

January 15, 2019

Charles J. Sheehan
Acting Inspector General
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (2410T)
Washington, DC 20460

Re: EPA Acting Administrator Andrew Wheeler's Possible Violations of the Ethics Pledge/Executive Order No. 13770

Dear Mr. Sheehan:

Upon his appointment to the Environmental Protection Agency ("EPA"), Acting Administrator Andrew Wheeler signed an Ethics Pledge as a condition of his appointment that committed him to undertake certain recusals to avoid the appearance that former clients are given privileged access and influence.¹ Citizens for Responsibility and Ethics in Washington ("CREW") respectfully requests that the Office of Inspector General ("OIG") investigate whether Acting Administrator Wheeler violated his Ethics Pledge by participating in the following matters:

- (1) Coal combustion residuals ("CCR", also known as coal ash) regulations and the Affordable Clean Energy ("ACE") rule, two separate particular matters on which he appears to have lobbied for his former client Murray Energy;
- (2) Meetings held in May and June 2018 with his former clients Darling Ingredients, Inc. ("Darling"), Growth Energy, and the Archer Daniels Midland Company, during his two-year recusal period; and
- (3) The renewable fuel standard ("RFS") program, a particular matter on which he previously was registered to lobby for Darling.

The Ethics Pledge bars Mr. Wheeler, as a former registered lobbyist, from participating for two years in any "particular matter" on which he lobbied within two years of his appointment or "in the specific issue area in which that particular matter falls."² It also prohibits him from participating for two years in any "particular matter involving specific parties" in which a former client is directly and substantially involved, including any meetings that are not "open to all interested parties."³ By participating in these matters within the two-year recusal period, Mr. Wheeler may have violated his Ethics Pledge.

¹ Executive Order No. 13770, Ethics Commitments by Executive Branch Appointees, Jan. 28, 2017; Andrew F. Wheeler Certification of Ethics Agreement Compliance, at 3, June 1, 2018, available at <http://altgov2.org/wp-content/uploads/Wheeler-EA-Certification-1-of-1.pdf>.

² Executive Order No. 13770, sec. 1, para. 7.

³ *Id.*, sec. 1, para. 6.

Mr. Wheeler's involvement in these matters also gives rise to the appearance of a lack of impartiality, which critically undermines the agency's integrity in carrying out these programs and operations. As a result, unless he was authorized to participate, his involvement violated his ethical obligations under the Standards of Ethical Conduct for Employees of the Executive Branch ("Standards of Conduct").⁴

In addition, Mr. Wheeler's relationship with Darling should be investigated to determine whether he violated the Ethics in Government Act by failing to report Darling as a source of compensation on his public financial disclosure report ("OGE Form 278").⁵

As a senior government official and acting head of an executive branch agency, Mr. Wheeler is held to the highest standards of ethical conduct. Yet Mr. Wheeler's meetings and regulatory activities in furtherance of his former clients' interests give rise to the appearance of privileged access and influence and undermines the very purpose of the Ethics Pledge.

Potential Violations

Prior to joining the EPA as Deputy Administrator in April 20, 2018,⁶ Mr. Wheeler was a principal at Faegre Baker Daniels Consulting ("Faegre"), where, according to his Faegre profile, he represented clients before Congress, the EPA, and the Departments of Energy and Transportation.⁷ As discussed below, Mr. Wheeler served as a registered lobbyist for some clients and provided strategic advice and counseling to others. By participating in matters at the EPA on which he previously lobbied and that involved his former clients, Mr. Wheeler may have violated the Ethics Pledge and other ethics rules.

Executive Order No. 13770 – the Ethics Pledge

Under Executive Order No. 13770, as a condition of appointment, all executive branch appointees must sign an Ethics Pledge obligating them to certain ethical requirements and prohibitions.⁸ Two provisions of the pledge are relevant here.

Paragraph 6 the Ethics Pledge prohibits appointees from participating "in any particular matter involving specific parties" that is directly and substantially related to his or her former employer or former clients for two years after appointment.⁹ A "former client" is defined as "any person for whom the appointee served personally as agent, attorney, or consultant with the 2

⁴ 5 C.F.R. § 2635.101(b)(14); 5 C.F.R. § 2635.502(a)(2), (d).

⁵ 5 U.S.C. app § 102(a)(6)(B); 5 C.F.R. § 2634.308(b)(6).

⁶ EPA Press Release, U.S. Senate Confirms Andrew Wheeler to Serve as Deputy EPA Administrator, Apr. 12, 2018, available at <https://www.epa.gov/newsreleases/us-senate-confirms-andrew-wheeler-serve-deputy-epa-administrator>; EPA website, Calendar for Andrew Wheeler, Acting Administrator, available at <https://bit.ly/2FpRojd> (asserting Mr. Wheeler "has served as Deputy Administrator from April 20, 2018").

⁷ Faegre Baker Daniels website, Andrew R. Wheeler Principal - Faegre Baker Daniels Consulting, archived and available at <https://bit.ly/2GIPVvZ>.

⁸ Executive Order No. 13770, sec. 1; Office of Government Ethics Memorandum DO-09-011, Mar. 26, 2009, available at <https://bit.ly/2EyPjXI>.

⁹ Executive Order No. 13770, sec. 1, para. 6.

years prior to the date of his or her appointment.”¹⁰ Under the pledge, a “particular matter involving specific parties” both incorporates the longstanding interpretation of that term reflected in 5 C.F.R. § 2641.201(h) and expands the term’s scope to include “any meeting or other communication relating to the performance of [the appointee’s] official duties with a former employer or former client, 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.”¹¹ The purpose of this expansion, according to the Office of Government Ethics (“OGE”), “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.”¹²

To be “open to all interested parties,” there must be a multiplicity of stakeholders present representing a diversity of viewpoints and not the same united perspective. OGE has explained that “common sense” demands “reasonable limits” be placed on the term’s meaning since “meeting spaces are typically limited, and time and other practical considerations also may constrain the size of meetings.”¹³ While these “meetings do not have to be open to every comer,” they “should include a multiplicity of parties.”¹⁴ In this regard, EPA ethics officials specifically advised Mr. Wheeler that when a former client is present at a meeting, “at least four other parties” should also be present to “ensure that a diversity of viewpoints is represented” and “not the same united perspective.”¹⁵

Paragraph 7 of the Ethics Pledge (“Lobbyist Ban”) imposes additional restrictions on appointees who were registered lobbyists within two years of their appointment.¹⁶ A former lobbyist appointee may not, for a period of two years after his or her appointment, “participate in any particular matter on which [the appointee] lobbied within 2 years before the date of [his or her] appointment or participate in the specific issue area in which that particular matter falls.”¹⁷ “Lobbied” here means to have “acted as a registered lobbyist.”¹⁸ Under the Lobbying Disclosure Act (“LDA”), lobbying activities include, among other things, communications with a covered executive branch official with regard to formulation, modification, or adoption of federal legislation or regulations, and the administration or execution of a federal program or policy.¹⁹

¹⁰ *Id.*, sec. 2(i).

¹¹ *Id.*, sec. 2(s).

¹² OGE Memorandum DO-09-011. *See also* OGE Legal Advisory LA-17-03 (Mar. 20, 2017) (“OGE’s prior guidance on Executive 13490 [President Obama’s Ethics Pledge] is applicable to Executive Order 13770 to the extent that it addresses language common to both executive orders.”).

¹³ OGE Memorandum DO-09-011.

¹⁴ *Id.*

¹⁵ Memorandum from Andrew R. Wheeler to E. Scott Pruitt, May 24, 2018, at 2 (“Wheeler Recusal Statement”), available at <https://wapo.st/2Bw7m7i>.

¹⁶ Executive Order No. 13770, sec. 1, para. 7. A “registered lobbyist” under the Ethics Pledge is a lobbyist who registered under the Lobbying Disclosure Act, 2 U.S.C. § 1603, or is named as a lobbyist in an organization’s lobbying registration. Executive Order No. 13770, sec. 2(w).

¹⁷ *Id.*, sec. 1, para. 7.

¹⁸ *Id.*, sec. 2(m).

¹⁹ 2 U.S.C. § 1602(7), (8).

The Ethics Pledge also permits the President or his designee to grant a waiver from the restrictions.²⁰

Murray Energy – Failure to recuse from CCR regulations

Mr. Wheeler appears to have violated his Ethics Pledge by failing to recuse from coal combustion residuals regulations (“CCR”) after having lobbied on those regulations.

As a registered lobbyist at Faegre, Mr. Wheeler’s highest-paying client was coal producer Murray Energy,²¹ which paid Faegre nearly \$3 million over an eight-year period from 2009 to September 2017, primarily for Mr. Wheeler’s lobbying services.²² During most of that time, including the two-year period prior to Mr. Wheeler joining the EPA, Faegre filed lobbying disclosure reports that covered Mr. Wheeler’s lobbying activity for Murray Energy on “general energy and environmental issues.”²³

Apparently as part of his representation of Murray Energy, Mr. Wheeler arranged for and personally attended a March 29, 2017 meeting for Murray Energy with Energy Secretary Rick Perry.²⁴ At the meeting, Murray Energy CEO Robert E. Murray presented Secretary Perry with an action plan with specific recommendations to roll back regulations and protect coal plants competing with other fuel suppliers.²⁵ The first item listed on that action plan called for CCR regulations promulgated in 2015 to be “suspended,” and proposed that the CCR regulations “be rewritten delegating the authority to the states.”²⁶ Mr. Murray also gave Secretary Perry a group of proposed executive orders for President Trump to sign, including one that would have

²⁰ *Id.*, sec. 3.

²¹ Steven Mufson, Scott Pruitt’s likely successor has long lobbying history on issues before the EPA, *Washington Post*, July 5, 2018, available at <https://wapo.st/2L8srce>.

²² Lisa Friedman, Andrew Wheeler, New E.P.A. Chief, Details His Energy Lobbying Past, *New York Times*, Aug. 1, 2018, available at <https://www.nytimes.com/2018/08/01/climate/andrew-wheeler-epa-lobbying.html>; FaegreBD Consulting, First Quarter 2009-Third Quarter 2017 Lobbying Disclosure Report on behalf of Murray Energy, available at <https://soprweb.senate.gov/index.cfm?event=selectFields&reset=1> (search for Registrant Name = Faegre, Client Name = Murray Energy, and Lobbyist Name = Wheeler).

²³ FaegreBD Consulting, First Quarter 2016-Third Quarter 2017 Lobbying Disclosure Reports on behalf of Murray Energy. See 2 U.S.C. §1604(a).

²⁴ Mufson, *Washington Post*, July 5, 2018; Hannah Northey and Christa Marshall, Oil, coal dominated Perry’s early calendar — documents, *E&E News*, Aug. 21, 2018, available at <https://bit.ly/2Q15Kr2>. Documents obtained by *E&E News* (“E&E Documents”) establish that Mr. Wheeler facilitated the meeting by sending emails, which included his and others’ biographical information, in preparation for it. E&E Documents, at 4-6, available at <https://bit.ly/2Gbt2uW>.

²⁵ See Action Plan for Reliable and Low Cost Electricity in America and to Assist in the Survival of Our Country’s Coal Industry, Enclosed by Letter from Robert E. Murray to Secretary J. Richard Perry, Mar. 28, 2017 (“Action Plan”), E&E Documents, at 17-58; Friedman, *New York Times*, Aug. 1, 2018 (Mr. Murray “delivered his proposals” at the March 2017 meeting); Steve Mufson, An American energy plan straight from coal country, *Washington Post*, Dec. 8, 2017 (Mr. Murray “presented a four-page ‘action plan’ to rescue the coal industry” at the meeting), available at <https://wapo.st/2sepezk>; Nadia Kounang, With EPA rule change, worries linger for those near coal ash ponds, *CNN*, July 21, 2018, available at <https://www.cnn.com/2018/07/21/health/epa-coal-ash-reaction/index.html>.

²⁶ Action Plan, E&E Documents, at 18.

suspended the CCR regulations and required the EPA and other executive departments to review the rules and consider whether the CCR regulations should delegate authority to the states.²⁷

On October 5, 2017, President Trump announced his intent to nominate Mr. Wheeler as EPA Deputy Administrator.²⁸ He was subsequently confirmed by the Senate on April 12, 2018,²⁹ and began work at EPA on April 20, 2018.³⁰ President Trump appointed Mr. Wheeler to be Acting Administrator on July 5, 2018, following his predecessor's resignation.³¹

In July 2018, Acting Administrator Wheeler signed his first major EPA rule by relaxing standards for storing coal ash.³² Relevant portions of the CCR regulations, at 40 C.F.R. §§ 257.50-257.107, were amended to give states the ability to regulate coal ash disposal programs, consistent with Murray Energy's request. The new rule gives states "flexibility to tailor disposal requirements based on site-specific considerations" and to allow them "to stop monitoring groundwater where there is no potential for contaminants to migrate to uppermost aquifers," and "delay[s] the timeline for shutting down existing coal ash storage pits in certain cases including when operators are unable to comply with placement restrictions."³³

Acting Administrator Wheeler's participation in the CCR regulations appears to have violated the Lobbyist Ban provisions of the Ethics Pledge. There is no question that Mr. Wheeler was a registered lobbyist within the two years before he was appointed EPA Deputy Administrator. The facts further indicate that Mr. Wheeler lobbied on the CCR regulations in March 2017. While a registered and highly-paid lobbyist for Murray Energy, working specifically on "energy and environmental issues," Mr. Wheeler arranged for and attended the March 29, 2017 meeting with Secretary Perry. At that meeting, Murray Energy's action plan, which listed amending the CCR regulations as its first priority, and the similar proposed executive order, were presented to Secretary Perry. The timing alone strongly suggests that the action plan and proposed executive order were integral to the meeting and very likely was intended to serve as a basis for, or supplement to, the discussion. In addition, Mr. Wheeler may have communicated with Department of Energy and/or other officials about the CCR regulations at this time. Considering Mr. Wheeler's position and involvement, it is highly likely he lobbied on the CCR regulations in March 2017.³⁴

²⁷ *Id.* at 28-29, 42-44.

²⁸ EPA Press Release, Andrew Wheeler Nominated as EPA Deputy Administrator, Oct. 5, 2017, available at <https://bit.ly/2hNixJY>.

²⁹ EPA Press Release, Apr. 12, 2018.

³⁰ EPA website, Calendar for Andrew Wheeler, Acting Administrator.

³¹ Sophie Tatum, A former coal lobbyist is the new leader of the EPA, *CNN*, July 5, 2018, available at <https://www.cnn.com/2018/07/05/politics/andrew-wheeler-epa/index.html>.

³² Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Amendments to the National Minimum Criteria (Phase One, Part One), Final Rule, 83 Fed. Reg. 36,435 (July 7, 2018); Nadia Kounang, EPA rolls back Obama-era coal ash regulations, *CNN*, July 18, 2018, available at <https://www.cnn.com/2018/07/18/health/epa-coal-ash-standards-bn/index.html>.

³³ Tracie Mauriello, EPA relaxes rules on coal ash; environmentalists decry the move, *Pittsburgh Post-Gazette*, July 18, 2018, available at <https://bit.ly/2SDj3zT>.

³⁴ Responding to news reports questioning his role as a coal lobbyist, Mr. Wheeler "distanced himself" from the Murray Energy action plan memo and the proposed executive order, saying that he only saw an early version of the memo and had no role in writing it, and that he did not work on the executive order. Friedman, *New York Times*,

There also is little doubt that the CCR regulations are covered under the Lobbyist Ban as a “particular matter” or a “specific issue area in which that particular matter falls.”³⁵ The CCR rules are a “particular matter of general applicability”³⁶ that focus on the coal industry as part of a discrete and identifiable class of persons.³⁷ As a result, they fall within the definition of a “specific issue area” under OGE’s guidance providing that term means a “particular matter of general applicability.”³⁸ In addition, even if Mr. Wheeler only lobbied on one part of the CCR regulations, he is recused from working on any part of them. An example given in OGE’s Ethics Pledge guidance makes clear that lobbying on a specific section of a proposed regulation bars a former lobbyist from working on the entire regulation for two years:

An appointee was a registered lobbyist during the two-year period before she entered government. In that capacity, she lobbied her agency against a proposed regulation focused on a specific industry. Her lobbying was limited to a specific section of the regulation affecting her client. Her recusal obligation as an appointee is not limited to the section of the regulation on which she lobbied, nor is it limited to the application of the regulation to her former client. Instead, she must recuse for two years from development and implementation of the entire regulation, subsequent interpretation of the regulation, and application of the regulation in individual cases.”³⁹

As a result of his apparent lobbying, Mr. Wheeler’s should have recused from participating in the CCR regulations for two years after he was appointed to the EPA on April 20, 2018. However, he participated in them just three months later when he signed the CCR amendments on July 17, 2018, likely violating his Ethics Pledge.⁴⁰

Aug. 1, 2018. Even if this is true, it does not mean Mr. Wheeler did not lobby on the CCR regulations in March 2017, for the same reasons discussed above.

³⁵ Executive Order No. 13770, sec. 1, para. 7.

³⁶ See OGE Legal Advisory LA-17-03, at 2, Mar. 20, 2017, available at <https://bit.ly/2T3jOme> (“OGE has issued guidance distinguishing two types of particular matters: ‘particular matters involving specific parties and ‘particular matters of general applicability.’ . . . The latter is broader than the former.”)

³⁷ Executive Order No. 13770, sec. 2(r) (citing 18 U.S.C. § 208 and 5 C.F.R. § 2635.402(b)(3), which defines “particular matters” as “matters that involve deliberation, decision, or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. Such a matter is covered by this subpart even if it does not involve formal parties and may include governmental action such as legislation or policy-making that is narrowly focused on the interests of such a discrete and identifiable class of persons.”).

³⁸ OGE Legal Advisory LA-17-03, at 1 (“The Counsel to the President’s office has advised OGE that, as used in Executive Order 13770, the term ‘specific issue area’ means a ‘particular matter of general applicability,’ and OGE has accepted the Administration’s interpretation of this term.”).

³⁹ *Id.* at 2.

⁴⁰ While the Ethics Pledge authorizes a waiver of these restrictions, Mr. Wheeler and EPA’s senior ethics counsel said he has not sought or received any ethics waivers. Friedman, *New York Times*, Aug. 1, 2018. The absence of Mr. Wheeler’s name on the online list of waiver recipients maintained by OGE further shows he has not received any Ethics Pledge waivers. See [https://www.oge.gov/web/oge.nsf/Agency+Ethics+Pledge+Waivers+\(EO+13770\)](https://www.oge.gov/web/oge.nsf/Agency+Ethics+Pledge+Waivers+(EO+13770)).

Murray Energy – Failure to recuse from ACE regulations

Mr. Wheeler also may have violated his Ethics Pledge by failing to recuse from the Affordable Clean Energy (“ACE”) regulations proposed to replace the Clean Power Plan (“CPP”) after having lobbied on those regulations on behalf of Murray Energy in March 2017.

Murray Energy had long opposed the Obama administration’s implementation of the CPP, including in litigation that resulted in the Supreme Court staying implementation of the CPP pending judicial review.⁴¹ In a November 1, 2016 letter to the EPA, for example, Mr. Murray argued that EPA’s efforts to implement the Clean Power Plan were “illegal” and “would impose draconian standards on the coal industry.”⁴² In addition, similar to the action plan presented to Secretary Perry, Murray Energy sent an action plan to Vice President Michael Pence on March 1, 2017 calling for the CPP to be “eliminated” as its top priority.⁴³

Throughout this period, Mr. Wheeler was registered to lobby for Murray Energy on “energy and environmental issues,” and has “acknowledged helping Mr. Murray oppose” the CPP.⁴⁴ Given his prominent lobbying role, which continued through September 2017, and the extraordinary efforts and priority Murray Energy placed on eliminating the CPP, it is likely that Mr. Wheeler was involved in lobbying efforts to eliminate the CPP, possibly including the development of the March 1, 2017 action plan sent to Vice President Pence. In addition, the CPP is a particular matter of general applicability covered by the Ethics Pledge because it focuses on the coal industry as part of a discrete and identifiable class of persons. As a result, Mr. Wheeler should have recused from the particular matter of the CPP and in the CPP’s specific issue area through April 20, 2020.

On August 20, 2018, Acting Administrator Wheeler signed a proposed rule to replace the CPP with revised emissions guidelines – the ACE rule.⁴⁵ EPA’s proposal to replace the CPP with the ACE rule was consistent with the Murray Energy action plan sent to Vice President Pence.

Despite acknowledging his work helping Mr. Murray oppose the CPP, Mr. Wheeler “maintained, however, that he is not obligated to recuse himself from working on a plan to replace that regulation.”⁴⁶ Mr. Wheeler’s attempted distinction makes little sense. Because the ACE rule is, according to EPA, “a proposal to replace to replace [CPP] with revised emissions guidelines,”⁴⁷ it is the same particular matter on which Mr. Wheeler likely lobbied or in the same specific issue area as CPP.

⁴¹ *West Virginia v. EPA*, No. 15A773, Order in Pending Case (S. Ct. Feb. 9, 2016), available at https://www.supremecourt.gov/orders/courtorders/020916zr_21p3.pdf.

⁴² Letter from Murray Energy Assistant General Counsel Jason D. Witt to EPA Administrator Gina McCarthy, Nov. 1, 2016, available at <https://bit.ly/2GqxiH5>.

⁴³ Murray Energy’s ‘Action Plan’ for the Trump Administration, *New York Times*, Jan. 9, 2018, available at <https://nyti.ms/2FmfR5Z>.

⁴⁴ Friedman, *New York Times*, Aug. 1, 2018.

⁴⁵ 82 Fed. Reg. 44,746 (Aug. 31, 2018).

⁴⁶ Friedman, *New York Times*, Aug. 1, 2018.

⁴⁷ 82 Fed. Reg. 44,746 (Aug. 31, 2018). The proposed regulations refer to the CPP dozens of times.

Accordingly, an investigation is warranted to determine the full extent of Mr. Wheeler's involvement in the action plan sent to Vice President Pence or similar lobbying activities in support of Murray Energy's efforts to eliminate the CPP while serving as a registered lobbyist for Murray Energy. If Mr. Wheeler was involved in those lobbying activities, he was prohibited by the Lobbyist Ban from signing the proposed rule to replace the CPP with the ACE rule, and likely violated the ban when he did.

Darling Ingredients, Inc. – Failure to recuse from RFS regulations and from June 26, 2018 meeting with former client

Mr. Wheeler further may have violated his Ethics Pledge by failing to recuse from renewable fuel standard ("RFS") regulations after having lobbied on those regulations, and by participating in a June 26, 2018 meeting with Darling Ingredients, Inc., his former client.

In 2015 and 2016, Mr. Wheeler was registered as a lobbyist for Darling,⁴⁸ a biodiesel producer that "recovers and converts used cooking oil and animal fats, and residual bakery produces into valuable feed and fuel ingredients."⁴⁹ Faegre filed five lobbying disclosure reports in those years disclosing \$270,000 in payments by Darling for Mr. Wheeler and two other Faegre employees to lobby Congress on "renewable fuel standard; renewable diesel and bio-diesel tax incentives."⁵⁰

It is not fully clear when Mr. Wheeler stopped lobbying for Darling on RFS and when Darling stopped being his client. Faegre's Second Quarter 2016 disclosure report for its lobbying on Darling's behalf, filed with the Secretary of the Senate and the Clerk of the House of Representatives, represented that the termination date for Mr. Wheeler and the other lobbyists was May 31, 2016.⁵¹ One news report, however, stated that Darling "ended their financial relationship" with Mr. Wheeler's firm "before April 2016."⁵²

Ascertaining the correct date or dates is critical to determining whether Mr. Wheeler violated his Ethics Pledge. If Darling was Mr. Wheeler's client within two years of his appointment on April 20, 2018, under Paragraph 6 of the Ethics Pledge he should not have participated in any meetings with Darling until April 20, 2020 unless the meeting was open to all interested parties. But if Darling stopped being his client before April 20, 2016, that restriction would not apply. Similarly, if Mr. Wheeler lobbied on RFS within two years of his appointment on April 20, 2018, under Paragraph 7 of the Ethics Pledge, the Lobbyist Ban, he should have recused from participating in the particular matter of RFS and in RFS's specific issue area until

⁴⁸ Corbin Hiar, Despite his assurances, Wheeler met with former clients, *E&E News*, July 26, 2018, available at <https://www.eenews.net/stories/1060091287>.

⁴⁹ Darling Ingredients, Inc., *Yahoo! Finance*, Dec. 7, 2018, available at <https://finance.yahoo.com/quote/DAR/>.

⁵⁰ FaegreBD Consulting, Second Quarter 2015-Second Quarter 2016 Lobbying Disclosure Act Reports on behalf of Darling International Inc., available at <https://soprweb.senate.gov/index.cfm?event=selectFields&reset=1> (search for Registrant Name = Faegre, Client Name = Darling, and Lobbyist Name = Wheeler).

⁵¹ FaegreBD Consulting, Second Quarter 2016 and Termination Lobbying Disclosure Act Report on behalf of Darling International Inc., available at <https://bit.ly/2SY883R>.

⁵² Juliet Eilperin, EPA chief Andrew Wheeler's past lobbying ties attract scrutiny, *Washington Post*, July 29, 2018, available at <https://wapo.st/2ruHioz>.

April 20, 2020. Again, if Mr. Wheeler stopping lobbying on RFS before April 20, 2016, he would not be bound by these Lobbying Ban restrictions.

On June 26, 2018 Mr. Wheeler participated in a “stakeholder meeting” at EPA with Darling.⁵³ As discussed above, Paragraph 6 of the Ethics Pledge prohibits appointees from participating in a meeting with a former client – meaning a client within the two years before the date of appointment⁵⁴ – unless the meeting is open to all interested parties.⁵⁵ As this meeting with Darling apparently was not open to any other interested parties, an investigation is necessary to ascertain the correct date on which Darling stopped being Mr. Wheeler’s client. If Mr. Wheeler provided personal services to Darling within two years of his appointment, he likely violated Paragraph 6 of his Ethics Pledge by participating in a meeting with a former client.⁵⁶

Mr. Wheeler also may have violated the Lobbying Ban by participating in the RFS particular matter or specific issue area within two years of his appointment by signing two final rules for EPA involving the RFS program. On July 24, 2018, Mr. Wheeler signed a final rule determining that certain biodiesel and heating oil produced from sorghum oil would meet the emissions reduction threshold required for advanced biofuels and biomass-based diesel under the RFS program.⁵⁷ On November 30, 2018, Mr. Wheeler signed a final rule establishing the renewable fuel percentage for cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel that apply to gasoline and diesel transportation fuel produced or imported in the year 2019.⁵⁸ In addition, because the RFS program focuses on obligated parties (meaning fuel refiners and importers) and renewable fuel producers as a discrete and identifiable class of persons,⁵⁹ the program is a “particular matter of general applicability.”⁶⁰

As a result, an investigation is necessary to establish the correct date on which Mr. Wheeler stopped lobbying on the RFS program. If he lobbied on the RFS program within two years of his appointment, he likely violated the Lobbying Ban by signing the two EPA rules involving the RFS program.

⁵³ Hiar, *E&E News*, July 26, 2018.

⁵⁴ Executive Order No. 13770, sec. 1, para. 6; *id.*, sec. 2(i).

⁵⁵ *Id.*, sec. 2(s).

⁵⁶ When questioned in July 2018 about the meeting with Darling, an EPA spokesperson responded that it did not present “any pledge issue for Mr. Wheeler” because Darling was not included on his recusal statement. Hiar, *E&E News*, July 26, 2018; *see* Wheeler Recusal Statement, at 2. The accuracy of the recusal list in Mr. Wheeler’s recusal statement, however, depends on ascertaining the correct date on which Darling stopped being his client.

⁵⁷ 83 Fed. Reg. 37,735 (Aug. 2, 2018).

⁵⁸ 83 Fed. Reg. 63,704 (Dec. 11, 2018).

⁵⁹ *See* EPA website, Renewable Fuel Standard Program, *available at* <https://www.epa.gov/renewable-fuel-standard-program/renewable-fuel-standard-exemptions-small-refineries>.

⁶⁰ *See* Memorandum from Robert I. Cusick, Director, U.S. Office of Government Ethics, to Designated Agency Ethics Officials, “Particular matter Involving Specific Parties,” “Particular Matter,” and “Matter,” DO-06-029, Oct. 4, 2006, at 7, *available at* <https://bit.ly/2CoHnA4>.

Growth Energy – Failure to recuse from June 26, 2018 meeting

Mr. Wheeler similarly may have violated his Ethics Pledge by failing to recuse from a separate June 26, 2018 meeting. That meeting included Growth Energy, another former client, and also involved the RFS program Mr. Wheeler previously lobbied on.

Growth Energy is a biofuel trade association that represents “producers and supporters of ethanol” fuel.⁶¹ On his OGE Form 278 public financial disclosure report, Mr. Wheeler reported Growth Energy as a former client and source of compensation for whom he provided “strategic advice and counseling.”⁶²

After being confirmed, Mr. Wheeler attended a meeting on June 26, 2018 with the CEO of Growth Energy, along with approximately nine other members of the Fuel America coalition.⁶³ Fuel America requested the meeting with Mr. Wheeler to discuss the “timing/importance of the 2019 renewable volume obligations” and to express their “unified support for a strong renewable fuel standard.”⁶⁴

Because Growth Energy is Mr. Wheeler’s former client, he should have recused from the meeting under Paragraph 6 of the Ethics Pledge. When questioned about the meeting, an EPA spokesman asserted Mr. Wheeler was permitted to attend because “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 [RFS].”⁶⁵ However, as detailed above, for a meeting to be “open to all interested parties” there must be a multiplicity of stakeholders present representing a diversity of viewpoints and not the same united perspective.⁶⁶

Despite the EPA spokesman’s claim, Growth Energy was part of a “united” coalition meeting expressing “unified support” of a strong renewable fuel standard, and the attendees represented the very type of united perspective that EPA ethics officials advised against. Accordingly, the meeting did not satisfy the requisite for “a diversity of viewpoints,” even if four or more parties attended and they purportedly had some differences on the RFS. Mr. Wheeler’s

⁶¹ Growth Energy website, About Us page, available at <https://growthenergy.org/about-us/>.

⁶² Andrew Wheeler, Public Financial Disclosure Report, part 4, item 9, Aug. 12, 2017 (“Wheeler Public Financial Disclosure Report”), available at <https://bit.ly/2GbM6ct>. Filers are required to disclose clients from the prior two calendar years and the calendar year of filing, meaning that Growth Energy could have been Mr. Wheeler’s client from anytime between January 1, 2015 and August 12, 2017, the date he signed and submitted his OGE Form 278. See OGE, Public Financial Disclosure Guide, Your Sources of Compensation Exceeding \$5,000 in a Year, available at <https://bit.ly/2wXCbCA>. However, Mr. Wheeler listed Growth Energy on his recusal statement, indicating Growth Energy was his client within two years of his date of appointment. See Wheeler Recusal Statement, at 2.

⁶³ Corbin Hiar and Kevin Bogardus, *Wheeler's private calendar reveals recused client contacts*, *E&E News*, Sept. 12, 2018, available at <https://www.eenews.net/stories/1060096733>; accompanying documents available at <https://bit.ly/2PRtkqz>.

⁶⁴ *Id.*

⁶⁵ *Id.*; see also Wheeler Recusal Statement, at 2.

⁶⁶ *Id.*

participation in the June 26, 2018 meeting therefore likely violated paragraph 6 of the Ethics Pledge under the Executive Order.

In addition, Growth Energy and other members of the Fuel America coalition requested the meeting to discuss “renewable volume obligations” and their support for strong “renewable fuel standards” – the same particular matter or specific issue area on which he previously lobbied as a registered lobbyist for Darling Ingredients. As with his other June 26, 2018 meeting with Darling, an investigation is necessary to determine the correct date that Mr. Wheeler stopped lobbying on the RFS program. If he lobbied on it within two years before his appointment, he likely violated the Lobbying Ban by participating in the meeting with Growth Energy.

Archer Daniels Midland Company – Failure to recuse from May 24, 2018 meeting

Mr. Wheeler further may have violated his Ethics Pledge by failing to recuse from a May 24, 2018 meeting with the Archer Daniels Midland Company (“ADM”), another former client.

ADM is an ethanol producer that “procures, transports, stores, processes, and merchandises agricultural commodities, products, and ingredients in the United States and internationally.”⁶⁷ On his OGE Form 278, Mr. Wheeler reported ADM as a source of compensation for whom he provided “strategic advice and counseling.”⁶⁸ As with Growth Energy, that listing means ADM could have been Mr. Wheeler’s client from anytime between January 1, 2015 and August 12, 2017. Mr. Wheeler did not list ADM on his recusal statement as a former client,⁶⁹ implying he does not believe ADM was a client within two years of his appointment, and ADM suggested that Mr. Wheeler’s work “occurred sometime in 2015.”⁷⁰ Nevertheless, it is not known for how long Mr. Wheeler provided consulting services to ADM based on publicly available information.

After being confirmed, Mr. Wheeler attended a meeting on May 24, 2018, with ADM and two other ethanol producers, POET LLC and Green Plains, Inc.⁷¹ According to an ADM spokesperson, the focus of the meeting was on the renewable fuel standard program.⁷² Here, again, an investigation to ascertain the correct date on which ADM stopped being Mr. Wheeler’s client is necessary. Because ADM was one of only three ethanol producers that attended the meeting with Mr. Wheeler, the meeting lacked the requisite number of attendees and diversity of viewpoints that EPA ethics officials said were necessary to meet the Ethics Pledge requirements. As a result, if ADM was Mr. Wheeler’s client within two years of his appointment, he likely violated Paragraph 6 of his Ethics Pledge by participating in a meeting with a former client.

In addition, the focus of the meeting with ADM was on the RFS program – again, the same particular matter or specific issue area on which he previously lobbied as a registered

⁶⁷ Archer Daniels Midland Co., *Yahoo! Finance*, Dec. 7, 2018, available at <https://finance.yahoo.com/quote/ADM/>.

⁶⁸ Wheeler Public Financial Disclosure Report, part 4, item 11.

⁶⁹ See Wheeler Recusal Statement, at 2.

⁷⁰ Hiar, *E&E News*, July 26, 2018 (see clarification).

⁷¹ *Id.*

⁷² *Id.*

lobbyist for Darling Ingredients. As with his meetings with Darling and Growth Energy, if Mr. Wheeler lobbied on the RFS program within two years before his appointment, he likely violated the Lobbying Ban by participating in the ADM meeting.

Standards of Ethical Conduct for Employees of the Executive Branch – 5 C.F.R. § 2635.502

All of the above suggests that Mr. Wheeler may also have undermined the agency's integrity when he participated in meetings with his former clients and in particular matters and specific issue areas on which he previously lobbied. Federal employees are instructed to avoid any actions creating the appearance that they are violating the law or ethical standards.⁷³ Moreover, under the Standards of Conduct, federal employees have an express obligation to seek authorization before participating in particular matters involving specific parties involving a former client for one year, and are expected to use the same process in circumstances that do not necessarily involve specific parties, such as rulemakings, or that otherwise raise a question about the employee's impartiality.⁷⁴

Because the Ethics Pledge expressly prohibits political appointees like Mr. Wheeler from engaging in specific types of meetings and communications with their former clients, Mr. Wheeler was on notice that his meetings with his former clients, Darling, Growth Energy and ADM, would cause a reasonable person to question his impartiality under Paragraph 6 of the Ethics Pledge. Likewise, Mr. Wheeler was on notice that his participation in the RFS program, CCR regulations, and the proposed ACE rule would cause a reasonable person to question his impartiality under the Lobbyist Ban. In the absence of an authorization to participate,⁷⁵ Mr. Wheeler's involvement in these matters creates the appearance of a lack of impartiality that critically undermines the agency's integrity in carrying out these programs and operations and violated his ethical obligations.

Ethics in Government Act – 5 U.S.C. app. § 104

Lastly, Mr. Wheeler may have violated the Ethics in Government Act ("EIGA") by failing to disclose Darling Ingredients on his OGE Form 278.

⁷³ 5 C.F.R. § 2635.101(b)(14).

⁷⁴ 5 C.F.R. § 2635.502(a)(2) ("An employee who is concerned that circumstances under than those specifically described in this section would raise a question regarding his impartiality should use the process described in this section to determine whether he should or should not participate in a particular matter."). See also Standards of Ethical Conduct for Employees of the Executive Branch, Proposed Rule, 56 Fed. Reg. 33,778, 33,786 (July 23, 1991) ("Notwithstanding the section's use of this concept [specific party matters] and its focus on specified relationships, questions about an employee's impartiality can arise from any number of interests or relationships an employee might have and in connection with his or her participation in matters that do not necessarily involve specific parties. Proposed 2635.502 therefore proves that an employee should use the process set forth in that section when circumstances other than those specifically described raise questions about his or her impartiality in the performance of official duties."); OGE DO-06-029, at 7, n.9 ("[A]n agency may require an employee to recuse from particular matters that do not involve specific parties, based on the concern that the employee's impartiality reasonably may be questioned under the circumstances.").

⁷⁵ 5 C.F.R. § 2635.502(d).

A nominee for a Senate-confirmed position is required by the EIGA to report a former client on Part 4 of his or her OGE Form 278 if the client was a source of compensation of more than \$5,000 in either the preceding two calendar years or during the current calendar year up to the date for filing.⁷⁶ If a filer knowingly and willfully fails to report any information that the EIGA requires be reported, he or she may be subject to a civil penalty of up to \$50,000.⁷⁷

According to Faegre's lobbying disclosure reports, Mr. Wheeler was a registered lobbyist for Darling from approximately April 2015 until May 31, 2016.⁷⁸ During that period, all of which was covered by Mr. Wheeler's OGE Form 278, the company paid Faegre \$270,000 for its lobbying services. Mr. Wheeler, however, did not report Darling as a client on his public financial disclosure report.⁷⁹

It is difficult to reconcile the lobbying income Faegre reported from Darling for Mr. Wheeler and a handful of other lobbyists in 2015 and 2016 and the absence of corresponding information about Darling as a source of compensation on Mr. Wheeler's OGE Form 278. Based on the information reported by Faegre, it is hard to imagine that Mr. Wheeler, a prominent member of his former firm, did not receive more than \$5,000 in compensation from his employer for personal services he provided to Darling during either calendar year 2015 or 2016. Accordingly, an investigation is needed to determine if Mr. Wheeler's services to Darling generated more than \$5,000 in income in either 2015 or 2016. If it did, Mr. Wheeler's omission of Darling from Part 4 of his OGE Form 278 likely violated the EIGA.

Conclusion

Before joining the EPA, Acting Administrator Wheeler spent years as a lobbyist and consultant for coal companies, energy producers, and others. To prevent even the appearance that government officials in Mr. Wheeler's position could take actions to benefit their former clients and providing them privileged access, the Ethics Pledge requires them to recuse from certain matters.

Mr. Wheeler's regulatory activities and meetings with his former clients, however, may have violated his Ethics Pledge and other rules. Mr. Wheeler's participation in amendments to the CCR regulations, the proposed rule to replace the Clean Power Plan with the ACE rule, and meetings and rulemaking involving the RFS program may violated the Lobbyist Ban under Paragraph 7 of his Ethics Pledge. In addition, Mr. Wheeler's meetings with his former clients Darling, Growth Energy, and ADM may have violated Paragraph 6 of his Ethics Pledge. Mr. Wheeler's involvement in these matters further gives rise to the appearance of a lack of impartiality that critically undermines the agency's integrity in carrying out its programs and operations; accordingly, it violates his ethical obligations and may have violated the Standards of

⁷⁶ 5 U.S.C. app. § 102(a)(6)(B); 5 C.F.R. § 2634.308(b)(6).

⁷⁷ 5 U.S.C. app. § 104(a).

⁷⁸ FaegreBD Consulting, Second Quarter 2016 and Termination Lobbying Disclosure Act Report on behalf of Darling International Inc., available at <https://bit.ly/2SY883R>. As noted above, one news report indicates that Darling ended its financial relationship with Faegre before April 2016.

⁷⁹ Wheeler Public Financial Disclosure Report, Part 4.

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Conduct. In addition, his failure to disclose Darling as a source of compensation on his OGE Form 278 may have violated his disclosure obligations under the Ethics in Government Act.

CREW therefore requests that your office investigate whether Mr. Wheeler violated the Ethics Pledge and take any necessary disciplinary action. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Noah Bookbinder', with a long horizontal flourish extending to the right.

Noah Bookbinder
Executive Director

cc: Hon. John Barrasso, Chairman, and Hon. Thomas R. Carper, Ranking Member,
Senate Committee on Environment and Public Works