] (ii) EPA's use of an unjustifiably low one-percent-of-NAAQS "contribution threshold" to "link" upwind states to downwind receptors and thereby to subject those states to additional regulation under the rule;[18] and (iii) EPA's failure, in conducting its air quality modeling, to properly account for effects of emissions from non-U.S. sources, which no state has the authority or ability to regulate.[19] Additional background regarding concerns with EPA's CSAPR Update Rule methodology is provided in the CSAPR Update Petition and in UARG's rulemaking comments submitted to

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[14] 81 Fed. Reg. 74,504 (Oct. 26, 2016).

[15] *See* UARG's Petition for Partial Reconsideration of the CSAPR Update Rule at Section X (Dec. 23, 2016) ("CSAPR Update Petition"), https://www.epa.gov/sites/production/files/2017-01/documents/the_utility_air_regulatory_group_0.pdf.

[16] *See* https://www.epa.gov/airmarkets/petitions-reconsideration-received-csapr-update.

[17] CSAPR Update Petition at Sections I & II.

[18] *Id.* at Section III.

[19] *Id.* at Section IV.

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EPA on the December 2015 proposed version of the CSAPR Update Rule.[20] In addition, several petitions for judicial review of the CSAPR Update Rule have been filed and are pending in the U.S. Court of Appeals for the D.C. Circuit, including petitions for review filed by UARG, Murray Energy Corporation, many other industry parties, and several states (Alabama, Arkansas, Ohio, Texas, Wisconsin, and Wyoming) (*Wisconsin v. EPA*, No. 16-1406 & consolidated cases).

EPA should promptly reconsider and modify key elements of the CSAPR Update Rule, as identified in UARG's CSAPR Update Petition, to alleviate unnecessary, costly, and counterproductive regulatory burdens.[21] In doing so, EPA should, for example, consider, propose, and promulgate changes that would increase the levels of states' emission budgets based on corrections to and further review of the existing rule, as well as changes that would appropriately reform EPA's methodology for addressing interstate transport, as described in the attached CSAPR Update Petition and UARG's rulemaking comments.[22] In addition, based on its review and reconsideration of the CSAPR Update Rule and its methodology, EPA should, to the extent supported by appropriate analysis, issue a determination identifying states that currently are subject to that Rule but that do not contribute significantly to nonattainment of the 2008

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[20] *See* UARG Comments on Proposed CSAPR Update Rule (Feb. 1, 2016), EPA-HQ-OAR-2015-0500-0253. UARG also submitted supplemental comments on June 1, June 9, and August 16, 2016, addressing information that became available after the deadline for submitting comments on the proposed rule. UARG's supplemental comments are attached to the CSAPR Update Petition as Appendix A to that document.

[21] UARG emphasizes that it will be important for EPA, as it reconsiders the CSAPR Update Rule, to ensure that states may continue to rely on compliance with the NOx and sulfur dioxide ("SO_2") emission limits in CSAPR itself to satisfy "best available retrofit technology" ("BART") requirements for EGUs under the CAA's visibility protection program, as provided in 40 C.F.R. § 51.308(e)(4) (as promulgated at 77 Fed. Reg. 33,642, 33,656 (June 7, 2012)). *See also* 81 Fed. Reg. 78,954, 78,961-64 (Nov. 10, 2016) (describing EPA's sensitivity analysis reaffirming the validity of the Agency's determination that participation in CSAPR is a valid BART alternative).

[22] As noted in the CSAPR Update Petition, EPA in reviewing and reconsidering the CSAPR Update Rule should not make any change that would result in imposition of an ozone-season NOx emission budget for any state that is more stringent than the budget for that state under the existing rule. EPA also should not make any change that would affect the continuing validity and effectiveness of the parts of the CSAPR Update Rule in which EPA determined that: (i) Florida, North Carolina, and South Carolina are excluded from the ozone-season NOx program under both the original CSAPR and the CSAPR Update Rule; and (ii) Georgia is not subject to any obligations with respect to interstate transport for ozone NAAQS beyond those established for that state in CSAPR itself.

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ozone NAAQS in (and do not interfere with maintenance of that NAAQS by) any other state and, consequently, remove those states from coverage under the CSAPR Update Rule.

III. Regional Haze and Other Visibility Regulations

EPA should reconsider and modify certain aspects (described below) of its January 10, 2017 visibility rule revisions that, if left unmodified, will impose unnecessary and counterproductive regulatory costs and other burdens.

Sections 169A and 169B of the Act and EPA regulations at 40 C.F.R. §§ 51.300-51.309 require states to adopt and submit state implementation plans ("SIPs") to achieve "reasonable progress" toward a national goal of preventing and remedying impairment of visibility in certain national parks and wilderness areas, to the extent visibility impairment in those areas results from manmade air pollution. The CAA's visibility program generally requires states to evaluate emission sources or source categories for potential emission controls to help achieve reasonable progress. Although Congress intended that states be the principal decisionmakers in this area, in many instances over the past eight years, EPA improperly assumed the states' role.

During the first "planning period" under the visibility program's "regional haze" provisions—a period that began in 2008 and will end in 2018—the primary regulatory driver was the CAA's BART requirement applicable to many EGUs and industrial sources. Now that decisionmaking on BART is complete for most states, the main focus of the upcoming second planning period, which will run from 2018 to 2028, will be implementation of the CAA's reasonable progress requirement.

EPA substantially amended many elements of its visibility protection regulations in its January 10, 2017 rule.[23] Contrary to the version of that final rule as signed on December 14, 2016 (which would have taken effect 30 days after publication in the *Federal Register*), the final rule as published on January 10 was made effective immediately in order to evade the incoming Administration's normal regulatory review and its "regulatory freeze" pending that review. The January 10 rule is the subject of three petitions for administrative reconsideration filed with EPA and eleven petitions for review in the U.S. Court of Appeals for the D.C. Circuit (*Texas v. EPA*, No. 17-1021 and consolidated cases). UARG filed a petition for administrative reconsideration[24] and a petition for judicial review of the rule. EPA has not yet responded to UARG's petition for reconsideration. As described below and in the Visibility Rule Petition, the rule has several provisions that EPA should now reconsider and repeal or modify.

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[23] 82 Fed. Reg. 3078 (Jan. 10, 2017).

[24] *See* UARG Petition for Partial Administrative Reconsideration of Amended Visibility Requirements (Mar. 13, 2017) ("Visibility Rule Petition") (attached as Exhibit 1).

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When Congress enacted the CAA's visibility provisions, it made clear the states have broad discretion in implementing the program. The D.C. Circuit recognized that principle in the leading case in this area, *American Corn Growers Ass'n v. EPA*, 291 F.3d 1 (D.C. Cir. 2002). As the program was implemented during the previous administration, however, EPA frequently failed to give the deference that it owed to state decisions and often supplanted reasonable state regulatory plans with more stringent and costly federal control requirements in many states, including Arizona, Arkansas, Nebraska, New Mexico, North Dakota, Oklahoma, Texas, Utah, and Wyoming.

To address these problems, EPA should modify its January 10, 2017 regional haze rules to emphasize the breadth of state authority and to make clear EPA will not second-guess state determinations. EPA should do this by, for instance, making clear that states are free to decide how to consider and assess each of the statutory "reasonable progress" factors, including the costs associated with additional emission controls, and whether visibility improvements resulting from further controls will be substantial enough to warrant imposing those controls.

Although some parts of the January 10, 2017 rule make common-sense revisions that should be preserved—such as a three-year extension, from July 2018 to July 2021, of states' deadline to develop and submit SIPs for the second planning period—other parts of that rule create problems that require additional regulatory action to make necessary modifications. For example, the rule purports to impose on states an improper interpretation—adopted in the last Administration, over many stakeholders' objections—of the relationship between two key elements of the regional haze program: the requirement that states determine and adopt "reasonable progress goals" and the requirement that states identify specific emission control measures to include in "long-term strategies" to achieve reasonable progress. The January 10, 2017 rule requires states to first identify all measures to be included in the state's long-term strategy and then to calculate reasonable progress goals based on the degree of visibility improvement that computer modeling projects those measures will achieve. This aspect of the rule subverts the normal regulatory process by making states' determinations of reasonable progress goals an afterthought and compelling states to consider regulation even where it is unnecessary to stay on track toward reasonable visibility objectives. States should instead be free to develop reasonable progress goals they deem appropriate for a given area and then to determine which specific measures should be included in long-term strategies to achieve those goals.

The January 10, 2017 rule also has several other provisions that EPA should reconsider and modify—including (among others) provisions concerning the "uniform rate of progress" and provisions addressing states' consultation processes with other states and with federal land

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management agencies. A detailed description of how EPA should address and reform these and other aspects of the rule is in UARG's Visibility Rule Petition.[25]

Consistent with Executive Order 13777, revising EPA's visibility rules as recommended in this comment letter and in UARG's Visibility Rule Petition would alleviate unnecessary regulatory burdens and would be consistent with applicable law. Such revisions would advance the Executive Order's objective of avoiding regulation that unnecessarily imposes costs that outweigh benefits and that inhibit job creation and economic growth.

IV. Regulation of Hazardous Air Pollutants

A. Compliance Provisions of the Mercury and Air Toxics Standards ("MATS") Rule, codified at 40 C.F.R. Part 63, Subpart UUUUU

The MATS Rule, regulating hazardous air pollutants from coal and oil-fired electric generating units, is among the most expensive and burdensome rules EPA has ever promulgated. Although the most significant costs associated with the rule derive from purchase, installation, and use of emission control technologies, the task of demonstrating compliance under the rule through periodic performance testing, continuous emissions monitoring, recordkeeping, and reporting also is costly. Some of those compliance demonstration costs are unavoidable, but other costs and burdens are avoidable. Rules that are written clearly and that offer flexibility—where that can be achieved without sacrificing environmental protections—provide the greatest "net benefit." Unfortunately, the MATS Rule has many provisions that are internally inconsistent, ambiguous, or inflexible, each of which adds significantly to the cost and burden of complying with the rule.

Although the current rule is the product of multiple rulemakings over a period of more than 5 years, those successive rulemakings have not fully addressed the rule's overall compliance burdens. The 2012 rule contained numerous errors and problems, many of which are described in detail in UARG's first petition for administrative reconsideration.[26] When EPA conducted a reconsideration rulemaking on a few of the issues in the rule pertaining to periods of startup and

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[25] As noted above and in the Visibility Rule Petition, one provision of the January 10, 2017 rule is an adjustment, from July 2018 to July 2021, of the deadline by which states must submit SIPs for the second planning period. UARG joins numerous states and other stakeholders in supporting that deadline adjustment and urges EPA *not* to reconsider that element of the rule.

[26] *See* UARG Petition for Reconsideration of MATS Rule at Section VI (Apr. 16, 2012), EPA-HQ-OAR-2009-0234-20180.

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shutdown, the Agency's 2014 reconsideration rule created more problems than it resolved.[27] UARG raised those problems and other longstanding issues in comments on the Agency's 2015 proposed "Technical Corrections" to the MATS Rule.[28] Although EPA resolved some of the issues from the prior two rulemakings in its 2016 Technical Corrections rule, a lot of work remains to be done to make the rule clear, consistent, and appropriately flexible. Even after improvements to the rule in the Technical Corrections, facilities are struggling to interpret and reconcile ambiguous and inconsistent provisions. They also remain subject to overly restrictive requirements for the conduct of performance tests that could result in operation of units that otherwise would not operate, simply to conduct tests to measure emissions. This is unnecessary, costly, and grossly inefficient.

EPA currently is in the middle of another MATS-related rulemaking, this one focused on improving the electronic reporting requirements of the MATS Rule by allowing all reports to be submitted using the Emissions Collection and Monitoring Plan System ("ECMPS") software system already used by utilities under the Acid Rain Program and CSAPR. Although UARG supports that change, UARG members are concerned that the burdens associated with some of the very detailed electronic reporting EPA has proposed will outweigh the cost savings associated with the move to ECMPS. EPA and utilities also cannot successfully implement the electronic reporting requirements without a common understanding of what other substantive compliance provisions in the rule require. As a result, in comments on that proposal, UARG again asked EPA to resolve some of the issues UARG has identified in the existing rule, in addition to requesting changes in the volume of new information EPA has proposed be submitted electronically.[29]

The MATS Rule has the potential to be less costly. EPA should use the opportunity of the ongoing rulemaking to work with UARG to achieve that end by resolving the issues that remain in the existing rule's compliance procedures, and addressing UARG's concerns about the proposed revisions.

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[27] EPA ultimately denied reconsideration on the remainder of UARG's 2012 petition without addressing the merits of UARG's concerns regarding the compliance provisions, concluding only that it had met its procedural obligations under CAA § 307(d)(7) to solicit comment on the rule. EPA, Denial of Petitions for Reconsideration of Certain Issues: MATS and Utility NSPS (Mar. 2015), EPA-HQ-OAR-2009-0234-20493.

[28] *See* UARG Comments on Proposed Technical Corrections (Apr. 3, 2015), EPA-HQ-OAR-2009-0234-20483.

[29] *See* UARG Comments on Proposed MATS Electronic Reporting Rule (Nov. 15, 2016), EPA-HQ-OAR-2009-0234-20609.

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B. Renewed Analysis of Potentially Delisting Natural Gas-Fired Stationary Combustion Turbines from Regulation Under CAA Section 112

Gas-fired combustion turbines make up a large and growing portion of the nation's electric generating fleet, and they are an essential part of maintaining electric reliability in the United States. But for over a decade these sources have been in legal limbo with respect to their regulatory status under the CAA's regulatory provisions governing hazardous air pollutants ("HAPs"). The resulting uncertainty presents risks to combustion turbine owners that should be addressed by EPA.

EPA listed stationary combustion turbines as a source category for regulation under section 112 of the Act in 1992 and promulgated emission standards limiting HAP emissions from new and reconstructed turbines in 2004.[30] However, almost immediately, EPA proposed to remove natural gas-fired combustion turbines from the list of sources subject to regulation under section 112.[31] Based on EPA's own analysis and on a petition for delisting submitted by the Gas Turbine Association, the Agency made a preliminary finding that gas-fired turbines meet the CAA's health-protective criteria for delisting.[32]

EPA's 2004 analysis found that even using conservative assumptions about exposure and risk, emissions from gas-fired combustion turbines would meet these health-protective statutory criteria. Accordingly, EPA proposed to delist gas-fired turbines from section 112 regulation. Recognizing that it would be irrational to require compliance with a rule it intended to revoke, EPA also issued a stay of the emission standards for gas-fired turbines until the Agency could take final action on its delisting proposal.[33]

However, EPA never took final action on its delisting proposal. According to the terms of the stay, if EPA ultimately decides not to delist gas-fired turbines, then the standards will spring into effect for any turbine built after January 2003. This twelve-year waiting period has generated significant regulatory uncertainty for owners of gas-fired combustion turbines, who cannot say for certain whether or not their turbines built in the interim must comply with the emission standards. That uncertainty is compounded by EPA's upcoming Risk and Technology

[30] 69 Fed. Reg. 10,512 (Mar. 5, 2004).
[31] 69 Fed. Reg. 18,327 (Apr. 7, 2004).
[32] *Id.*; *see* CAA § 112(c)(9)(B) (describing criteria).
[33] 69 Fed. Reg. 51,184 (Aug. 18, 2004).

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Review ("RTR") for stationary combustion turbines: turbine owners cannot be sure whether EPA will further tighten the standards that might ultimately apply if the stay is lifted.[34]

EPA should revisit its delisting proposal for gas-fired combustion turbines and assess whether those sources still meet the statutory criteria for delisting. The Agency's previous review showed that gas-fired turbines' HAP emissions posed minuscule risks to health and the environment. If the delisting criteria are still satisfied, EPA should promptly delist gas-fired turbines from regulation under section 112.[35] If gas-fired turbines are not delisted, the Agency should, as appropriate, provide for a transition mechanism for gas-fired turbines constructed since 2003, and EPA should be careful in the RTR proceeding not to impose revised standards that would be unduly burdensome and costly.

C. National Emissions Standards for Hazardous Air Pollutants and New Source Performance Standards for Stationary Reciprocating Internal Combustion Engines ("RICE"), codified at 40 C.F.R. Part 60 Subparts IIII and JJJJ and 40 C.F.R. Part 63 Subpart ZZZZ

EPA has promulgated a set of interrelated regulations for emissions from RICE units pursuant to both CAA § 111 (new source performance standards) and § 112 (national emissions standards for HAPs). Each set of rules identifies numerous subcategories of internal combustion engines and applies varying requirements to each subcategory based on age, size, fuel type, engine design, use, and other factors. The overlapping regulatory programs and range of subcategories have resulted in a complex set of requirements that can be difficult for source owners to navigate.

The RICE regulations generally require manufacturers to install cost-effective state-of-the-art technology to minimize emissions. UARG agrees that requiring manufacturers (rather than source owners or operators) to install these controls is a reasonable approach to regulation for these sources. But EPA has also promulgated extensive and burdensome testing, maintenance, and record-keeping requirements for owners and operators. These requirements

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[34] A federal court recently set a March 2020 deadline for EPA to complete its RTR for stationary combustion turbines (along with 19 other source categories). *Cal. Cmtys. Against Toxics v. Pruitt*, No. 15-cv-512 (TSC), 2017 WL 978974 (D.D.C. Mar. 13, 2017).

[35] Although the D.C. Circuit has ruled that CAA § 112(c)(9)(B)(i) only allows EPA to delist entire source categories (rather than subcategories), *see NRDC v. EPA*, 489 F.3d 1364 (D.C. Cir. 2007), nothing in the Act prohibits EPA from reclassifying gas-fired combustion turbines as a separate source category and delisting them. *See* CAA § 112(c)(1).

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impose substantial costs with little to no benefit. Emissions from RICE sources are already small and do not warrant these onerous and needless regulations.

For example, EPA has placed unnecessary restrictions on the operation of emergency engines. These engines are limited to just 50 hours of non-emergency operation, which count toward the 100 hour annual limit for testing and maintenance. Tracking these independent uses of RICE sources is burdensome and achieves no benefit. In addition, the work practice standards for most RICE sources require servicing the unit more often than manufacturer specifications, which is inefficient and does not provide environmental benefits. Finally, for new Tier 4 engines, EPA adopted redundant requirements for both manufacturers and operators restricting operation when certain emission controls are not working properly, which serve only to hinder operators' ability to address emergency situations. These provisions are burdensome, threaten reliability, and inappropriately place manufacturers in the role of policing emergency situations.

EPA should eliminate the unnecessary requirements applicable to RICE sources and adopt clear, streamlined replacements.

V. Preconstruction Permitting Issues

A. New Source Review ("NSR") Reform

The Act's NSR program requires major stationary sources to go through an extensive, time-consuming, and costly review and permitting process prior to construction. The NSR program also applies to existing facilities if they are modified in substantial ways and if, as a result, emissions increase by significant amounts (these are known as "major modifications"). The NSR program requires, among other things, that the owner or operator of a proposed new major source or a proposed major modification obtain a pre-construction permit, which will be issued only if the owner/operator (i) demonstrates—normally through air quality modeling—that the proposed major new source or modification will not cause or contribute to a violation of air quality standards; (ii) installs the best available control technologies ("BACT") to reduce levels of specific regulated pollutants, and (iii) demonstrates that the proposed new source or modification will not cause an adverse impact on air quality-related values in federally protected lands (*e.g.*, national parks or wilderness areas).

For the first two decades of the NSR program, existing sources rarely triggered it. That is because EPA applied it in a way to be triggered only by unusual projects that would expand the capacity of the source—i.e., projects that create *new* sources of emissions. It is also because NSR is so time-consuming and expensive that sources generally avoided activities that would expand their capacities *because* they could trigger NSR.

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Starting in the late 1990s, however, EPA's enforcement arm, in an effort to drive policy, filed and/or threatened a large number of lawsuits to force the installation of controls not otherwise required by the Act. To achieve this goal, EPA asserted in the lawsuits a theory of universal liability: any maintenance project—anything larger than day-to-day activity akin to changing a car's oil—is a "change" that could trigger NSR; and any such "change," if it addresses reliability, availability, or efficiency issues that the plant might have experienced in the recent past, according to the lawsuits, will "increase" total emissions as compared to the recent past and therefore will trigger NSR. More than a decade and half later, these types of lawsuits continue, with no certainty as to how the NSR program will apply to existing plants. For example, courts have reached diametrically opposite conclusions with respect to whether similar projects are considered routine maintenance, repair, and replacement ("RMRR") and thus excluded from NSR.[36] EPA's latest revision of the emissions increase provisions has, in a single case, generated five different opinions as to how these provisions should apply.[37] At a minimum, the fact that courts—and even judges within the same court—cannot agree on what these regulations mean and how they should apply in particular circumstances highlights the uncertainty these regulations have created and how inefficient their application has been in the recent past.

The NSR rules, as EPA's enforcement arm has sought to apply them to existing facilities for the last decade and a half, discourage—and potentially impose very large costs on—needed projects to maintain and improve existing plants' availability, reliability, safety, and efficiency. Those are precisely the types of projects that maintain American industry's competitiveness and are needed to cost-effectively maintain the reliability of the nation's energy systems. For these reasons, the NSR rules should be revised to remove the uncertainty surrounding their applicability and the perverse incentives they create.

B. Synthetic Minor Sources

Current NSR regulations contain a provision (40 C.F.R. § 52.21(r)(4)) stating that a synthetic minor source—i.e., a source or modification that took operational or other limitations

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[36] *Compare, e.g.*, *Nat'l Parks Conservation Ass'n v. TVA*, No. 3:01-CV-71, 2010 WL 1291335 (E.D. Tenn. Mar. 31, 2010) (finding economizer and superheater replacements RMRR); *with United States v. La. Generating LLC*, No. 09-100-JJB-CN, 2012 WL 4107129, at *4 (M.D. La. Sept. 19, 2012) (finding reheater replacements not RMRR).

[37] *See United States v. DTE Energy Co.*, 845 F.3d 735 (6th Cir. 2017) (three different opinions), 711 F.3d 643 (6th Cir. 2013) (two different opinions). The Sixth Circuit recently denied DTE Energy's petition for rehearing en banc, and currently has pending before it DTE Energy's motion to stay the mandate pending the filing of a petition for certiorari.

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to remain minor—becomes subject to NSR when it "becomes a major source or major modification solely by virtue of relaxation in any enforceable limitation" established in a federally enforceable air permit. This provision was placed in the NSR regulations to prevent circumvention of those regulations—that is, sources taking limitations to avoid NSR review when they are constructed, only to seek to relax these limitations a short period thereafter.

That provision is too broad, however, in that it sweeps into its scope circumstances in which EPA's concerns about circumvention are clearly not implicated: for example, a situation in which a relaxation of the permit limits may be sought years after the initial construction. As a result, this rule unnecessarily limits production and hinders economic growth, even though the increase in emissions from the later construction is very small and would have a *de minimis* impact (i.e., even though the proposed change itself is not major). In the utility industry, the result is that generation is shifted to higher cost units, unnecessarily increasing costs for ratepayers and, in all likelihood, resulting in more (not less) emissions.

This "relaxation" provision should be revised such that it does not apply in situations in which the risk of circumvention is very unlikely or nonexistent. For example, EPA should consider whether, after a certain amount of time has passed (such as five or more years after a permit containing the operational limitation was issued), the relaxation provision should no longer apply. In these circumstances, a proposed physical or operational change should be analyzed under the base NSR rules, as it would be for any other "true" minor source or modification. Such a change to the regulations would sensibly encourage economic growth while simultaneously ensuring that any physical or operational change that is a major source or modification in its own right would be subject to preconstruction review.

C. Prevention of Significant Deterioration ("PSD") Significant Emissions Rate for Greenhouse Gases

In *UARG v. EPA*,[38] the Supreme Court held that EPA's so-called "Tailoring Rule" was unlawful in as much as it would apply the PSD and Title V permitting programs to sources based solely on their GHG emissions. Instead, the Court held, EPA's authority to regulate GHGs under PSD and Title V extends only to "anyway" sources, that is, sources that otherwise would trigger these permitting requirements for non-GHG pollutants. For these "anyway" sources, EPA could require BACT for GHGs "only if the source emits more than a *de minimis* amount of greenhouse gases."[39] On remand, EPA proposed to establish its previous Tailoring Rule threshold, 75,000 tons per year, as that *de minimis* level or "Significant Emissions Rate" (also known as a

[38] 134 S. Ct. 2427 (2014).
[39] *Id.* at 2449.

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significance threshold).[40] UARG and its members filed comments supporting EPA's authority to establish a significance threshold on *de minimis* grounds, but objecting to the proposed rule's approach of merely reverse-engineering a pre-determined result—namely, the Tailoring Rule's 75,000 tons per year level—instead of applying the correct legal standard for *de minimis* authority and properly evaluating the facts and data in the record under that standard.[41] Indeed, as UARG's comments explained, applying EPA's historic and well-established approach would have yielded a significance threshold of 320,000 tons per year, four times higher than EPA's predetermined, "preferred" result. Yet, not only did the proposed rule reject any significance threshold higher than 75,000 tons per year, it arbitrarily declared that EPA would not even accept comments on such higher thresholds.

Establishing an appropriate PSD *de minimis* level for GHGs falls squarely in the category of action that would alleviate unnecessary, costly, and counterproductive regulatory burdens. EPA should withdraw the current proposal, and propose a new, higher significance threshold for GHGs.

VI. New Source Performance Standards ("NSPS") Issues

A. Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills, 81 Fed. Reg. 59,276 (Aug. 29, 2016), codified at 40 C.F.R. Part 60, Subpart Cf

UARG urges EPA to grant petitions for reconsideration that are pending before the Agency regarding this rule, which revised the existing emissions guidelines for municipal solid waste landfills to make them more stringent. Although EPA possesses authority to amend regulations to correct mistakes or to streamline processes as part of its authority under section 111(d), the Agency lacks authority under that provision to revise its emission guidelines to direct states to make previously promulgated standards of performance for existing sources more stringent. UARG filed comments on EPA's proposed revision to the emission guidelines that are available in the rulemaking docket.[42] UARG is also challenging this rule (along with other Petitioners) in the U.S. Court of Appeals for the District of Columbia Circuit (*Nat'l Waste & Recycling Ass'n v. EPA*, No. 16-1371 and consolidated cases).

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[40] 81 Fed. Reg. 68,110 (Oct. 3, 2016).

[41] UARG Comments on Proposed Significance Threshold (Dec. 16, 2016), EPA-HQ-OAR-2015-0355-0089.

[42] *See* UARG Comments on Proposed Emission Guideline Revisions for Municipal Solid Waste Landfills (Oct. 26, 2015), EPA-HQ-OAR-2014-0451-0198.

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B. Electronic Reporting Under the NSPS, codified at 40 C.F.R. Part 60

New source performance standards establish federally enforceable emission standards and related compliance requirements for new, modified, and reconstructed facilities in specific source categories.[43] NSPS are established by EPA, but their implementation and enforcement usually are delegated to state agencies. Reporting requirements for the NSPS are established in the general provisions in Subpart A and in individual subparts. The general provisions currently require duplicate reporting to EPA Regional Offices and delegated state agencies, generally in hard copy (although use of electronic media also is permitted for submissions to state agencies with their consent).

Electronic reporting of information to a centralized data system has the potential to reduce costs and burdens and improve accessibility of information to regulators, the regulated entities, and the public. Unfortunately, EPA's implementation of such reporting under the NSPS has done the opposite.

Beginning in 2009, EPA started inserting into individual subparts of the NSPS a requirement that facilities electronically submit certain reports to EPA using an EPA-designed software system and website that the Agency was in the process of developing. The first of those requirements took effect July 1, 2011.[44] The requirement to submit existing reports electronically to a central location has not been controversial. However, the software system EPA has specified (called the "Electronic Reporting Tool" or "ERT") is controversial because the program is outdated and difficult to use, and because it requires submission of significant volumes of information that are not necessary to demonstrate compliance with any applicable NSPS.[45] EPA's failure to relieve sources from existing duplicate paper reporting requirements also generated objections.

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[43] UARG members own and operate facilities subject to many NSPS subparts, including those applicable to steam generating units (Subparts D, Da, Db, and Dc), combustion turbines (Subparts GG and KKKK), coal preparation plants (Subpart Y), and nonmetallic mineral processing plants (Subpart OOO).

[44] *See, e.g.*, 40 C.F.R. § 60.49a(v)(4) (Subpart Da), § 60.46b(j)(14) (Subpart Db), § 60.45c(c)(14) (Subpart Dc), § 60.258(d) (Subpart Y).

[45] EPA has said it is collecting the additional information to assist in development of emission factors. Initially, EPA collected the information simply by mandating use of the ERT software. However, in 2016, EPA revised the general provisions to codify some of those reporting requirements. 81 Fed. Reg. 59,800 (Aug. 30, 2016) (revising 40 C.F.R. § 60.8(f)).

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In 2015, EPA proposed to expand the electronic reporting requirement to all but a few NSPS subparts by revising the general provisions.[46] UARG's objections to the ERT and EPA's proposed expansion of the requirement are described in detail in UARG's comments on that proposal.[47]

On December 21, 2016, EPA Administrator Gina McCarthy signed a final rule that would impose many of the burdens to which UARG and others objected. The rule has not yet been published. Although that rule includes some extended deadlines, multiple promises to develop alternatives to the use of the ERT, and other improvements as a result of comments, the basic mandate of the rule is the same. If the rule becomes effective, numerous facilities will be required (at least in the short term) to electronically report significant volumes of information to EPA using the ERT, in addition to providing the same information in hard copy to any delegated state that does not waive the duplicate reporting requirement. The final rule also includes drafting errors that would inadvertently impose the new requirements on facilities EPA said it planned to exclude from the rule. If the rule is published, UARG intends to petition for administrative reconsideration.

The current NSPS electronic reporting requirements, and the planned expansion of those requirements to include many additional subparts, do not provide a "net benefit." EPA should formally withdraw the signed final rule and issue a new proposal to replace existing requirements for reporting using the ERT with a more workable electronic reporting system and to reduce the volume of information that must be reported electronically. For electric utilities, EPA should consider adapting its existing ECMPS software, which already is used by utilities to report information under the Acid Rain Program and CSAPR, to collect any additional information needed for those sources to demonstrate compliance with an applicable NSPS. As discussed further in Section IV.A above, EPA already is doing that for the MATS Rule at 40 C.F.R. Part 63, Subpart UUUUU.

Finally, EPA should act expeditiously—perhaps by direct final rule—to authorize use of electronic reporting (including email submission of electronic media) to EPA Regional Offices and to remove requirements for duplicate reporting to EPA Regions of information already electronically reported to EPA (e.g., to ECMPS or EPA's Central Data Exchange),

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[46] 80 Fed. Reg. 15,100 (Mar. 20, 2015).

[47] *See* UARG Comments on Proposed NSPS Electronic Reporting Rule (June 18, 2015), EPA-HQ-OAR-2009-0174-0093.

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C. Reconsideration of the NSPS for Stationary Combustion Turbines, codified at 40 C.F.R. Part 60, Subpart KKKK

EPA promulgated the NSPS for new, modified, and reconstructed stationary combustion turbines in July 2006 as Subpart KKKK.[48] UARG filed a petition for administrative reconsideration of that rule raising several objections, including that (i) the rule's NOx standards were unachievable for large gas-fired turbines operating in simple cycle mode, (ii) the rule failed to provide a methodology to calculate compliance for operating periods when several different standards apply, and (iii) several other issues related to emissions monitoring.[49]

EPA agreed to reconsider the Subpart KKKK rule and issued a proposed reconsideration rule in August 2012.[50] Instead of simply addressing UARG's reconsideration request, EPA proposed an almost complete rewrite of the rule, creating many new problems. At the same time, the proposal failed to actually address some of the specific issues UARG raised in its reconsideration petition. Further, EPA proposed to radically alter the analysis used to determine whether an existing combustion turbine had been "reconstructed," such that commonplace, insignificant work regularly performed at turbine facilities could subject those units to the stringent standards in Subpart KKKK. UARG submitted comments explaining its objections to the proposed changes to the reconstruction analysis and other problematic aspects of the proposal.[51] EPA never finalized its proposed reconsideration rule.

EPA's proposed reconsideration rule has subjected combustion turbine owners to considerable regulatory uncertainty, making it difficult for them to anticipate the legal consequences of necessary maintenance activities or to predict what standards their turbines will ultimately need to comply with. UARG urges the Agency to address this uncertainty by issuing a supplemental proposal on reconsideration of Subpart KKKK that withdraws the 2012 proposal's changes to the reconstruction analysis and that addresses in full the issues in UARG's petition for reconsideration and its comments on the 2012 proposed rule.

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[48] 71 Fed. Reg. 38,482 (July 6, 2006).

[49] *See* UARG Petition for Reconsideration of Subpart KKKK Rule (Sept. 7, 2006), EPA-HQ-OAR-2004-0490-0325.

[50] 77 Fed. Reg. 52,554 (Aug. 29, 2012).

[51] *See* UARG Comments on Subpart KKKK Reconsideration Proposal (Dec. 28, 2012), EPA-HQ-OAR-2004-0490-0418.

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D. Reconsideration of the NSPS for Coal Preparation and Processing Plants, codified at 40 C.F.R. Part 60, Subpart Y

EPA promulgated revisions to the NSPS for coal preparation and processing plants in October 2009.[52] UARG filed a limited petition for reconsideration of these Subpart Y revisions, noting that the rule was vague as to how one could determine whether an existing coal pile had been "modified" or "reconstructed" and thus become subject to Subpart Y.[53] Because coal piles are always in flux and their emissions are difficult to measure, it is unclear how EPA would determine whether an emissions rate increase occurs for the purposes of modification, or what components would be included in a reconstruction analysis. UARG also asked EPA to reconsider its imposition of the burdensome electronic reporting requirements discussed above in Section VI.B. EPA agreed to reconsider those issues but has never issued a proposed reconsideration rule.

EPA's continued failure to address the treatment of existing coal piles under Subpart Y has created substantial regulatory uncertainty within the industry, making it difficult for them to predict how certain activities at their coal piles might trigger the requirements of Subpart Y. UARG urges the Agency to issue a proposed rule responding to UARG's reconsideration petition that clarifies how existing coal piles will be treated under Subpart Y and adopts a more reasonable mechanism for electronic reporting..

E. Revisions to Test Method for Determining Stack Test Gas Velocity Taking Into Account Velocity Decay Near the Stack Walls

In 2009, EPA proposed revisions to Test Method 2H in 40 C.F.R. Part 60, Appendix A, that would reduce regulatory burdens associated with emissions testing.[54] The proposal would incorporate into Method 2H a procedure in Conditional Test Method 041 the use of which EPA was already routinely approving through source-by-source petitions. The proposal, which would make the method more accurate and require less testing, was universally supported and technically sound.[55] UARG asked EPA to move expeditiously to finalize the revisions in order to eliminate the need for source-by-source petitions. More than seven years later, the proposal has yet to be finalized. UARG urges EPA not to delay any further and finalize the revisions as proposed.

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[52] 74 Fed. Reg. 51,950 (Oct. 8, 2009).

[53] *See* UARG Petition for Reconsideration of Subpart Y Rule (Dec. 7, 2009).

[54] 74 Fed. Reg. 42,819 (Aug. 25, 2009).

[55] *See, e.g.* UARG Comments on Test Method 2H Revisions (Oct. 26, 2009), EPA-HQ-OAR-2008-0697.

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VII. National Ambient Air Quality Standards

A. "Findings of Substantial Inadequacy" of SIPs and "SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction," published at 80 Fed. Reg. 33,840 (June 12, 2015)

In 2015, EPA Administrator Gina McCarthy in one action issued a group of "SIP Calls" mandating that 36 states revise their previously EPA-approved SIPs, because certain provisions of those SIPs addressing emissions from industrial sources during periods of startup, shutdown, or malfunction of applicable process or control equipment ("SSM") are inconsistent with EPA's most recent interpretations of certain CAA provisions. The SIP Calls are not based on any finding of air quality impacts or finding that removing the provisions is necessary to meet other CAA goals. Rather, they are based on the conclusion that there is a "facial inconsistency" of the called SIP provisions' language with EPA's recent interpretations of certain CAA provisions, and that inconsistency renders the previously EPA-approved SIPs "substantially inadequate."

Under the CAA, states have primary responsibility for attaining, maintaining, and enforcing the NAAQS through their SIPs and EPA has only a secondary role that provides no authority to force states to adopt specific control measures. The SIP Calls are inconsistent with that system of cooperative federalism. The SIP Calls also are inconsistent with agencies' inherent responsibility to consider costs and benefits when exercising discretionary authority. UARG is currently a petitioner challenging the SSM SIP Call in the U.S. Court of Appeals for the D.C. Circuit, and the opening briefs that Industry Petitioners (including UARG), State Petitioners, and Texas Petitioners filed are available in the docket for those consolidated cases.[56]

The called SIP provisions are all designed to address the inability of sources to meet otherwise applicable emission control requirements under certain operating conditions, like SSM periods. All of the states subject to the SIP Calls have submitted (or, for revised NAAQS, will submit) demonstrations establishing that their SIP will result in attainment of the NAAQS. Many of the subject states already are achieving some or all of the NAAQS through their existing SIPs. On the other hand, the SIP Calls have imposed on states, and on EPA, the obligation to embark on a years-long and costly process of review and approval/disapproval of revised state rules and potentially development of Federal Implementation Plans. Imposition of such costs, in the absence of quantifiable benefits, also is contrary to the goals of Executive Order 13777.

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[56] *See Walter Coke, Inc. v. EPA*, No. 15-1166 (D.C. Cir. Oct. 31, 2016), ECF Nos. 1643502, 1643571, 1643769.

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In short, the SIP Calls interfere with state discretion and impose significant costs and burdens without any corresponding finding of air quality-related benefit. EPA should convene a proceeding to withdraw the SSM SIP calls by applying a SIP call standard that is consistent with its limited authority under the CAA and obligation to consider the impacts of its exercise of that authority.

B. NAAQS Promulgation and Implementation

NAAQS and their implementation are at the heart of the CAA. EPA sets the NAAQS and must review them at least every five years, revising them as appropriate. Unfortunately, when the NAAQS for a particular pollutant are revised, previous NAAQS for that pollutant seem to linger forever in scattered sections of the Code of Federal Regulations. For example, NAAQS for fine particulate matter ("$PM_{2.5}$") are found in sections 50.7, 50.13, and 50.18 of 40 C.F.R. Part 50. Such scattered codification of NAAQS is at best confusing and at worst misleading. UARG recommends revision of 40 C.F.R. Part 50 to remove NAAQS that have been replaced and to consolidate the current NAAQS for each regulated pollutant in a single section of the C.F.R.

UARG also urges the Agency to consider changes that would simplify the process that it uses to set and revise NAAQS. For example, the present process involves preparation by EPA's career staff of a Policy Assessment. This document is not required by the Act. It could be eliminated, modified to reflect senior management input, or replaced by an Advance Notice of Proposed Rulemaking as was planned in 2006.[57] In addition, to the extent that risk assessment remains a part of the process, UARG urges that the assessment fully capture uncertainty about the estimated number and quality of effects. Preparation of an Integrated Uncertainty Analysis, as the National Academy of Sciences has recommended, would advance this effort.

Once NAAQS have been promulgated, rules established by EPA play a vital role in their implementation. UARG recommends revision of certain aspects of recently-promulgated NAAQS implementation rules, including EPA's March 2015 rule establishing SIP requirements for the 2008 ozone NAAQS[58] and its August 2016 rule establishing SIP requirements for the 2012 $PM_{2.5}$ NAAQS,[59] to eliminate unnecessary and duplicative requirements. Specifically,

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[57] Memorandum from Marcus Peacock, Deputy Adm'r, EPA, to Dr. George Gray, Assistant Adm'r, Office of Research & Development, & William L. Wehrum, Acting Assistant Adm'r, Office of Air & Radiation (Apr. 17, 2007), https://www3.epa.gov/ttn/naaqs/pdfs/memo_process_for_reviewing_naaqs.pdf.

[58] 80 Fed. Reg. 12,264 (Mar. 6, 2015).

[59] 81 Fed. Reg. 58,010 (Aug. 24, 2016).

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UARG urges EPA to revoke the requirement for "anti-backsliding" measures for the 1997 ozone NAAQS,[60] which was replaced in 2008 by a more stringent standard for ozone.[61] Section 172(e) of the CAA requires such measures only when a NAAQS is "relaxed." In addition, UARG recommends that EPA revise its implementation rule for the 2012 $PM_{2.5}$ NAAQS to revoke the less stringent 1997 standard throughout the nation, not just in areas designated attainment.[62] Although UARG recognizes the need for continuity in the NAAQS program and therefore is not recommending that a superseded NAAQS be rendered null immediately upon promulgation of a revised one, UARG recommends that EPA revoke any superseded NAAQS a year after the effective date of area designations for the new or revised NAAQS. The revocation should be effective nationwide. States should not be required to complete an attainment demonstration (or equivalent) for the superseded NAAQS.[63]

Finally, UARG urges EPA to return to its prior approach of relying on air quality monitoring to make initial designations for areas as attainment, nonattainment, or unclassifiable. The SO_2 NAAQS promulgated in 2010 was the first NAAQS for which the Agency chose to rely on modeling predictions—rather than monitoring data—for making initial designations. Modeling is not as accurate as monitoring. EPA's preferred air quality models and required approaches to modeling are conservative by design to ensure that pollutant concentrations in ambient air are not underestimated. EPA acknowledges that its preferred AERMOD model cannot predict pollutant concentrations accurately at a given time and place. Furthermore, EPA continues to revise its AERMOD modeling system, leading to questions concerning the modeling on which designations will be based.[64]

In addition to returning to its prior approach of relying on monitoring for initial designations in the future, EPA should revise nonattainment designations that have already been

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[60] 40 C.F.R. § 51.1105.

[61] *Compare* 40 C.F.R. § 50.10, *with id.* § 50.15.

[62] *See* 81 Fed. Reg. at 58,142.

[63] *See* Comments by UARG and the American Petroleum Institute on Proposed PM NAAQS Implementation Rule at 61-64 (May 29, 2015), EPA-HQ-OAR-2013-0691-0096; *see also* UARG Comments on Proposed Implementation Rule for the 2015 Ozone NAAQS at 5-8 (Feb. 13, 2017), EPA-HQ-OAR-2016-0202-0105.

[64] *See* Memorandum from Richard A. Wayland, Div. Dir., Air Quality Assessment Div., EPA Office of Air Quality Planning & Standards, to Regional Air Dirs., Regions 1-10 (Mar. 8, 2017) (clarification of the version of the AERMOD modeling system to be used for designations in light of recent revisions of the model), https://www3.epa.gov/ttn/scram/guidance/clarification/SO2_DRR_Designation_Modeling_Clarificaiton_Memo-03082017.pdf.

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made based on modeling. Several areas were designated nonattainment based on modeling in 2016,[65] and states have submitted modeling for several other areas for which designations are required by the end of 2017.[66] EPA should use its correction authority under section 110(k)(6) of the Act to replace modeling-based nonattainment designations made in 2016 with unclassifiable designations. Because of the overestimates inherent in modeled air quality, however, attainment designations based on modeling remain valid and should be retained. Furthermore, areas for which designations must be made at the end of 2017 that have not demonstrated attainment through modeling and that do not have adequate monitoring data should be designated unclassifiable; those with adequate monitoring data should be designated according to those data. EPA should also repeal its 2015 Data Requirements Rule for SO_2.[67] That rule places additional burdens on states either to perform modeling or to conduct additional air quality monitoring of SO_2 sources for designations. Although this rule requires the use of either modeling or monitoring, even the monitoring requirement exceeds what is required of states for other criteria air pollutants.[68]

VIII. Air Quality Modeling Issues

On January 17, 2017, EPA promulgated revisions to its Guideline on Air Quality Models, codified at 40 C.F.R. Part 51, Appendix W ("Appendix W").[69] This rule, which specifies models, inputs, and techniques for use in preparing SIPs and PSD permit applications, is not yet effective. Although UARG supports some aspects of the rule revisions, others are expected to make SIP preparation and obtaining permits for new or modified sources more time-consuming and costly. Specifically, UARG is concerned about new modeling requirements for sources seeking permits that emit precursors to ozone or $PM_{2.5}$. Many electric generators fall in this category. The screening tools that EPA suggests—Significant Impact Levels and Modeled Emission Rates for Precursors—are not particularly helpful in their present form.[70] The photochemical grid modeling mandated for sources not helped by these tools is time-consuming

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[65] 81 Fed. Reg. 45,039 (July 12, 2016); 81 Fed. Reg. 89,870 (Dec. 13, 2016).

[66] *See* Fact Sheet: Final Data Requirements Rule for the 2010 1-Hour SO_2 Primary NAAQS (undated), https://www.epa.gov/sites/production/files/2017-02/documents/fact_sheet_-_final_data_requirements_rule.pdf.

[67] 80 Fed. Reg. 51,052 (Aug. 21, 2015).

[68] *See* UARG Comments on the Proposed Data Requirements Rule for the 1-Hour SO_2 NAAQS (July 14, 2014), EPA-HQ-OAR-2013-0711-0075.

[69] 82 Fed. Reg. 5182 (Jan. 17, 2017).

[70] UARG Comments on Draft Guidance on Development of MERPs (Mar. 31, 2017) (attached as Exhibit 2); UARG Comments on Draft Guidance on SILs for Ozone and Fine Particles (Sept. 30, 2016) (attached as Exhibit 3).

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and costly. EPA does not specify a particular model to be used, meaning the selected model must be approved on a case-by-case basis. Formal new requirements for written approval by EPA's (non-statutory) Model Clearinghouse whenever a model not specified in Appendix W is used are likely to further delay the process. Accordingly, the NAAQS Implementation Coalition, of which UARG is a member, filed a petition for reconsideration of these and other aspects of the Appendix W revisions.[71]

IX. Demonstration-of-Compliance Issues

A. Outreach on Current Rulemakings

Measures used to demonstrate compliance with emission standards and other requirements, while critical to the effectiveness of a rule, also can significantly increase the rule's cost, particularly if the rule is unclear or contains errors. EPA often initiates rulemakings with the goal of fixing such problems it has identified in rules, but does so without soliciting input from stakeholders on additional ways the rule could be improved. When UARG participates in such proceedings UARG often includes in comments suggestions for other revisions it believes would make the rule more cost effective without sacrificing environmental benefits. Unfortunately, these comments often are rejected as beyond the scope of the rulemaking because they suggest changes the Agency did not propose. To avoid this problem, before engaging in such rulemakings, EPA should solicit input from stakeholders either informally or formally on ways the rule could be made more cost-effective so that the Agency can address those suggestions in its development of the proposal and/or final rule. While some of these suggestions may not by themselves warrant initiating a rulemaking, once EPA decides to initiate a rulemaking it should make a greater effort to ensure that all potential improvements can be achieved.

For example, EPA already has on its regulatory agenda plans to revise the rules governing compliance demonstrations under the Acid Rain Program, and CSAPR at 40 C.F.R. Part 75. UARG believes there are many opportunities to relieve regulatory burdens under those rules by, for example, updating fuel sampling and analysis requirements to reflect current market and operating conditions and incorporating relief already provided for individual sources by petition. EPA should engage in outreach to affected sources prior to issuing its proposal to maximize the improvements to the rule.

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[71] Petition of the NAAQS Implementation Coalition for Reconsideration of Portions of the Final Rule on Revisions to the Guideline on Air Quality Models (Mar. 20, 2017), EPA-HQ-OAR-2015-0310-0181.

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B. The So-Called "Credible Evidence Rule"

In 1997, EPA promulgated revisions to 40 C.F.R. Parts 51, 52, 60, and 61 removing restrictions on the use of information other than the EPA or state-specified compliance method to establish violations of, or compliance with, emission limitations.[72] Later, EPA revised its model rules for Federal Permit Operating Programs under Title V at 40 C.F.R. Parts 70 and 71 to require identification and consideration of information other than the specified compliance method when certifying compliance with permit terms and conditions.[73] These rules, which have so far avoided judicial review,[74] impose significant regulatory burdens and uncertainty on sources regarding the standard for compliance and responsible officials' obligations when making certifications or compliance under penalty of perjury. They also are inconsistent with Congress' limited authorization to use such information when assessing civil penalties only to determine the duration of a violation that already has been established using the specified compliance method. EPA should engage in rulemaking to repeal or revise these rules to limit the methods for establishing violations and determining compliance to those specified in rules and permits, and to limit use of other information to establishing the duration of a violation or compliance, consistent with Congress' direction in CAA § 113(e).

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UARG appreciates this opportunity to provide input on EPA regulations that may be appropriate for repeal, replacement, or modification. We look forward to the future opportunities for engagement mentioned in the *Federal Register* notice. Please feel free to contact me with any questions.

Sincerely,

/s/ Andrea B. Field
Andrea Field
Counsel for the Utility Air Regulatory Group

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[72] 62 Fed. Reg. 8314 (Feb. 24, 1997).

[73] 62 Fed. Reg. 54,900, 54,946-47 (Oct. 22, 1997); 79 Fed. Reg. 43,661 (Jul. 28, 2014).

[74] Industry groups, including UARG, challenged both rules when they were promulgated, but the U.S. Court of Appeals for the D.C. Circuit refused to review their validity, finding instead that the challenges were not "ripe for review." *Clean Air Implementation Project v. EPA*, 150 F.3d 1200 (D.C. Cir. 1998); *NRDC v. EPA*, 194 F.3d 130 (D.C. Cir. 1999).

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EXHIBIT NN

Wehrum, Bill Calendar
Wehrum.Bill@epa.gov
Monday, November 13, 2017 – Wednesday, February 28, 2018
Time zone: (UTC-05:00) Eastern Time (US & Canada)
(Adjusted for Daylight Saving Time)

November 2017

Su	Mo	Tu	We	Th	Fr	Sa
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5	6	7	8	9	10	11
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December 2017

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January 2018

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February 2018

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Busy | Tentative | Free
Out of Office | Working Elsewhere | Outside of Working Hours

November 2017

Mon, Nov 13

	Before 8:00 AM	**Free**
	8:00 AM – 3:30 PM	**Free**
	3:30 PM – 4:30 PM	FW: Call: Prep for California Meeting Dial-In: (202)[redacted] Leader Code: [redacted] Participant Code: [redacted] Delahoyde, Magdelana A. EOP/WHO

		WJC-N 5400 + [redacted] Participant Code: [redacted] Wehrum, Bill
	4:15 PM – 5:00 PM	Meet with Lignite Energy Council (Confirmed) WJC-N 5400 Wehrum, Bill
	5:00 PM – 6:00 PM	**Free**
	After 6:00 PM	**Free**

Thu, Dec 7

	Before 8:00 AM	**Free**
	8:00 AM – 8:30 AM	**Free**
	8:30 AM – 9:00 AM	Meet with the Ute Tribe (Confirmed) WJC-N 5400 + Mike Koerber by video Wehrum, Bill
	9:00 AM – 9:30 AM	Management Roundtable WJC-N 5400 + Dial: [redacted] Conference ID: [redacted] (6) [redacted] Participant Code: [redacted] Wehrum, Bill
	9:30 AM – 10:00 AM	Motorpool from EPA WJC-N Courtyard to Auto Alliance Speech Black Chevy Volt, Tag# [redacted] Wehrum, Bill
	10:00 AM – 11:00 AM	Auto Alliance Board Speech (Confirmed) Auto Alliance office – 803 7th Street, NW Suite 300 (Office is located on the corner of 7th Street and H Street NW) Wehrum, Bill
	11:00 AM – 11:05 AM	**Free**
	11:05 AM – 11:30 AM	Motorpool from Auto Alliance Speech to EPA Black Chevy Volt, Tag# [redacted] Wehrum, Bill
	11:30 AM – 12:30 PM	OTAQ Fuels Weekly WJC-N 5400 + Video with AA + [redacted] Participant Code: [redacted] Wehrum, Bill
	12:30 PM – 1:00 PM	HOLD - Management Time
	1:00 PM – 1:15 PM	**Free**
	1:15 PM – 2:00 PM	Limetree Bay Terminals (LBT) Refinery, St. Croix, U.S. Virgin Islands WJC-N 5400 + Video with OAQPS + [redacted] Participant Code: [redacted] Wehrum, Bill
	2:00 PM – 2:30 PM	General with OGC/Ethics Bill's Office, WJC-N Room 5406A Wehrum, Bill

■	2:30 PM – 3:00 PM	Motorpool from EPA WJC-N Courtyard to Hunton Black Chevy Volt, Tag#[redacted] Wehrum, Bill
■	3:00 PM – 4:00 PM	Speech at Hunton with American Electric Power, The Southern Company, Duke Energy, Dominion Energy, and the Utility Air Regulatory Group (Confirmed) Hunton & Williams Offices, 2200 Pennsylvania Avenue NW - 9th Floor Wehrum, Bill
□	**4:00 PM – 4:05 PM**	**Free**
■	4:05 PM – 4:30 PM	Motorpool from Hunton to EEOB Black Chevy Volt, Tag#[redacted] Wehrum, Bill
■	4:30 PM – 5:00 PM	WAVES submitted by Shanita
▨	5:00 PM – 6:00 PM	NADA CAFE-GHG Cordell Hull, EEOB 208 (WAVES link and Call-in info located in Calendar notes) Delahoyde, Magdelana A. EOP/WHO
□	**After 6:00 PM**	**Free**

Fri, Dec 8

□	All Day	Telework: Emily Atkinson
□	**Before 8:00 AM**	**Free**
□	**8:00 AM – 9:45 AM**	**Free**
▨	9:45 AM – 10:15 AM	Briefing: OAR/OECA Update Administrator's Office [redacted]
□	**10:15 AM – 10:20 AM**	**Free**
■	10:20 AM – 10:30 AM	Motorpool from EPA Courtyard to 726 Jackson Place NW Black Chevy Volt, Tag#[redacted] Wehrum, Bill
■	10:30 AM – 12:00 PM	WH Meeting - Climate Diplomacy PCC (Confirmed) White House Conference Center (WHCC), 726 Jackson Place, half a block North of the White House Wehrum, Bill
□	**12:00 PM – 12:05 PM**	**Free**
■	12:05 PM – 12:30 PM	Motorpool from Jackson Place to EPA Black Chevy Volt, Tag#[redacted] Wehrum, Bill
▨	12:30 PM – 1:00 PM	[redacted]
■	1:00 PM – 1:30 PM	Scheduling Meeting WJC-N 5400 + Dial: [redacted] Conference ID: [redacted] Participant Code: [redacted]

Congress of the United States

Washington, DC 20510

March 20, 2019

Charles J. Sheehan
Acting Inspector General
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Acting Inspector General Sheehan,

We write to bring additional information to your attention regarding our February 21, 2019, request that you open an investigation into improper involvement of William Wehrum and David Harlow in the Environmental Protection Agency's (EPA) December 7, 2017 memo regarding EPA's New Source Review (NSR) program ("DTE Memo").[1]

It has been brought to our attention that EPA's DTE Memo adopts, without discussion, a novel interpretation of an EPA NSR regulation known as the "demand growth exclusion," based on a single sentence from a 1992 EPA preamble. This interpretation, it appears, was previously enunciated only by lawyers from Hunton, Andrews, Kurth [Hunton]—Mr. Wehrum's and Mr. Harlow's former law firm—in two briefs submitted to the Sixth Circuit on behalf of DTE Energy on February 27, 2015, and May 1, 2012. If this is accurate, an argument advanced only by Hunton lawyers in specific litigation was recently adopted by EPA in a memo whose issuance appears to have been timed to affect the outcome of litigation involving Hunton's current client.

It appears unlikely that an arcane application of a single sentence from a 1992 preamble notice (a) suddenly became known to EPA authors of the DTE memo, and (b) was adopted as formal EPA policy in that memo without further explanation, absent the direct involvement of lawyers knowledgeable of DTE Energy's position in the DTE litigation—Mr. Wehrum and Mr. Harlow.

Mr. Wehrum and Mr. Harlow were barred by ethics rules from participating in the development of the DTE Memo because it concerned ongoing EPA litigation against DTE Energy, in which DTE Energy is represented by their former law firm. DTE Energy had been a client of Mr. Harlow himself at Hunton. This information, taken together with information and documents presented in our February 21 letter, further suggests that Mr. Wehrum and Mr. Harlow may have violated federal ethics rules by participating in the development of the DTE Memo.

Attached as an appendix is an analysis of the provisions in question. As you consider our February 21 request, we urge you to consider this additional information. EPA OIG is in the best

[1] U.S. Environmental Protection Agency, Memorandum from Administrator Scott Pruitt to Regional Administrators, (Dec. 7, 2017).

position to analyze this collection of information and interview key staff to evaluate whether violations of federal ethics rules occurred.

Sincerely,

Sheldon Whitehouse
United States Senator

Thomas R. Carper
United States Senator

Frank Pallone, Jr.
United States Representative

Appendix

In 1992, EPA issued a final rule adopting several changes to the New Source Review (NSR) regulations, including establishing what EPA calls the "demand growth exclusion" for utility projects. The 1992 rule provides that, in projecting future emissions after a physical change or method of operation, the regulatory authority shall

> *[e]xclude . . . that portion of the unit's emissions* following the change that could have been accommodated during the representative baseline period and is *attributable to an increase in projected capacity utilization at the unit that is* ***unrelated to the particular change,*** *including any increased utilization due to the rate of electricity demand growth for the utility system as a whole.*

(40 CFR 51.165(a)(1)(xxi)(B) (emphases added)). In responding to comments, EPA rejected an argument from an environmental commenter that EPA should always assume that increased operations result from a physical change, rather than independent factors. Instead, EPA chose to retain its requirement for a case-by-case determination reflected in the regulatory text. In rejecting the commenter's argument, EPA cites an example: "[i]f efficiency improvements are the predominant cause of the change in emissions and demand growth is not, the exclusion does not apply. But this is a question of fact which must be resolved on a case-by-case basis...." (57 Fed. Reg. 32327 (July 21, 1992)).

In the DTE Memo, EPA references this language to conclude: "Because increased emissions may be caused by multiple factors, the EPA has recognized that the source must exercise judgement to exclude increases for which the project is not the 'predominant cause.' 45 Fed. Reg. 32,327 (1992)." (DTE Memo at 7)[2] This reading misapplies language in the 1992 preamble by transforming the "unrelated" prong into a "predominant cause" test, reflecting neither the language itself nor the underlying regulatory text. Put differently, the preamble text merely identifies one situation in which the demand growth exclusion does not apply to support EPA's rejection of an across-the-board rule – it does not state that if the project is not the "predominant cause" of the increased emissions the exemption applies, as the DTE Memo suggests.

This same seemingly erroneous interpretation of the 1992 language was used by Hunton lawyers in their briefs for DTE Energy before the Sixth Circuit. The briefs both refer to the "'causation' test" allegedly established by the 1992 NSR rules and reference the "predominant cause" language, stating: "For the second prong (i.e., 'unrelated to the change'), the causation standard is whether the 'change' was the 'predominant cause' of the increase. *Id.* at 32,327." (Feb. 27, 2015 Brief at 20) and (May 1, 2012 Brief at 15 & fn.8.) The 2015 brief also references a "'predominant cause' test" in a footnote. (Feb. 27, 2015 Brief at 58, fn. 18.)

This is not a reading that EPA enunciated or recognized prior to the DTE memo, to the best of our knowledge. This conclusion is shared by John Walke and Bruce Buckheit, two NSR experts we consulted in the preparation of this letter. At various times, Mr. Walke and Mr.

[2] Note that the citation in the DTE Memo to "45 Fed. Reg." is incorrect.

Buckheit previously worked on NSR at EPA (Mr. Walke at the Office of General Counsel, and Mr. Buckheit at the Office of Enforcement and Compliance Assurance), and Mr. Buckheit also worked on these issues at the Department of Justice. They do not believe EPA intended this position in 1992, and have never seen it advanced other than by Hunton lawyers in the DTE litigation.