

April 16, 2019

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

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

Dear Mr. Sheehan:

This letter supplements Citizens for Responsibility and Ethics in Washington's ("CREW") prior request that the Office of Inspector General ("OIG") investigate Environmental Protection Agency ("EPA") Administrator Andrew Wheeler's potential violations of the Ethics Pledge he signed as a condition of his employment and the Standards of Ethical Conduct for Employees of the Executive Branch ("Standards of Conduct").¹ In addition to the matters described in our previous request, CREW further respectfully requests that OIG investigate whether Administrator Wheeler similarly violated his Ethics Pledge and the Standards of Conduct by participating in a proposed rule that could reverse prior EPA actions taken to regulate emissions from coal- and oil-fired electric utilities, a particular matter on which he appears to have lobbied on behalf of his former client Murray Energy.

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 By participating in the proposed rule within the two-year recusal period, Mr. Wheeler may have violated his Ethics Pledge. Mr. Wheeler's involvement in this matter also gives rise to the appearance of a lack of impartiality under the Standards of Conduct. As a result, unless he was authorized to participate, Mr. Wheeler's involvement appears to violate his ethical obligations under the Standards of Conduct.³

Background

As CREW explained in our previous request for an investigation, Mr. Wheeler was a principal at Faegre Baker Daniels Consulting ("Faegre") prior to joining the EPA as Deputy

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>; Letter to Charles J. Sheehan, EPA Acting Inspector General, Jan. 15, 2019, *available at* <https://bit.ly/2UjflRp>.

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

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

Administrator on April 20, 2018.⁴ At Faegre, Mr. Wheeler represented clients before Congress, the EPA, and the Departments of Energy and Transportation,⁵ including coal producer Murray Energy.⁶ 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."⁷

Apparently as part of this representation, Mr. Wheeler arranged for and personally attended a March 29, 2017 meeting for Murray Energy with Energy Secretary Rick Perry.⁸ 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.⁹ The sixth item on the Action Plan called for the "electric utility maximum achievable technology and ozone regulations" to be "completely overturned."¹⁰ The item also noted that "we have won these issues in the United States Supreme Court."¹¹

On October 5, 2017, President Trump announced his intent to nominate Mr. Wheeler as EPA Deputy Administrator.¹² He was subsequently confirmed by the Senate on April 12, 2018,¹³ and began work at EPA on April 20, 2018.¹⁴ President Trump appointed Mr. Wheeler to be Acting Administrator on July 5, 2018, following his predecessor's resignation.¹⁵ The Senate confirmed Mr. Wheeler as EPA Administrator on February 28, 2019.¹⁶

⁴ 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 Administrator Andrew Wheeler, available at <https://bit.ly/2FpRojd> (asserting Mr. Wheeler "has served as Deputy Administrator from April 20, 2018").

⁵ Faegre Baker Daniels website, Andrew R. Wheeler Principal - Faegre Baker Daniels Consulting, archived and available at <https://bit.ly/2GIPVvZ>.

⁶ 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>.

⁷ FaegreBD Consulting, First Quarter 2016-Third Quarter 2017 Lobbying Disclosure Reports on behalf of Murray Energy. See 2 U.S.C. §1604(a).

⁸ 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/2QI5Kr2>. 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 in preparation for it. E&E Documents, at 4-6, available at <https://bit.ly/2Gbt2uW>.

⁹ 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; 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> (Mr. Murray "delivered his proposals" at the March 2017 meeting).

¹⁰ Action Plan, at 19.

¹¹ *Id.* This is almost certainly a reference to *Michigan v. EPA*, 135 S. Ct. 2699 (2015), in which the Supreme Court held that the EPA's hazardous air pollutant standards did not properly consider cost. *Id.* at 2711.

¹² EPA Press Release, Andrew Wheeler Nominated as EPA Deputy Administrator, Oct. 5, 2017, available at <https://bit.ly/2hNixJY>.

¹³ EPA Press Release, U.S. Senate Confirms Andrew Wheeler to Serve as Deputy EPA Administrator, Apr. 12, 2018, available at <https://bit.ly/2UkO4Nm>.

¹⁴ EPA website, Calendar for Administrator Andrew Wheeler.

¹⁵ *Id.*

¹⁶ Alex Guillen, Senate confirms Wheeler as Trump's permanent EPA chief, *Politico*, Feb. 28, 2019, available at <https://politi.co/2I0eCxU>.

The Action Plan advocated for overturning the “electric utility maximum achievable technology regulations.”¹⁷ These regulations are known as the Mercury and Air Toxic Standards (“MATS”), which are applications of Maximum Achievable Control Technology (“MACT”) emissions standards to electric utilities, namely, coal- and oil-fired power plants.¹⁸ The 2012 MATS rule “require[d] coal- and oil-fired EGUs [electric utility steam generating units] to meet hazardous air pollutant (HAP) standards reflecting the application of the maximum achievable control technology.”¹⁹

In 2015, the Supreme Court held that when enacting this rule, the EPA unreasonably found that “cost is irrelevant to the initial decision to regulate power plants.”²⁰ In 2016, on remand, EPA determined that, after considering cost, regulation of power plants’ emissions of hazardous air pollutants remains “appropriate and necessary.”²¹ Following that, Murray Energy, apparently as part of a multi-pronged effort to thwart EPA’s efforts to regulate hazardous air pollutants from coal- and oil-fired electric utilities, initiated litigation to overturn EPA’s affirmative “appropriate and necessary” finding.²² That case has been held in abeyance since April 2017, when the D.C. Circuit granted EPA’s motion for a continuance to give its newly-appointed officials an opportunity to review the 2016 action and to determine whether it should be “maintained, modified, or otherwise reconsidered.”²³

In February 2019, EPA published a proposed rule that, “[a]fter considering the cost of compliance relative to the HAP benefits of regulation . . . proposed to find that it is not ‘appropriate and necessary’ to regulate HAP emissions from coal- and oil-fired EGUs.” In addition to the proposed reversal of its 2016 conclusions, EPA also sought comments on its authority to rescind the MATS rule.²⁴ The premise of the proposal is that regulation of HAP emissions is not warranted.²⁵ Therefore, the MATS regulation could be rescinded or vacated if the Proposed Rule comes into effect. Acting Administrator Wheeler signed the Proposed Rule on December 27, 2018, which was published in the Federal Register on February 7, 2019.²⁶

¹⁷ Action Plan, at 19.

¹⁸ See Environmental Protection Agency, History of the MATS Regulation, July 20, 2017, available at <https://bit.ly/2WMof6L>.

¹⁹ Final Rule, National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9303, 9304 (Feb. 16, 2012) (codified at 40 C.F.R. §§ 60, 63); 42 U.S.C. § 7401.

²⁰ *Michigan v. EPA*, 135 S. Ct. at 2711.

²¹ Supplemental Finding That It is Appropriate and Necessary to Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units, 81 Fed. Reg. 24,420 (April 25, 2016).

²² *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir.). See 84 Fed. Reg. at 2674 (discussing the pending Murray Energy litigation); Opening Brief of State and Industry Petitioners, *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. dated Nov. 18, 2016 and filed in final form Mar. 24, 2017).

²³ Order, *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. Apr. 27, 2017); EPA’s Motion to Continue Oral Argument, *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. Apr. 18, 2017).

²⁴ Proposed Rule, National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units-Reconsideration of Supplemental Finding and Residual Risk and Technology Review, 84 Fed. Reg. 2670, 2672 (Feb. 7, 2019) (“Proposed Rule”); Lisa Friedman, New E.P.A. Plan Could Free Coal Plants to Release More Mercury Into the Air, *New York Times*, Dec. 28, 2018, available at <https://nyti.ms/2Q8V36e>.

²⁵ Proposed Rule, 84 Fed. Reg. at 2679.

²⁶ Proposed Rule, 84 Fed. Reg. at 2670, 2704.

Potential Violations

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.²⁷ Paragraph 7 of the Ethics Pledge (the “Lobbyist Ban”) imposes particular restrictions on appointees who were registered lobbyists within two years of their appointment.²⁸ 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 the 2 years before the date of [his or her] appointment or participate in the specific issue area in which that particular matter falls.”²⁹ “Lobbied” here means to have “acted as a registered lobbyist.”³⁰ Under the Lobbying Disclosure Act, 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.³¹

Administrator Wheeler’s participation in the Proposed Rule appears to have violated the Lobbyist Ban. There is no question that Mr. Wheeler was a registered lobbyist for Murray Energy within the two years before he was appointed EPA Deputy Administrator. Mr. Wheeler appears to have lobbied on the Action Plan in March 2017 when he arranged for and attended the March 29, 2017 meeting with Secretary Perry. At that meeting, Murray Energy’s Action Plan, which listed overturning the electric utility MATS regulations as a top priority, were presented to Secretary Perry. The timing alone strongly suggests that the Action Plan was 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 overturning the MATS regulations for electric utilities at this time. Considering Mr. Wheeler’s position and involvement, it is very likely he lobbied on overturning the electric utility MATS regulations in March 2017.³²

There also is little doubt that lobbying to overturn the electric utility MATS regulation is the same particular matter as the Proposed Rule and falls within the same specific issue area. The Action Plan proposed overturning the “maximum achievable technology regulations” of electric

²⁷ Executive Order No. 13770, sec. 1; Office of Government Ethics Memorandum DO-09-011, Mar. 26, 2009, available at <https://bit.ly/2EyPJXI>.

²⁸ 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).

²⁹ *Id.*, sec. 1, para. 7.

³⁰ *Id.*, sec. 2(m).

³¹ 2 U.S.C. § 1602(7), (8).

³² Responding to news reports questioning his role as a coal lobbyist, Mr. Wheeler “distanced himself” from the Murray Energy Action Plan memo, saying that he only saw an early version of the memo and had no role in writing it. Friedman, *New York Times*, Aug. 1, 2018. Even if this is true, it does not mean Mr. Wheeler did not lobby on the MATS regulations in March 2017, for the reasons discussed above.

utilities.³³ MACT is a set of standards under the Clean Air Act which require “reduction in emissions of hazardous air pollutants” to the “maximum degree.”³⁴ The MATS standards are limits on HAP emissions by power plants, and are the application of MACT standards to the industry mentioned in the Action Plan, electric utilities.³⁵ Accordingly, the goal of the Action Plan item was to end MATS standards for electric utilities, which the Proposed Rule could do if it became final.

Both the lobbying to overturn the MATS regulations and the Proposed Rule are covered under the Lobbyist Ban as a “particular matter” or a “specific issue area in which that particular matter falls.”³⁶ The Proposed Rule is a “particular matter of general applicability”³⁷ that focuses on electric utilities power plants, specifically oil- and coal-fired powered plants, as part of a discrete and identifiable class of persons, which covers the same class of electric utilities that Murray Energy focused upon in item six of its Action Plan.³⁸ As a result, they both fall within the definition of a “specific issue area” under OGE’s guidance providing that term means a “particular matter of general applicability.”³⁹ In addition, even if Mr. Wheeler only lobbied on one part of the MATS regulations, he is recused from working on any part of them.⁴⁰

As a result of his apparent lobbying, Mr. 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.⁴¹

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

These facts also suggest that Mr. Wheeler may also have undermined the agency’s integrity when he participated 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.⁴² Moreover, under the Standards

³³ Action Plan, at 19.

³⁴ EPA website, Summary of the Clean Air Act, available at <https://bit.ly/2dVdhF4>.

³⁵ EPA website, Cleaner Power Plants, available at <https://bit.ly/2FWcCUU>.

³⁶ Executive Order No. 13770, sec. 1, para. 7.

³⁷ 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.”).

³⁸ Executive Order No. 13770, sec. 2(r) (citing 18 U.S.C. § 208 and 5 C.F.R. § 2635.402(b)(3)).

³⁹ 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.”).

⁴⁰ *Id.* at 2 (“[An official’s] 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.”).

⁴¹ Executive Order No. 13770, sec. 1, para. 7; 5 C.F.R. 2635.502(a). 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)).

⁴² 5 C.F.R. § 2635.101(b)(14).

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.⁴³

Mr. Wheeler was on notice that his participation in the Proposed Rule would cause a reasonable person to question his impartiality under the Lobbyist Ban. In the absence of an authorization to participate,⁴⁴ Mr. Wheeler's involvement in this matter 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.

Conclusion

Inspectors General play an important role in ensuring the integrity of agency ethics programs and operations and work closely with the Office of Government Ethics ("OGE") to enforce the government's ethics rules.⁴⁵ This is particularly so, since OGE has informed the public that it "does not handle complaints of misconduct, nor does OGE have investigative or prosecutorial authority."⁴⁶ As OGE Director Emory Rounds III recently noted in his nomination hearing, OGE relies on the Inspectors General to investigate possible ethics infractions.⁴⁷

Based on the foregoing, in addition to the matters cited in our previous letter, it is essential to the integrity of the EPA and its ethics program for OIG to investigate Mr. Wheeler's participation in the Proposed Rule to determine whether he violated the Ethics Pledge and the applicable Standards of Conduct, and thereby undermined the integrity of the agency's decision-making process.

⁴³ 5 C.F.R. § 2635.502(a)(2) ("An employee who is concerned that circumstances other 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.").

⁴⁴ 5 C.F.R. § 2635.502(d).

⁴⁵ Walter M. Shaub, Jr., OGE and the Inspector General Community, OGE website, Jul. 17, 2015, *available at* <https://bit.ly/2HVe8ZZ>.

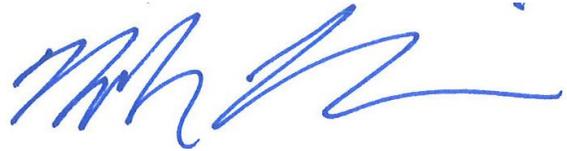
⁴⁶ OGE Mission and Responsibilities, OGE website, *available at* <https://bit.ly/2YRi2s6>.

⁴⁷ Emory Rounds III, Testimony Before the Senate Committee on Homeland Security and Governmental Affairs, May 23, 2018, *available at* <https://bit.ly/2FWJygg> ("I see it as no coincidence that OGE's symbiotic relationship with the Inspector General community began at inception, by way of the Ethics in Government Act (EIGA). Both the EIGA and Inspector General Act came out of the same committee at about the same time in the post-Watergate era. IGs are tasked among other duties- to address fraud, waste, and abuse within the Executive Branch, and OGE's mission to prevent conflicts of interest dovetails with the IGs' missions. OGE, in its preventive role, and I, if am confirmed as OGE's Director, would rely on the IGs' investigative and enforcement capabilities, when issues arise regarding employees and possible ethics infractions. OGE would continue to work with IGs who seek guidance regarding the various ethics laws and rules, especially as might affect an ongoing investigation.").

Acting Inspector General Charles J. Sheehan
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Thank you for your attention to this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Noah Bookbinder". The signature is fluid and cursive, with a long horizontal stroke at the end.

Noah Bookbinder
Executive Director