

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,<sup>1</sup> which “develops national programs, policies, and regulations for controlling air pollution and radiation exposure.”<sup>2</sup> 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.<sup>3</sup> 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”),<sup>4</sup> “where his practice focused on air quality issues.”<sup>5</sup>

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<sup>1</sup> U.S. Senate, Roll Call Vote 115th Congress - 1st Session, Vote No. 268, Nov. 9, 2017, <https://bit.ly/2IyFkOg>.

<sup>2</sup> EPA, About the Office of Air and Radiation (OAR), <https://bit.ly/2Gt1fkp> (last viewed May 7, 2019).

<sup>3</sup> *Id.*

<sup>4</sup> The firm later changed its name to Hunton Andrews Kurth, LLP. We refer to it as “Hunton” to avoid confusion.

<sup>5</sup> EPA, About the Assistant Administrator of EPA's Office of Air and Radiation, <https://bit.ly/2viYLLz> (last viewed May 7, 2019).

### 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.<sup>6</sup> 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.”<sup>7</sup> In addition to Hunton, the meeting included American Electric Power, Dominion Energy, Duke Energy, Southern Company, and Utility Air Regulatory Group (“UARG”).<sup>8</sup> Duke Energy and UARG are both former clients of Mr. Wehrum.<sup>9</sup> 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.<sup>10</sup>

All meeting participants were tied to UARG. Hunton was UARG’s legal counsel, and the other participants were UARG members.<sup>11</sup> UARG is a membership association that describes itself as an unincorporated, not-for-profit association of individual electric generating companies and national trade associations.<sup>12</sup> Though UARG reportedly has no staff or physical location,<sup>13</sup> 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.”<sup>14</sup>

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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<sup>6</sup> Juliet Eilperin, EPA regulator skirts the line between former clients and current job, *Washington Post*, Feb. 25, 2019, <https://wapo.st/2P3f8M9>.

<sup>7</sup> 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>.

<sup>8</sup> 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>.

<sup>9</sup> Memorandum from William Wehrum, Assistant Administrator, to Andrew R. Wheeler, Acting Administrator, Recusal Statement, Sept. 17, 2018, <https://bit.ly/2HyxNPF> (“Wehrum Recusal Statement”).

<sup>10</sup> 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).

<sup>11</sup> 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).

<sup>12</sup> 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”).

<sup>13</sup> 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”).

<sup>14</sup> 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.”<sup>15</sup> 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.”<sup>16</sup> 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.<sup>17</sup>

*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.”<sup>18</sup> 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.<sup>19</sup> 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.”<sup>20</sup>

#### 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”).<sup>21</sup> 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.<sup>22</sup> The memorandum addressed the Clean Air Act’s New Source Review (“NSR”) program at issue in that lawsuit.<sup>23</sup>

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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<sup>15</sup> *Id.*

<sup>16</sup> 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).

<sup>17</sup> 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).

<sup>18</sup> Zack Colman, Industry group tied to EPA air chief dissolves, *Politico*, May 10, 2019, <https://politi.co/2HsZwhJ>.

<sup>19</sup> Sean Reilly, Embattled trade group tied to EPA air chief to dissolve, *E&E News*, May 13, 2019, <https://bit.ly/2JjZnR>. A Hunton attorney speaking anonymously denied that the investigation caused UARG’s dissolution. *Id.*

<sup>20</sup> 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>.

<sup>21</sup> Eilperin, *Washington Post*, Feb. 25, 2019.

<sup>22</sup> *Id.*

<sup>23</sup> 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/2jUCLIF>.

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.”<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup> 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.”<sup>27</sup>

After the conference, the Supreme Court denied certiorari.<sup>28</sup> 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.”<sup>29</sup> 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.”<sup>30</sup>

### **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.”<sup>31</sup>

#### **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.<sup>32</sup> 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.<sup>33</sup>

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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<sup>24</sup> Email from Mandy Gunasekara to Susan Bodine, Dec. 4, 2017 (Senators’ OIG Letter, at 93).

<sup>25</sup> *Id.* at 1.

<sup>26</sup> Letter from Hunton & Williams to Clerk of the Supreme Court, Dec. 8, 2017 (transmitting NSR Memo) (*New York Times* Documents, at 212).

<sup>27</sup> Eilperin, *Washington Post*, Feb. 25, 2019.

<sup>28</sup> *DTE Energy Co. v. United States*, 138 S. Ct. 555 (2017) (denying petition for writ of certiorari).

<sup>29</sup> Sierra Club, Press Release, *U.S. Supreme Court Declines Review of DTE Energy Air Pollution Case*, Dec. 11, 2017, <https://bit.ly/2JEyGrg>.

<sup>30</sup> Eilperin, *Washington Post*, Feb. 25, 2019.

<sup>31</sup> 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”).

<sup>32</sup> Ethics Agreement of William Wehrum, Aug. 28, 2017, <https://bit.ly/2BW9SVw> (“Ethics Agreement”).

<sup>33</sup> *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.<sup>34</sup> Mr. Wehrum’s ethics agreement omits this “reasonable person” standard.<sup>35</sup> 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.<sup>36</sup>

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.<sup>37</sup> On December 7, 2017, he filed a form attesting that he had not received such an authorization.<sup>38</sup> On September 29, 2018, EPA notified a Senator that Mr. Wehrum still had not received an authorization.<sup>39</sup>

## B. The Ethics Pledge

Mr. Wehrum also signed President Trump’s Ethics Pledge for political appointees pursuant to Executive Order No. 13770.<sup>40</sup> 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.<sup>41</sup>

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.<sup>42</sup> 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.<sup>43</sup> Another

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<sup>34</sup> 5 C.F.R. § 2635.502(a), (c).

<sup>35</sup> Compare Ethics Agreement at 1 with 5 C.F.R. § 2635.502(a).

<sup>36</sup> 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>.

<sup>37</sup> Ethics Agreement at 1; see also 5 C.F.R. § 2635.502(d).

<sup>38</sup> William Wehrum, Certification of Ethics Agreement Compliance, Item 9, Dec. 7, 2017, <https://bit.ly/2T2wgXP> (“Compliance Certification”).

<sup>39</sup> Letter from Kevin Minoli to Sen. Sheldon Whitehouse, Sept. 29, 2018, (attached to Senators’ OIG Letter, at 85).

<sup>40</sup> 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>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*, § 2(s).

<sup>43</sup> 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.”<sup>44</sup>

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.<sup>45</sup> On December 7, 2017, he indicated he had not received such a waiver.<sup>46</sup> A review of the Ethics Pledge waivers listed on OGE’s website confirms that he has not received a waiver since then.<sup>47</sup>

### **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.<sup>48</sup> Therefore, by granting Hunton’s

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<sup>44</sup> *Id.*; OGE Inv. Adv. Op. 06 x 09 (2006) (differentiating party matters from other matters), <https://bit.ly/2ASzf9k>.

<sup>45</sup> Executive Order No. 13770, §§ 1(6), 2(s).

<sup>46</sup> Compliance Certification.

<sup>47</sup> Office of Gov’t Ethics, Agency Ethics Pledge Waivers, <https://bit.ly/2VFJnuO> (last viewed May 14, 2019).

<sup>48</sup> 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.<sup>49</sup>

OGE has established an interpretive exception to the Ethics Pledge permitting an appointee to give a speech to a former employer.<sup>50</sup> This exception, however, is not absolute. The exception does not apply if the speech would have a demonstrable financial effect on the former employer.<sup>51</sup> 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*).”<sup>52</sup>

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. Wehrum had represented before entering government.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> In fact, he admits that he did not consult EPA’s ethics officials in advance of this decision.<sup>56</sup> 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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<sup>49</sup> 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.

<sup>50</sup> OGE DO-09-020, at 1.

<sup>51</sup> *Id.*, at 2-3. The same analysis would apply to a speech that had a demonstrable financial effect on a client.

<sup>52</sup> *Id.*, at 2 (emphasis added).

<sup>53</sup> Invite Form.

<sup>54</sup> 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.”).

<sup>55</sup> Compliance Certification, Item 7.

<sup>56</sup> Eilperin, *Washington Post*, Feb. 25, 2019.

without first obtaining a waiver, Mr. Wehrum violated his Ethics Pledge.<sup>57</sup> 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.<sup>58</sup>

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.”<sup>59</sup> 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.<sup>60</sup>

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.”<sup>61</sup> The available evidence suggests that member

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<sup>57</sup> Wehrum Ethics Pledge, ¶ 6.

<sup>58</sup> Eilperin, *Washington Post*, Feb. 25, 2019.

<sup>59</sup> Executive Order No. 13770, §§ 1(6), 2(s).

<sup>60</sup> OGE DO-09-11, at 2 (emphasis added).

<sup>61</sup> 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.”<sup>62</sup>

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.”<sup>63</sup> 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.<sup>64</sup> 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.”<sup>65</sup> 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.”<sup>66</sup> 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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<sup>62</sup> Email from William Wehrum to Mandy Gunasekara, July 20, 2017 (*New York Times* Documents, at 74).

<sup>63</sup> Email from William Wehrum to Mandy Gunasekara, May 23, 2017 (*New York Times* Documents, at 31).

<sup>64</sup> Executive Order No. 13770, § 2(s).

<sup>65</sup> OGE DO-09-11, at 2.

<sup>66</sup> 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/2W3XTNI>; 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.<sup>67</sup> 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.<sup>68</sup> 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."<sup>69</sup> 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."<sup>70</sup> 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."<sup>71</sup>

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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<sup>67</sup> William Wehrum, Clean Air Act: Update on Stationary Source Regulations, Dec. 7, 2017, (presentation at meeting) (*New York Times* Documents, at 200).

<sup>68</sup> Eilperin, *Washington Post*, Feb. 25, 2019.

<sup>69</sup> Email from Mandy Gunasekara to Ryan Jackson, Dec. 7, 2017 (Senators' OIG Letter, at 115).

<sup>70</sup> 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.

<sup>71</sup> 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.<sup>72</sup>

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.”<sup>73</sup> 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,”<sup>74</sup> and an entry in Mr. Wehrum’s calendar for 1:00 p.m. that day is titled “NSR Discussion.”<sup>75</sup> 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.<sup>76</sup> Mr. Wehrum also received two more emails regarding the NSR memorandum on December 7, 2017, and one on December 8, 2017.<sup>77</sup> 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.<sup>78</sup>

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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<sup>72</sup> Eilperin, *Washington Post*, Feb. 25, 2019 (the insertion of “[redacted]” appears in the original text of the article).

<sup>73</sup> Annotation to Wehrum calendar for Dec. 5, 2017 added by the *New York Times* (*New York Times Documents*, at 178).

<sup>74</sup> Email from Brian Doster to Justin Schwab and Marcella Burke, Dec. 5, 2017 (Senators’ OIG Letter, at 105).

<sup>75</sup> Wehrum calendar for Dec. 5, 2017 (*New York Times Documents*, at 179).

<sup>76</sup> Email from Mandy Gunasekara to William Wehrum and David Harlow, Dec. 5, 2017 (Senators’ OIG Letter, at 103).

<sup>77</sup> 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).

<sup>78</sup> Wehrum calendar for Dec. 11, 2017 (Senators’ OIG Letter, at 113).

and substantial participation.<sup>79</sup> OGE’s regulations explain that participation “may be substantial even though it is not determinative of the outcome of a particular matter.”<sup>80</sup> 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.<sup>81</sup>

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.<sup>82</sup> 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.”<sup>83</sup> A second official wrote: “Attached for review are the current drafts of two memos regarding the issues in the DTE NSR litigation.”<sup>84</sup> 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.”<sup>85</sup> A fourth referred to the memorandum as the “NSR DTE memo.”<sup>86</sup> A fifth even discussed distributing the memorandum to the media only after the Supreme Court’s certiorari hearing concluded.<sup>87</sup>

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.<sup>88</sup> 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*.”<sup>89</sup> 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.<sup>90</sup>

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<sup>79</sup> 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>.

<sup>80</sup> 5 C.F.R. § 2635.401(b)(4).

<sup>81</sup> Ethics Agreement at 1; Wehrum Ethics Pledge.

<sup>82</sup> 5 C.F.R. § 2641.201(h)(1) (establishing that a “court case” is a particular matter involving specific parties).

<sup>83</sup> Email from Mandy Gunasekara to Susan Bodine and Patrick Taylor, Dec. 4, 2017 (Senators’ OIG Letter, at 93).

<sup>84</sup> Email from Brian Doster to Justin Schwab, et al., Oct. 4, 2017 (Senators’ OIG Letter, at 131).

<sup>85</sup> Email from Josh Lewis to Mandy Gunasekara (Senators’ OIG Letter, at 117).

<sup>86</sup> Attachment to email from Peter South to Mike Koerber, Oct. 3, 2017 (Senators’ OIG Letter, at 128-29).

<sup>87</sup> 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).

<sup>88</sup> NSR Memo, at 1.

<sup>89</sup> *Id.* at 2 (emphasis added).

<sup>90</sup> *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.<sup>91</sup> 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.<sup>92</sup>

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.<sup>93</sup> 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.<sup>94</sup> 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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<sup>91</sup> NSR Memo, at 5-6, 8.

<sup>92</sup> *Id.* at 6 (emphasis added).

<sup>93</sup> Letter from Hunton & Williams to Clerk of the Supreme Court, Dec. 8, 2017 (*New York Times Documents*, at 212).

<sup>94</sup> *Id.*

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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