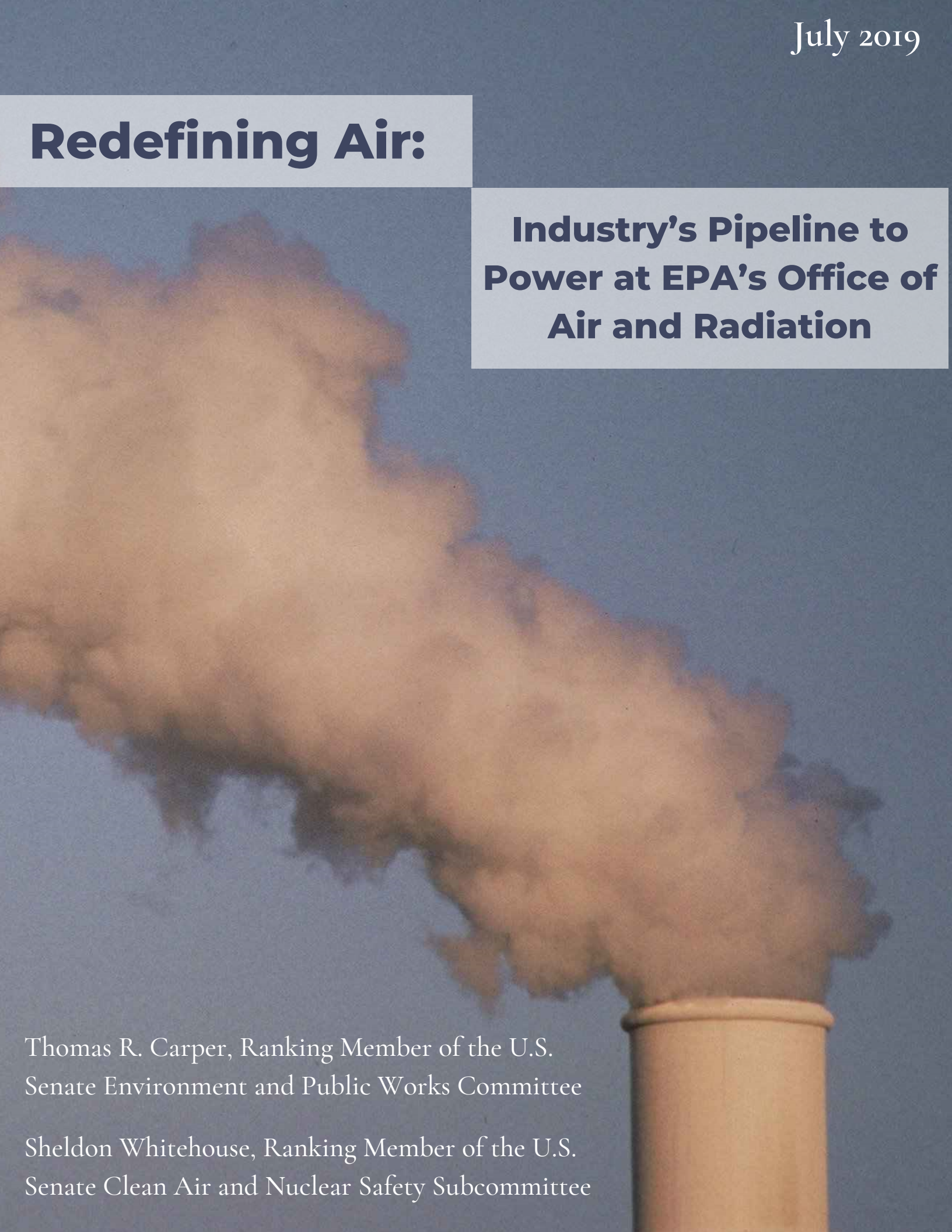
July 2019

Redefining Air:

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



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

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EXECUTIVE SUMMARY

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

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

On June 26, 2019, EPA Administrator Andrew Wheeler announced that Wehrum would be leaving his position at EPA, thanking him for the "tremendous progress he has made" repealing climate regulations and "in so many other regulatory initiatives."[3]

This report demonstrates that Wehrum's "tremendous progress" was largely to the benefit of Hunton-represented industry groups, which have had remarkable success under his tenure achieving their policy objectives to roll back air pollution protections. And while Wehrum left the agency under the scrutiny of congressional oversight, after less than two years on the job, Harlow, his senior counsel, remains.

Staying behind as well are the Hunton-driven rollbacks that Wehrum and Harlow undertook, which will continue to have consequences for everyone who breathes air. These include major efforts to weaken or undermine landmark climate and air toxics regulations, such as the Clean Power Plan (CPP) and the Mercury and Air Toxics Standards (MATS) rule, at the expense of human health. For example, the Trump EPA proposed to repeal the Clean Power Plan despite the fact that, by the Trump EPA's own admission, doing so could prematurely kill 1,400 people per year.[4] Although the final rule stayed

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[1] Q&A With Hunton & Williams' Bill Wehrum, LAW360, May 6, 2013, https://www.huntonak.com/images/content/2/4/v2/2407/Law360_Bill_Wehrum_QA.pdf

[2] Zack Colman, *Industry group tied to EPA air chief dissolves*, POLITICO, May 10, 2019.

[3] Statement of Administrator Andrew Wheeler regarding the departure of Assistant Administrator Bill Wehrum, June 26, 2019 (press release).

[4] Lisa Friedman, *Cost of New E.P.A. Coal Rules: Up to 1,400 More Deaths a Year*, N.Y. TIMES, Aug. 21, 2018.

largely the same in substance, the economic analyses were changed to no longer show those harms.[5] As another example, Wehrum withdrew the "Once In, Always In" policy for toxic air pollution, and on June 25, 2019 the Trump EPA issued a proposed rule to codify the shift, even while acknowledging that it would allow 3,912 facilities nationwide to substantially increase their toxic air pollution.[6] Independent analyses indicate that those sources could more than double their toxic air pollution under this new approach.[7]

But these higher-profile rollbacks are not the only Hunton-advocated policies being carried out by the Trump EPA. This investigation also identified numerous technical, often arcane, policy shifts sought by Hunton-represented industry groups that carry major air pollution implications. These policy shifts, and agency actions to implement them, illustrate the close relationship between Hunton and former Hunton employees who now direct this country's air pollution policy at EPA. Such shifts include the adoption of a novel legal interpretation of New Source Review regulations that was used to abandon EPA's legal posture in an enforcement action against a Hunton client, DTE Energy; a change to the meaning of "conflict of interest" that allowed EPA to purge academic researchers from several of its scientific advisory panels and replace them with industry-funded consultants; a redefinition of "ambient air" that would exclude more open air from being subject to the Clean Air Act; and even an argument that the Clean Air Act's looser requirements for "International border areas" should apply everywhere in the country, regardless of proximity to any international border.

This report also explores significant questions about the ongoing relationship between Wehrum, Harlow, and the member companies of the various Hunton-represented industry groups. Such questions include whether Wehrum and Harlow have been forthright about their past legal work on behalf of these entities, and whether they have adhered to the ethical requirements of public service. This investigation identifies circumstances in which Wehrum and Harlow may have involved themselves in litigation and other matters to benefit Hunton and former clients; failed to report the existence of former clients from which they should have been recused; and impermissibly met with former clients, including former clients that were not properly disclosed to agency ethics officials.

There has been good deal of reporting on the dissolution of UARG, which "has participated in every major EPA rulemaking affecting the electric generating industry" since the group was formed in 1977.[8] UARG repeatedly advocated in those rulemakings for shifts in public policy that would increase air pollution, exacerbate climate change, and limit public access to information about pollution in their communities.

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[5] https://www.epa.gov/sites/production/files/2019-06/documents/utilities_ria_final_cpp_repeal_and_ace_2019-06.pdf

[6] Proposed Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act at 95 (pre-publication version).

[7] *See* ENVTL. DEF. FUND, PRUITT'S NEW AIR TOXICS LOOPHOLE at 2 (Aug. 2018) (estimating that eligible facilities in the Houston-Galveston area could increase their toxic air pollution by 146% to 152% under the new approach).

[8] Defendant Duke Energy Corp.'s Reply, *United States et al. v. Duke Energy Corp.*, 2003 WL 25509066 (M.D.N.C. Feb. 13, 2003) (citing Declaration of Norman W. Fitchorn).

For example, while at Hunton, one of Harlow's clients was DTE Energy, a UARG member. DTE sought Hunton's assistance in an EPA enforcement case alleging that one of the utility's coal-fired power plants had emitted pollution in violation of the Clean Air Act's New Source Review (NSR) program. In that case, Wehrum personally filed a brief as a lawyer for UARG in support of DTE's position.[9] Despite Wehrum's private practice advocacy, DTE Energy had not been successful in its efforts to resolve this NSR matter. The utility had already lost twice before the U.S. Court of Appeals for the 6th Circuit, and faces millions of dollars in penalties.

On December 7, 2017, shortly after Harlow and Wehrum left Hunton for EPA, the agency published a memorandum (known as the "DTE Memo"). The DTE Memo reversed the agency's position in Hunton's DTE case.[10] Furthermore, the release of the DTE Memo was timed so that DTE's Hunton lawyers could file it with the U.S. Supreme Court before the Court decided the very next day whether it would hear DTE's appeal.[11] These actions – along with other evidence suggesting that Wehrum and Harlow participated in the development of the DTE Memo, despite ethical rules barring their involvement in matters involving their particular clients (UARG and DTE Energy, respectively) – led Senator Sheldon Whitehouse (D-RI), along with Senate Environment and Public Works Committee Ranking Member Tom Carper (D-DE) and House Energy and Commerce Chairman Frank Pallone, Jr. (D-NJ) to ask the Acting Inspector General of the EPA on February 25, 2019 to undertake an investigation.[12] On May 10, 2019, following additional supplemental filings with the Acting Inspector General,[13] along with other disclosures[14] and congressional investigation,[15] UARG's "policy committee" announced that they would "disband" the organization.

UARG is not the only Hunton-represented industry group comprised of polluting interests with business before the EPA. On May 6, 2019, the offices of Senators Carper and Whitehouse discovered that language included by EPA in the DTE Memo was copied verbatim from a document that Hunton

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[9] Brief Amici Curiae of UARG et al. in Support of Defendants-Appellees, at *2, *United States v. DTE Energy Co. & Detroit Edison Co.*, 2012 WL 1656078 (May 8, 2012) (listing Wehrum as "Counsel for UARG").

[10] Memorandum from EPA Admin'r Scott Pruitt to Reg'l Administrators, *New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected Actual Applicability Test in Determining Major Modification Applicability*, at 8 (Dec. 7, 2017).

[11] Letter from Senator Whitehouse, Senator Carper, Representative Pallone to Charles J. Sheehan, Acting Inspector General, U.S. EPA, at 7–8 & Exhs. M–N (emails from EPA political appointee Mandy Gunasekara stating that the memorandum "needs to go out before" the Supreme Court considers whether to hear the DTE enforcement case), https://www.whitehouse.senate.gov/download/doj-ig-memo-letter.

[12] https://www.whitehouse.senate.gov/news/release/democrats-call-for-investigation-of-top-epa-officials-role-in-reversing-enforcement-position. An ethics watchdog group, Citizens for Responsibility and Ethics in Washington (CREW), later filed a supplemental complaint with the Inspector General. https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2019/05/28205410/William-Wehrum-Complaint-29-MAY-2019.pdf.

[13] https://www.whitehouse.senate.gov/download/wehrum-oig-supplemental-letter

[14] https://www.epw.senate.gov/public/index.cfm/press-releases-democratic?ID=E598EA19-BB86-4737-ABE8-BE97F356D11E

[15] https://energycommerce.house.gov/newsroom/press-releases/ec-leaders-launch-investigation-of-secretive-front-group-uarg-and-its-ties

had submitted to EPA on behalf of the Air Permitting Forum,[16] a similar Hunton-represented industry group with little existence independent from the law firm.

The full list of Hunton organizations examined in this report includes:

- The **Utility Air Regulatory Group**, itself a former client of both Wehrum and Harlow, which until its recent demise was comprised of multiple trade organizations and coal-fired power plant operators, including at least three more former Wehrum clients (Dominion, Duke Energy, and Salt River Project) and at least two more former Harlow clients (DTE Energy and LG&E & KU Energy);

- The **Air Permitting Forum**, which nominally advocates on Clean Air Act permitting matters, and whose members include one former client shared by Wehrum and Harlow (Chevron), as well as at least three other former Wehrum clients (ExxonMobil, Georgia-Pacific, and General Electric), and six additional companies that are not former Wehrum or Harlow clients (Fiat Chrysler, Ford, General Motors, Toyota, Shell, and International Paper);

- The **Auto Industry Forum**, a "sub-coalition" of the Air Permitting Forum that represents several automakers on issues related to stationary source emissions, and whose members include at least Fiat Chrysler, Ford, General Motors, and Toyota;

- The **NAAQS Implementation Coalition**, which advocates for policy changes that would increase opportunities for political interference with, or otherwise weaken, air quality standards, and whose members include UARG (and thus UARG's members) and at least three other former Wehrum clients (the American Forest & Paper Association, the American Petroleum Institute, and the Brick Industry Association); and

- The **CCS Alliance**, which advocates on issues related to carbon capture and storage matters, and whose membership includes at least two former UARG members (the National Mining Association (NMA) and the National Rural Electric Cooperative Association (NRECA)), as well as Berkshire Hathaway Energy, NRG Energy, PacifiCorp, and Zurich North America.

This report provides a comprehensive examination of Hunton court filings, public comments, and regulatory petitions made on behalf of these five organizations in order to determine the extent to which they have influenced policy within the Trump EPA air office. Although the examination covers submissions to EPA and the courts extending back decades, this report focuses primarily on submissions made during the Trump Administration, including submissions made in response to EPA's April 2017 request for the identification of "regulations that may be appropriate for repeal, replacement, or modification."[17]

[16] https://www.epw.senate.gov/public/index.cfm/press-releases-democratic?ID=E598EA19-BB86-4737-ABE8-BE97F356D11E

[17] 82 Fed. Reg. 17793 (Apr. 13, 2017).

The analysis shows that since the beginning of the Trump Administration, these organizations have been highly successful in obtaining policy outcomes that benefit their corporate clients at the expense of everyone who breathes air (Finding #1). They also raise more questions about whether Wehrum and Harlow have been forthright in their ethical obligations to put the public trust above the interests of their friends and former clients, and to avoid even the appearance of impropriety (Finding #2).

In sum, this investigation indicates that private companies no longer need to pay for Hunton lawyers to effectuate their goals, because those very same lawyers are now representing their interests at the highest levels within EPA, at the taxpayers' expense. Summaries of the key findings are below.

SUMMARY OF FINDING #1: With Wehrum and Harlow at EPA, Hunton-represented industry groups are getting the policy results they seek.

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

- Although **UARG** has taken dozens of industry-friendly positions on the Clean Air Act, early in the Trump Administration it emphasized 17 rules, sets of rules, or programs it recommended be withdrawn, revisited, or severely weakened. Of those, the Trump EPA has already taken actions responsive to eight of UARG's most significant requests to weaken air pollution rules, including the reversal adopted in the DTE Memo.[18]

- The **Air Permitting Forum** (an umbrella group that includes the **Auto Industry Forum**) prioritized 19 changes to permitting requirements, emission standards, or the National Ambient Air Quality Standards (NAAQS). Of those priorities, the Trump EPA has already formally adopted eight rollbacks – including using verbatim text submitted by the Forum in the DTE Memo – and has stated that it is actively considering another two of the Forum's priorities.[19]

[18] The only UARG priority that the Trump EPA appears to have proposed rejecting is to remove the subcategory "stationary combustion turbines" from the Clean Air Act's hazardous air pollutant (HAP) program. That is because the D.C. Circuit ruled 12 years ago that EPA has no authority to remove a subcategory from HAP regulation. However, the Trump EPA has proposed that no additional health-based standards should be required for the subcategory.

[19] The only Forum priority that the Trump EPA appears to have rejected outright was withdrawal of an EPA rule regarding how the agency would treat disagreements among federal courts regarding the Clean Air Act – a rule

- The **NAAQS Implementation Coalition** requested dozens of changes to how the NAAQS are developed and implemented. The Coalition's most notable successes have been to undermine the science-based NAAQS development process, which by statute is led by the independent Clean Air Scientific Advisory Committee (CASAC). The Trump EPA has adopted the Coalition's recommendations to change CASAC's membership – including through the appointment and elevation of Committee members who have scientific views that are well outside the mainstream – and changed the definition of "conflict of interest" to allow for the removal of independent members from academia, while adding industry-funded members. The full extent of Coalition's successes may become more evident as the Trump EPA reviews the NAAQS for ground-level ozone (smog) and particulate matter (soot), to be proposed in March 2020.

- Although the **CCS Alliance** nominally promotes carbon capture and storage (CCS) technology, its submissions to EPA's air office have largely been to advocate that EPA should *not* use the existence of partial CCS technology as the basis for any air pollution standards. The Trump EPA has proposed to no longer use partial CCS technology to set greenhouse gas emission limitations for new power plants, echoing the Alliance's positions.

SUMMARY OF FINDING #2: Former Hunton lawyers Wehrum and Harlow appear to have violated ethical requirements in their rush to serve former clients tied to Hunton-represented industry groups.

Wehrum and Harlow's continued engagement with their former clients and Hunton-represented industry groups (and the members thereof) raises numerous ethical questions for EPA's Designated Ethics Official, EPA's Inspector General, and the U.S. Office of Government Ethics. Specifically, the "Trump Ethics Pledge" (Executive Order 13770) prohibits Wehrum and Harlow, "for a period of 2 years from the date of [their] appointment[s]," from participating in any meeting, any communications, or "any particular matter involving specific parties that is directly and substantially related to [their] former employer [Hunton] or former clients, including regulations . . . ."[20] A limited exception to the Trump Ethics Pledge permits them to participate in "communications and meetings" with Hunton or their former clients, but only if the event is both (1) on a matter of general applicability, and (2) "open to all interested parties," a phrase interpreted to mean "*five or more* stakeholders" representing a diversity of viewpoints, "even if *one* of the stakeholders is a former employer or former client."[21]

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unanimously upheld by courts as lawful against a legal challenge brought by Wehrum himself in 2016 when he was in private practice.

[20] E.O. 13770 § 1, ¶ 6 ("Trump Ethics Pledge").

[21] Memorandum from Robert I. Cusick, Dir. of U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, DO-09-011, at 1–2 (Mar. 26, 2009) (explaining the meaning of the phrase "open to all interested parties") (emphasis added); Legal Advisory from David J. Apol, General Counsel of U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, LA-17-02, at 1 (Feb. 6, 2017) (emphasis added) ("With respect to [President Trump's] Executive

As of July 2, 2019, neither Wehrum nor Harlow had received a waiver from the Trump Ethics Pledge.[22] In addition, the Office of Government Ethics' impartiality regulations and Wehrum's pre-confirmation ethics agreement make his recusal from such meetings mandatory, unless he had received prior written authorization from an agency ethics official.[23] As of September 29, 2018, Wehrum had never received prior authorization from an agency ethics official to participate in a matter otherwise prohibited by the Office of Government Ethics regulations.[24]

This report demonstrates that:

a. ***Wehrum and Harlow appear to have violated the terms of the Trump Ethics Pledge and Ethics in Government Act regulations by participating in the development of the DTE Memo.*** Although Wehrum and Harlow were both recused from working on "any particular matter" in which a recent former client is a party, or in which Hunton "represents a party," Wehrum and Harlow appear to have violated this ethical requirement by involving themselves in the development of the DTE Memo, in which EPA (1) analyzed litigation in which DTE, a former Harlow client, was represented by Hunton, and in which Wehrum entered an appearance on behalf of UARG; (2) reversed EPA policy on the eve of the Supreme Court's consideration of this litigation to adopt the position Hunton advocated on behalf of its clients that the agency should not "second-guess" polluters' own calculations of how much pollution they expect to emit; (3) directly copied language submitted to EPA by Hunton on behalf of the Air Permitting Forum into the DTE Memo; and (4) cited the Hunton-DTE litigation as the basis for that shift in policy. Although EPA previously stated that Wehrum was not involved in developing the DTE Memo,[25] Wehrum subsequently acknowledged this was false.[26]

b. ***In his recusal statement, Wehrum failed to disclose at least three former clients that he previously represented in court – the Alliance of Automobile Manufacturers; the Minnesota Trucking Association; and the Minnesota Automobile Dealers Association***[27] – in addition to two confidential clients he is contractually prohibited from

Order 13770, ethics officials and employees may continue to rely on OGE's prior guidance regarding [President Obama's] Executive Order 13490 to the extent that such guidance addresses language common to both orders").

[22] U.S. Office of Gov't Ethics, *USOGE | Agency Ethics Pledge Waivers (EO 13770)* (last visited July 2, 2019).

[23] *See* Letter from William L. Wehrum to Kevin S. Minoli, Designated Agency Ethics Official, U.S. EPA, at 1 (Aug. 28, 2017) (citing 5 C.F.R. § 2635.502(d)).

[24] Letter from Kevin S. Minoli, Designated EPA Ethics Official, to Sen. Sheldon Whitehouse, at 1 (Sept. 29, 2018) ("To date, Mr. Wehrum has not received any waivers or authorizations issued pursuant to Executive Order 13770, 18 U.S.C. § 207(b)(1), or 5 C.F.R. § 2635.502(d).").

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

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

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

disclosing. Wehrum's failure to disclose his recent former clients frustrates the "screening arrangement" in his recusal statement, which stated that his subordinates would "assist in screening EPA matters" involving the entities he listed to ensure his compliance with ethical rules. Furthermore, although the recusal statements for both Wehrum and Harlow disclosed "confidential" clients, only Harlow's statement acknowledges his personal obligation "not to participate in specific party matters for the duration of my ethics obligation," even for clients "who are not listed."[28]

c. ***Wehrum has had at least six meetings with one of his undisclosed former clients, the Alliance of Automobile Manufacturers, in apparent violation of Ethics in Government Act regulations and the Trump Ethics Pledge.***[29] None of these meetings appear to have been "open to all interested parties" as the Office of Government Ethics defines that term, and were thus impermissible even if Wehrum only spoke about generally applicable regulations affecting his former client's interests. All members of the Hunton-represented industry group the Auto Industry Forum are also members of the Alliance of Automobile Manufacturers.

d. ***Wehrum and possibly Harlow appear to have artificially – and perhaps improperly – limited their list of former clients from which they are recused.*** Although Wehrum and Harlow were nominally recused from certain meetings with "UARG," their recusal statements imposed no limits on discussions with *UARG members* (1) who paid hefty UARG "dues" that went almost exclusively to Hunton (and thus to Wehrum and Harlow as Hunton partners), or (2) with whom Wehrum and Harlow may have developed an attorney-client or other privileged relationship, even absent direct billing. Under D.C. attorney ethics rules it is "well established" that "neither a written agreement nor the payment of fees is necessary to create an attorney-client relationship."[30] Additionally, Hunton and UARG have successfully argued in court that Hunton lawyers and UARG members have attorney-client privileged conversations, adding further credence to the notion that Wehrum and Harlow should have listed more UARG members as former clients in their recusal statements.

e. ***Wehrum repeatedly met with clients he worked with in private practice – actions that appear to violate the intent of the Trump Ethics Pledge and Wehrum's own ethics agreement.*** A review of Wehrum's calendars shows that at least 10 different UARG members have been in attendance at nine separate meetings with Wehrum (American Electric Power; Dominion Energy; Duke Energy; Minnesota Power; Otter Tail Power; Southern Company;

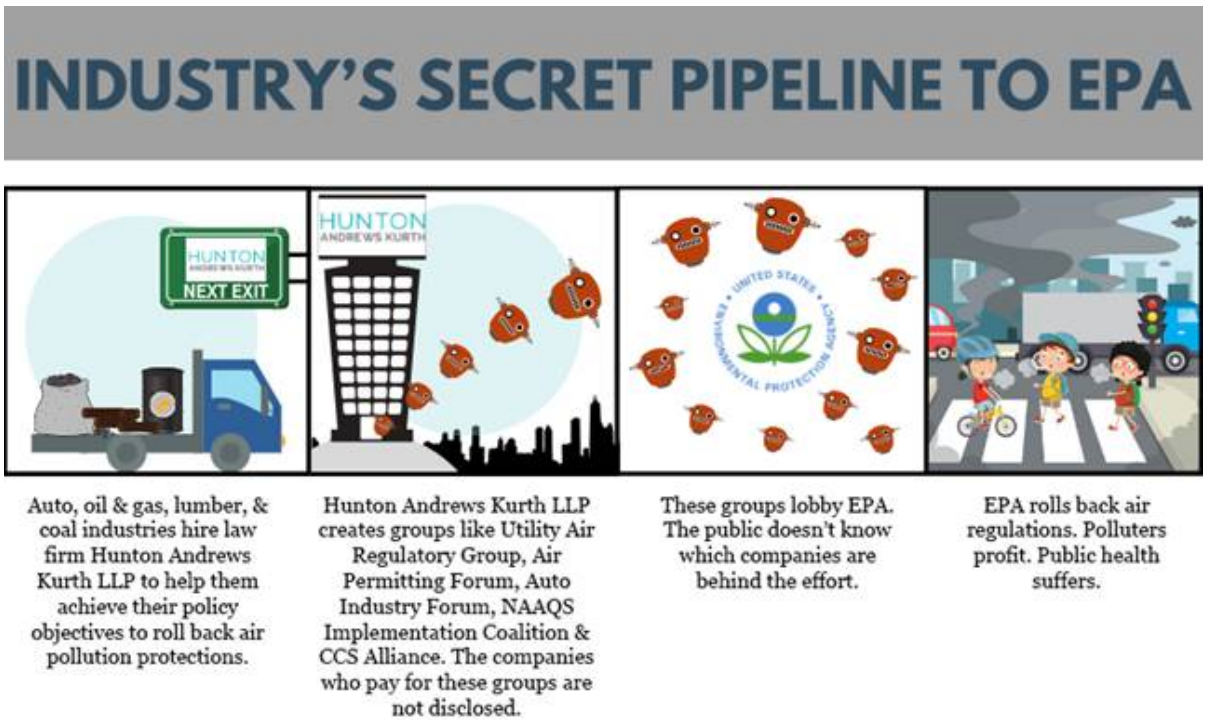
Automobile Dealers Association, Alliance of Automobile Manufacturers, American Petroleum Institute, and American Fuel & Petrochemical Manufacturers").

[28] *Compare* Harlow recusal at 2 nn.1–2 ("For my former clients who are not listed, I understand that I am personally obliged not to participate in specific party matters for the duration of my ethics obligations."), *with* Wehrum recusal at 2 n.1 (simply acknowledging the existence of two "confidential clients").

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

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

the American Coalition for Clean Coal Electricity; the Edison Electric Institute; the National Mining Association; and the National Rural Electric Cooperative Association). On December 7, 2017, the same day EPA issued the DTE Memo, Wehrum gave a closed-door briefing on Clean Air Act regulatory developments at his former employer Hunton. This presentation occurred during a two-day set of meetings at Hunton that appears to have been a pre-planned gathering of UARG's membership. Such a gathering raises the prospect that the event was really a meeting with a single entity, UARG, which Wehrum was prohibited from meeting with alone – not a meeting with five parties. In any event, the meeting was also not "open to all interested parties" as required by the Trump Ethics Pledge, because Hunton only invited its own clients to this closed-door meeting. Wehrum also held two private meetings with his former client General Electric (which is also a member of the Air Permitting Forum). Under the terms of his ethics agreement, Wehrum is supposed to be recused from "any meetings or communications relating to the performance of [his] official duties" with his former clients or employer – the only exception being for meetings with at least five parties present where the discussion is limited to matters of general applicability. The purpose of these meetings is unknown; one of these meetings was solely with General Electric, while the other was with five members of the Gas Turbine Association, which at the time of the meeting was chaired by a General Electric manager.



SECTION #1: With Wehrum and Harlow at EPA, Hunton-represented industry groups are getting the policy results they seeking.

Introduction

This report describes a comprehensive examination of Hunton court filings, public comments, and regulatory petitions made on behalf of amorphous "coalitions," "forums," "groups," and "alliances," that are secretive about their membership and have little existence outside the Hunton law firm. In fact, the Hunton-represented industry groups described in this report appear to exist solely for the purposes of coordinating payments to Hunton for legal services. They are not incorporated anywhere, hold no legal status, and are not required to publicly disclose their members. Their "staff" are attorneys at Hunton, where Wehrum and Harlow worked before assuming their roles at EPA. The organizations exist only on paper, and among the benefits they impart on their "members" is the assumption of anonymity and the ability to coordinate a well-funded, expert-led effort to influence EPA under the public's radar.

Hunton-represented industry groups are achieving remarkable success with their policy objectives, on everything from major efforts to roll back landmark climate and toxic air pollution regulations, to more technical changes that allow for more air pollution such as by narrowing the definition of "ambient air" or expanding the Clean Air Act's "International border areas" to include states without international borders.

Most of these Hunton-represented industry groups filed comments in response to EPA's April 2017 request for the identification of "regulations that may be appropriate for repeal, replacement, or modification."[31] One of the groups (UARG) sought 17 rollbacks, and the Trump EPA air office has acted on the eight most significant ones. Another group, the Air Permitting Forum, sought 13 changes to weaken Clean Air Act permitting programs, and the Trump EPA air office has acted upon or has stated it is actively considering eight of the requests. Still another Hunton-represented industry group formed to weaken the National Ambient Air Quality Standards (NAAQS) program has seen the Trump EPA begin to implement its suggestions for doing so, including by removing government-funded academics from science advisory panels under the guise of "conflict of interest," while adding industry-funded consultants who have long questioned the health effects of pollution.

Appendices to this report contain more detailed information, including quotes and citations, to where the Trump EPA appears to be granting the requests of these Hunton-represented industry groups. Research revealed at least five such organizations represented by Hunton that have advocated for policy changes from the EPA air office:

- Utility Air Regulatory Group (UARG)
- Air Permitting Forum ("the Forum")
- Auto Industry Forum (AIF)

[31] 82 Fed. Reg. 17793 (Apr. 13, 2017).

- CCS Alliance ("the Alliance")
- NAAQS Implementation Coalition ("the Coalition")

In some cases, these organizations are also members of each other. For example, UARG is a "member" of the NAAQS Implementation Coalition, and the Auto Industry Forum is a "sub-coalition" of the Air Permitting Forum. This makes it particularly difficult to determine who is a member of each group. In all cases, however, the public-facing representatives of these organizations are lawyers at Hunton.

Below are descriptions of each Hunton-represented industry group, along with a summary of some of the long-desired policy goals the groups are achieving from the Trump EPA's air office. This report includes detailed appendices cataloguing these and other positions taken by the Hunton-represented industry groups that the Trump EPA's air office has subsequently adopted.

a. The Utility Air Regulatory Group (UARG)

One of Wehrum's and Harlow's mutual clients was the recently-disbanded Utility Air Regulatory Group (UARG), which advocates against pollution limits for fossil fuel-fired power plants and their related interests (*e.g.*, coal mining). In court filings, UARG's Hunton lawyers have stated that, "since its inception in 1977, UARG has participated in every major EPA rulemaking affecting the electric generating industry."[32] UARG has alternatively described itself as an "informal consortia" of power plant operators and "national associations";[33] "an ad hoc, unincorporated association" of electricity generators and "industry groups";[34] and as "a not-for-profit association" of individual [electric] generating companies and national trade associations."[35]

In 1988, UARG counted 64 individual electric utility companies among its members, as well as three related trade associations.[36] By 2017, UARG's membership consisted of 25 power plant companies, five coal-related trade associations, and the federally owned Tennessee Valley Authority.[37]

Together, Hunton and UARG have been among the most prolific industry-funded participants in EPA rulemakings and litigation under the Clean Air Act (CAA). In 2017, Mr. Wehrum accepted an award for Hunton's representation of UARG and others fighting public health protections at EPA, stating that those fights are "very important issues to our clients, and we are doing everything we can

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[32] Defendant Duke Energy Corp.'s Reply, *United States et al. v. Duke Energy Corp.*, 2003 WL 25509066 (M.D.N.C. Feb. 13, 2003) (citing Declaration of Norman W. Fitchorn).

[33] Hunton & Williams comments of UARG et al., Docket Id. No. 102-RQ-14-116, at 1 (Aug. 25, 1983).

[34] Brief for Intervenor-Petitioners UARG et al., Case Nos. 14-1112 & 14-1151 at v (D.C. Cir.) (filed Dec. 30, 2014).

[35] *See* Comments of UARG, Docket Id. ID No. EPA-HQ-OAR-2017-0355-24421 (Aug. 31, 2018).

[36] *See Maine v. Thomas*, 690 F. Supp. 1106, 1107 n.2 (D. Me. 1988) (describing those entities all as "members of the Utility Air Regulatory Group").

[37] Leaked UARG Policy Committee document

to represent them successfully in these issues."[38] Wehrum's nomination to lead the Trump EPA air office was announced less than nine months later.

While Hunton may attempt to imply that "UARG" is an organization with meaningful independence from Hunton, the facts indicate otherwise:

- Documents indicate that although UARG counts many corporations and trade associations among its "members," the organization itself has little existence outside the walls of Hunton's firm. Indeed Hunton itself "founded" UARG in the late 1970s,[39] and has served as counsel to UARG and its members ever since.

- An internal budget proposal presented to the "UARG Policy Committee" in June 2017 sought nearly $2 million in "dues" from UARG members, to cover work during the period "June 23 to early September 2017."[40] Although couched as a request for "technical consultant *and* legal support," only 2.3% of the proposed budget ($45,000 out of $1,955,000) would have supported technical services. The remaining 97.7% went to Hunton for legal services in 11 subject areas.

- Hunton appeared to be in control of day-to-day management and growth of UARG itself. For example, Hunton was the sole entity paid for UARG's "planning/general coordination," with $100,000 in legal fees proposed to go to Hunton in exchange for "continuation of efforts to recruit new members" for UARG.

The following is a list of all UARG's members as of June 2017, shortly before Wehrum and Harlow left for EPA.[41] The five Wehrum/Harlow clients from which they are formally recused are also noted below:[42]

- American Electric Power
- Ameren
- Consumers Energy
- **Dominion (Wehrum recused)**
- **DTE Energy Co. (Harlow recused)**
- **Duke Energy Corp. (Wehrum recused)**
- Dynegy Inc.
- Eversource Energy/Pub Service of N.H.
- FirstEnergy Corp.
- Kansas City Power & Light Co.

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[38] Stan Parker, *Environmental Group Of The Year: Hunton & Williams*, LAW360, Jan. 17, 2017 (9:59 PM EST).

[39] *United States v. Illinois Power,* Civil Action No. 99-CV-833-MJR (S.D. Ill. April 24, 2003) (J. Proud).

[40] Leaked UARG Policy Committee document at 1.

[41] *See id.* at 6.

[42] *See* Wehrum recusal at 2 (listing former clients); Harlow recusal at 2 (listing former clients).

- **LG&E & KU Energy LLC (Harlow recused)**
- Luminant
- Minnesota Power Co./ALLETE
- NiSource Inc.
- Oglethorpe Power Corp.
- Ohio Valley Electric Corp.
- Otter Tail Power Co.
- Pinnacle West/Arizona Public Service
- **Salt River Project (Wehrum recused)**
- South Carolina Elec & Gas Co. (SCANA)
- Southern Company Services
- Tri-State Generation & Transmission
- Tucson Electric Co.
- Wabash Valley Power Association
- WeEnergies
- American Coalition for Clean Coal Electricity
- American Public Power Association
- EEI-J/E [Edison Electric Institute]
- National Rural Electric Cooperative Association (NRECA)
- National Mining Association (NMA)
- Tennessee Valley Authority (TVA)

UARG's 2018 budgeting document, prepared for a meeting less than three months before Wehrum was nominated, had projected that the group would require an overall budget of between $8.2 and $8.5 million. The precise amount, UARG wrote, would depend on whether "the new Administration is ready and able in 2018 to undertake a substantial number of initiatives to reform the unreasonable Clean Air Act programs of the previous Administration...."[43] Wehrum has stated that he does not remember this two-day UARG meeting, at which his former client voted on whether to pay Hunton millions of dollars in legal fees, but others have confirmed he attended.[44]

UARG has taken dozens of industry-friendly positions on the Clean Air Act, the most salient of which can be found in Appendix 1 to this report alongside the status of corresponding Trump EPA actions.

[43] *See* Leaked UARG Policy Committee document at 3 (projecting an $8.2 million budget request, or potentially "3-4% higher than that" depending on the Trump EPA's ambitions).

[44] Zack Colman, *Industry group tied to EPA air chief dissolves*, POLITICO, May 10, 2019.

In May 2017, UARG submitted a prioritized set of 17 rules, sets of rules, or programs it suggested should be withdrawn, revisited, or changed in ways that would severely weaken public health protections.[45] Of those 17 rollbacks, the Trump EPA has taken concrete steps to effectuate the eight most significant matters:

1. UARG asked EPA to repeal the Clean Power Plan's greenhouse gas (GHG) emission guidelines for certain existing power plants, and to replace them with weaker requirements and significant room for states to create further loopholes. The Trump EPA issued a final rule doing so in June 2019. The Trump EPA's own analysis of the proposal projected that it could prematurely kill 1,400 people a year by 2030.[46] Although the final rule stayed largely the same in substance, the economic analyses were changed to no longer show those harms.[47]

2. UARG asked EPA to repeal or revise GHG limits for new power plants. The Trump EPA has proposed to do so, and to finalize the rule in December 2019.

3. UARG asked EPA to weaken the framework interstate pollution rules. On August 31 and October 19, 2018, the Trump EPA issued memoranda and guidance documents that would allow for more interstate air pollution under those framework rules.[48]

4. UARG asked EPA to make changes to the New Source Review (NSR) permitting program that would allow older sources to continue polluting without having to install additional controls. The Trump EPA has proposed rules and issued guidance documents to weaken NSR in at least five different ways, starting December 7, 2017 with the "DTE Memo," which announced that the agency would no longer "second guess" the projections of UARG members and other large polluters regarding whether upgrades would "significantly increase" emissions and thus require pollution controls. Wehrum and Harlow's involvement in developing the DTE Memo raises substantial ethical concerns, as discussed in Section 2 of this report. The Trump EPA has announced plans to propose multiple changes to the NSR program in the summer of 2019.

5. UARG asked EPA to weaken the rules restricting regional haze in national parks and wilderness areas. On December 20, 2018 and April 4, 2019, the Trump EPA issued guidance documents to that effect,[49] and also announced in a letter to Hunton that it would propose a rule to accomplish other related UARG-sought changes.

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[45] Hunton comments for UARG, Docket Id. No. EPA-HQ-OA-2017-0190-40140 (May 12, 2017).

[46] Lisa Friedman, *Cost of New E.P.A. Coal Rules: Up to 1,400 More Deaths a Year*, N.Y. TIMES, Aug. 21, 2018.

[47] https://www.epa.gov/sites/production/files/2019-06/documents/utilities_ria_final_cpp_repeal_and_ace_2019-06.pdf

[48] *See* Stuart Parker, *EPA Guidance Grants States 'Flexibilities' To Avoid Interstate Air Mandates*, INSIDEEPA, Nov. 1, 2018.

[49] *See, e.g.*, Stuart Parker, *EPA Expands Air Data Waivers for 'Exceptional' Events, Sparking Criticism*, INSIDEEPA (Apr. 11, 2019) (noting that the expanded waivers could be used in "selecting data to show compliance with EPA's rule limiting regional haze).

6. UARG asked EPA to repeal a rule that, if repealed, would allow states to create loopholes where polluters can emit unlimited quantities of air pollution during certain operational phases, such as when the facility is "malfunctioning." The Trump EPA has proposed to partially repeal that rule, and has told courts that it is considering whether to allow additional loopholes.

7. UARG asked EPA to reconsider the GHG emission guidelines for municipal solid waste landfills – presumably to establish regulatory precedents that could limit similar EPA regulations of existing coal-fired power plants. The Trump EPA announced that it is reconsidering the landfill rule and, separately, has proposed to postpone some of the rule's implementation deadlines from six months to two years.

8. UARG asked EPA to reduce the electronic reporting requirements for emissions of hazardous air pollution under the Mercury and Air Toxics Standards (MATS) rule. The Trump EPA has granted power plants a two-year reprieve from these requirements, and has also proposed to reverse the economic and legal underpinning of the entire MATS rule.

EPA appears to have outright rejected only one UARG request from this prioritized wish list: a request to remove the "stationary combustion turbine" subcategory from regulation under the Clean Air Act's hazardous air pollution program. EPA has proposed to reject this request because a D.C. Circuit case expressly holds that EPA has no legal ability to remove subcategories (rather than categories) from regulation under the hazardous air pollution program.[50] However, the Agency proposed to determine that no additional health-based controls on the subcategory were necessary.

b. The Air Permitting Forum ("the Forum") and its sub-coalition, the Auto Industry Forum (AIF)

Another opaque "coalition" nominally housed at Hunton is the Air Permitting Forum ("the Forum"). In public comments, the Forum has described itself as "a coalition of manufacturing companies focused on stationary source implementation issues under the Clean Air Act"[51] who "are subject to numerous CAA regulatory requirements . . . ."[52] The Forum is closely associated with the Auto Industry Forum (AIF), which describes itself as a "sub-coalition" within the Forum that is focused on stationary source regulations affecting the automobile manufacturing industry.[53] Because AIF is a sub-entity of the larger "Forum," this investigation ascribes the Forum's policy positions to all of its members, including those within the smaller AIF entity.

[50] 84 Fed. Reg. 15046, 15068 (Apr. 12, 2019).

[51] Forum comments on Title V rule, Docket Id. No. EPA-HQ-OAR-2016-0194-0031, at 1 (Oct. 24, 2016).

[52] Forum comments on CPP repeal, Docket Id. No. EPA-HQ-OAR-2017-0355-19903, at 1 (Apr. 26, 2018),

[53] Forum comment on stratospheric ozone, Docket Id. No. EPA-HQ-OAR-2003-0167-0166 at 1 (March 7, 2012).

The Forum originally existed outside of Hunton, but the organization's two longtime lawyers were hired by Hunton in June 2016.[54] Since then, Wehrum and Harlow's former law firm has represented the Forum on numerous matters before EPA and the courts, including in litigation filed jointly with Wehrum himself against EPA.[55]

Like UARG, the Forum does not have any apparent physical address, or even a public website. In the headers for the Forum's and AIF's public comments, the organization has listed individuals serving in various roles for the groups, such as an "Executive Director," "Director," "Counsel," and "Manager" – but all of these individuals are lawyers employed by the Hunton law firm, and their contact information is their Hunton email address.[56]

Unlike UARG, however, neither the Forum nor its sub-coalition AIF are listed as a former client of Wehrum or Harlow. Accordingly, it appears that neither Wehrum nor Harlow have recused themselves from meetings with, or working on particular matters related to, the Forum or its representatives.

Evidence suggests that the Forum is comprised of at least some former Wehrum and Harlow clients. In May 2015, 18 individuals associated with the Forum met with EPA staff about Clean Air Act rulemakings. As required,[57] EPA staff docketed summaries of those meetings, including a list of attendees representing the Forum.[58] In addition to three lawyers (all of whom would later join Hunton), the Forum's representatives included employees from four automakers, three oil and gas companies, two pulp and paper companies, and General Electric. Forum members from whom Wehrum or Harlow are recused are noted below:

- Fiat Chrysler
- Ford
- General Motors
- Toyota
- **Chevron (Wehrum & Harlow recused)**
- **ExxonMobil (Wehrum recused)**
- Shell
- **Georgia-Pacific (Wehrum recused)**
- International Paper
- **General Electric (Wehrum recused)**

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[54] https://www.huntonak.com/en/news/chuck-knauss-and-shannon-broome-join-global-environmental.html

[55] *See* Proof Petitioners' Opening Brief, *Nat'l Envtl. Dev. Assn's Clean Air Project v. EPA*, Case No. 16-1344 (D.C. Cir. Aug. 30, 2017) (brief filed by Wehrum on behalf of the American Petroleum Institute, alongside other Hunton lawyers on behalf of the Air Permitting Forum).

[56] *See, e.g.*, Forum comments on CPP repeal, Docket Id. No. EPA-HQ-OAR-2017-0355-19903, at 1 (Apr. 26, 2018).

[57] *See Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977).

[58] *See* U.S. EPA, "Summary of EPA Stakeholder Meeting – Air Permitting Forum; May 19, 2015"; U.S. EPA "Summary of Meeting with the Air Permitting Forum on May 20, 2015."

The Hunton-represented Forum has been highly successful in getting EPA to adopt its policy positions on rollbacks – so much so that language written by Hunton lawyers for the Forum was copied verbatim into the DTE Memo, without attribution, as part of EPA's justification for rolling back New Source Review permitting requirements. Specifically, Hunton's submittal to EPA on behalf of the Forum stated that:

> "While historically EPA has recognized that a source must exercise judgment to exclude increases for which the project is not the 'predominant cause,' more recent EPA actions reflect the view that all emission increases are presumed to be caused by the change."[59]

Despite the fact that this statement was erroneous,[60] nearly identical language appeared without explanation in EPA's DTE Memo disavowing the federal government's position in litigation involving Hunton, UARG, and a UARG member:

> "Because increased emissions may be caused by multiple factors, the EPA has recognized that the source must exercise judgment to exclude increases for which the project is not the 'predominant cause.'"[61]

The only other instance in which this particular legal argument was made – albeit not with the same words – was also by Hunton. Hunton made this argument in briefs defending UARG member DTE Energy from the EPA enforcement action that was the impetus for the agency's DTE Memo.[62, 63]

EPA's use of language supplied by the Forum in the DTE Memo is only the tip of the iceberg. Like UARG, the Forum has achieved remarkable success in convincing EPA to change its position in ways that mirror the Forum's advocacy. The May 2017 Forum document that EPA plagiarized included a wish list of 19 desired rollbacks of Clean Air Act permitting requirements and emission limits, and of the National Ambient Air Quality Standards.

As of July 2019, the Trump EPA has adopted six of the Forum's air permitting and emission standard rollbacks in final rules, orders, and/or final guidance documents, or a combination – including the substance of the DTE Memo described above:

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[59] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 12 (May 15, 2017).

[60] https://energycommerce.house.gov/newsroom/press-releases/pallone-whitehouse-carper-raise-new-questions-about-wehrum-s-involvement-in

[61] DTE Memo at 7.

[62] https://www.whitehouse.senate.gov/news/release/whitehouse-carper-pallone-raise-new-questions-about-wehrum

[63] This is not the first time Bill Wehrum appears to have copy-pasted text verbatim from documents provided by his former clients. In 2004, while Wehrum was serving as chief counsel in the Bush Administration's Office of Air and Radiation, EPA proposed mercury emissions rules that *also used verbatim text from his former law firm* – in that case, the firm Latham & Watkins. *See* Eric Pianin, *Proposed Mercury Rules Bear Industry Mark*, WASH. POST, (Jan. 31, 2004).

1. With respect to air toxics, the Forum asked the EPA to withdraw its "once in, always in" policy that requires major sources of toxic air pollution to continue meeting strong emission limits. In a January 25, 2018 memorandum from Wehrum, the Trump EPA withdrew the policy, and on June 25, 2019 proposed a rule that would enshrine the looser toxic air pollution limits in regulation.[64] The Forum and UARG joined litigation helping the Trump EPA defend the issuance of what they call, "the Wehrum Memo," in court.[65] If the withdrawal of the "once in, always in" policy is finalized, the Trump EPA projects that 3,912 facilities nationwide – nearly half of all major air toxic polluters – could substantially increase their toxic air pollution.[66] Independent analyses indicate that those sources could more than double their toxic air pollution under the new approach.[67] The Trump EPA has acknowledged that it conducted no health or environmental analysis before Wehrum withdrew the policy in 2018.[68]

2. With respect to New Source Review, the Forum asked EPA to "reduce, if not eliminate, federal second-guessing" of state permitting programs to ensure compliance with legal requirements. The Trump EPA has issued a memorandum calling for "General Deference" to states and tribes implementing those programs.[69]

3. With respect to New Source Review, the Forum also asked EPA to "clarify its position" regarding deference to polluters' projections of their own emissions, and included language inaccurately characterizing the types of pollution that EPA has allowed sources to exclude from their calculations. The Trump EPA issued the DTE Memo "to provide greater clarity" on that issue, and adopted verbatim without citation the Forum's novel legal argument, which itself mirrored Hunton's position on behalf of a UARG member in the DTE litigation. As discussed in Section 2, Wehrum and Harlow's involvement in developing the DTE Memo raises serious ethical concerns.

4. With respect to New Source Review, the Forum also asked EPA to expand the scope of "netting," which allows polluters to upgrade old equipment – and prolong the life of their facility – without triggering new pollution control requirements. In guidance, the Trump EPA changed its interpretation of its rules to allow for that exact expansion of project netting – now called "project emissions accounting" – and in March 2019 it sent a proposal to OMB

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[64] https://www.epa.gov/sites/production/files/2019-06/documents/frn_mm2a_proposal_and_reg_text_6_25_19.pdf

[65] *See generally* Intervenor-Respondents Air Permitting Form, et al. Final Response to Petitioners' Opening Brief, *Calif. Communities Against Toxics v. U.S. Envtl. Protection Agency*, 2019 WL 858013 (D.C. Cir.).

[66] Proposed Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act at 95 (pre-publication version).

[67] ENVTL. DEF. FUND, PRUITT'S NEW AIR TOXICS LOOPHOLE at 2 (Aug. 2018) (estimating that eligible facilities in the Houston-Galveston area could increase their toxic air pollution by 146% to 152% under the new approach).

[68] Testimony of Scott Pruitt, Senate Comm. on Env't and Publ. Works, Jan. 30, 2018, https://www.c-span.org/video/?440282-1/epa-administrator-pruitt-testifies-senate-oversight-hearing&live&start=1832

[69] Memorandum from Andrew R. Wheeler, *Principles and Best Practics for Oversight of Federal Environmental Programs Implemented by States and Tribes* at 3 (Oct. 30, 2018).

that would enshrine the change in EPA regulations.[70] EPA expects to publish the proposal sometime in July 2019.[71]

5. With respect to New Source Review, the Forum also asked EPA to lift the agency's stay of a 2009 rule finalized in the last week of the George W. Bush Administration, which would have allowed polluters to artificially divide the significant emissions from construction projects into smaller pieces, and thereby claim that no individual piece significantly increases emissions. The Trump EPA decided it would lift the Obama Administration EPA's stay of this "aggregation" rule, allowing the Bush Administration rule to come into effect.[72]

6. With respect to the Clean Air Act's core operating permit program, the Forum's "highest priority" was to limit the public's ability to challenge certain illegal permit conditions before EPA – what the Forum derisively referred to as "a second bite at the apple." The Trump EPA rejected a Sierra Club petition on that precise basis, stating the group was, "in essence, asking for a 'second bite at the apple' . . . ."[73]

The Trump EPA has also stated that it is actively considering two more of the Forum's permitting rollbacks:

7. With respect to New Source Review, the Forum asked EPA to expand the "debottlenecking" rule, which would allow major polluters to ignore emissions increases that upgrades cause at other parts of the plant. In October 2017, the Trump EPA listed changes to the debottlenecking rule as one of the "important areas" it would assemble a task force to review.[74]

8. With respect to New Source Review, the Forum also asked EPA to redefine the word "routine," so that even changes that "occur only once or twice during the life of a plant" are considered routine and thus exempt from triggering additional pollution control requirements. In April 2018, the Trump EPA said it was "evaluating the need to clarify the interpretation and appropriate application" of this exception to New Source Review.[75]

In addition to permitting rollbacks, the Forum also sought a number of other changes to the way EPA establishes and implements the National Ambient Air Quality Standards (NAAQS). The full scope of the Forum's success in influencing the Trump EPA regarding the NAAQS will become clear as the agency undertakes a major scientific review of the NAAQS for particulate matter (soot) and ground-

[70] Memorandum from Scott Pruitt, Admin'r, to Reg'l Admin'rs, *Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program* (Mar. 13, 2018).

[71] https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2060-AT89

[72] 83 Fed. Reg. 57324, 57324 (Nov. 15, 2018).

[73] *In re PacificCorp Energy Hunter Power Plant*, Order on Petition No. VIII-2016-4 at 17 (Oct. 16, 2017).

[74] U.S. EPA, FINAL REPORT ON REVIEW OF AGENCY ACTIONS THAT POTENTIALLY BURDEN THE SAFE, EFFICIENT DEVELOPMENT OF DOMESTIC ENERGY RESOURCES UNDER EXECUTIVE ORDER 13783 at 2 (Oct. 25, 2017).

[75] Anna Marie Wood, U.S. EPA, *NAAQS and Other Implementation Updates* at slide 33 (Apr. 5, 2018).

level ozone (smog), but early signs indicate substantial influence. Most notably, the Trump EPA appears determined to undermine the scientific reviews underpinning the NAAQS. The seven-member Clean Air Scientific Advisory Committee (CASAC) is charged by law with providing independent advice on the public health and environmental science of air pollution. Whereas CASAC was previously "a committee of nationally and internationally recognized researchers at the leading edge of their fields,"[76] the Trump EPA has replaced all but one of the academic research scientists, and appointed as chair a fossil fuel consultant, Tony Cox, who disputes the well-established health effects of particulate matter (PM).[77,78] The Trump EPA then disbanded a 20-person panel of experts who advise CASAC specifically on PM science, leaving CASAC – according to the Trump appointees' own admission – unable to conduct a "meaningful independent scientific review" of the literature.[79] The Trump EPA further recommended that individual CASAC members should be allowed to share their own personal views of the science with EPA political officials, even when those views "fall outside the committee consensus."[80] Combined, these changes to undermine in-depth scientific review and to elevate fringe views of CASAC members, could provide cover for EPA political appointees to differ wildly from mainstream public health science when setting the NAAQS.

During the time Wehrum was at the helm of the Trump EPA air office, the agency sought to adopt several Forum-proposed rollbacks concerning the NAAQS, such as:

9. The Forum asked EPA to review how it evaluates the health benefits that come from reducing PM pollution, even if the reductions are in places already meeting the NAAQS. Five months later, in an October 2017 proposal concerning the Clean Power Plan, the Trump EPA floated the possibility that any benefits from PM reductions below the NAAQS levels could be treated as "zero" benefit.[81] In May 2019, Wehrum publicly questioned[82] the public health benefits of PM reductions caused by the MATS rule in areas achieving the NAAQS. In June 2019, rather than rely on the agency's independent science advisory boards, the Trump EPA "invite[d] the

[76] Letter from former members of CASAC Particulate Matter Review Panel to Tony Cox, CASAC Chair, at 2 (Dec. 10, 2018).

[77] Stuart Parker, *CASAC Research Scientist Attacks Panel Chairman's NAAQS Review Shift*, INSIDEEPA (Mar. 26, 2019).

[78] *See,* U.S. EPA, *Health and Environmental Effects of Particulate Matter (PM)*, https://www.epa.gov/pm-pollution/health-and-environmental-effects-particulate-matter-pm (last visited July 2, 2019).

[79] *See* Letter from Tony Cox, Chair of CASAC, to Andrew Wheeler, EPA Admin'r, at 2 (Apr. 10, 2019) (stating that "CASAC recommends that the EPA reappoint the previous CASAC PM panel (or appoint a panel with similar expertise)," among other recommendations, in order to review an integrated scientific assessment that will "enable independent scientific review" by CASAC).

[80] Memorandum from Scott Pruitt to Asst. Admin'rs, *Back-to-Basics Process for Reviewing National Ambient Air Quality Standards*, at 10 (May 9, 2018).

[81] 82 Fed. Reg. 48035, 48044 (presenting an "alternative approach" to calculate premature death from particulate matter in which "Forgone $PM_{2.5}$ co-benefits fall to zero in areas whose model-predicted air quality is at or below the annual average $PM_{2.5}$ NAAQS").

[82] Lisa Friedman, *E.P.A. Plans to Get Thousands of Pollution Deaths Off the Books by Changing Its Math*, N.Y. TIMES, May 20, 2019.

public to nominate scientific experts" who could review a forthcoming reexamination of how PM benefits are calculated.[83]

10. The Forum asked EPA to reexamine how it treats "foreign sources of emissions" for purposes of achieving the NAAQS.[84] The Trump EPA now states that the Clean Air Act's weaker "International border area" provision is no longer restricted to areas on the international border, and instead applies to any emissions that can be traced back to foreign countries.[85]

Indeed, this investigation could find only one change sought by the Forum that the Trump EPA has expressly rejected: Repealing an EPA "regional consistency" rule that four Hunton lawyers – including Bill Wehrum himself – were challenging in court. EPA defended the rule against Hunton's challenge, and the D.C. Circuit unanimously rejected Hunton's arguments on June 8, 2018, seven months after Wehrum began his current tenure at EPA.[86]

c. The NAAQS Implementation Coalition ("the Coalition")

The NAAQS Implementation Coalition ("the Coalition") appears to have been established at Hunton in 2011, which is also when it submitted its first public comments to EPA (in that case, asking the agency to weaken the way it models violations of air quality standards).[87]

Like the other Hunton-represented industry groups, the Coalition has no public website, no apparent physical address, and no employees other than its Hunton "counsel."

In recent years, the Coalition has been similarly opaque about its membership and funding, instead merely describing itself as being "comprised of trade associations, companies, and other entities who confront difficulties in permitting and operating facilities" pursuant to EPA's National Ambient Air Quality Standards (NAAQS), particularly for smog-forming ozone.[88] However, the Coalition's first-ever public comment – filed in 2011 by a former managing partner of Hunton's Washington, D.C. office – lists the following organizations as some of the members:[89]

- American Chemistry Council
- **American Forest & Paper Association (Wehrum recused)**

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[83] *See* 84 Fed. Reg. 27632 (June 13, 2019).

[84] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 25 (May 15, 2017).

[85] 83 Fed. Reg. at 63010 (Dec. 6, 2018) ("a demonstration prepared under CAA section 179B [the Clean Air Act's international border areas provision] could consider emissions emanating from . . . intercontinental sources and is not restricted to areas adjoining international border areas . . . .").

[86] *Nat'l Envtl. Dev. Assn's Clean Air Project v. EPA*, No. 16-1344 (D.C. Cir. June 8, 2018).

[87] Coalition comment on SO2 guidance, Docket Id. No. EPA-HQ-OAR-2010-1059-0057 (Dec. 2, 2011).

[88] https://www.uschamber.com/sites/default/files/2.13.17-_coalition_comments_to_epa_on_proposed_nonattaniment_area_classifications_and_sip_requirements_for_2015_ozone_naaqs.pdf

[89] Coalition comment on SO2 guidance, Docket Id. No. EPA-HQ-OAR-2010-1059-0057, at 2 n.1 (Dec. 2, 2011),

- **American Petroleum Institute (Wehrum recused)**
- American Wood Council
- **Brick Industry Association (Wehrum recused)**
- Corn Refiners Association
- National Oilseed Processors Association
- Rubber Manufacturers Association
- **Utility Air Regulatory Group (Wehrum and Harlow recused)**

In May 2017, the Coalition filed detailed comments with EPA asking for 21 major changes to how EPA reviews and implements the NAAQS, which form the core of the Clean Air Act. The Trump EPA has not yet had the opportunity to review air quality standards for the two most significant NAAQS pollutants, particulate matter and smog-forming ozone. However, the Trump EPA is currently undertaking reviews of those air quality standards, and has announced its intention to propose standards for both pollutants in March 2020.[90] The Trump EPA also recently disbanded a 20-person panel of experts on particulate matter.[91] The main Clean Air Science Advisory Committee that will advise on public health risks now has only one academic research scientist, and is led by an industry-backed consultant who disputes[92] the well-established health effects of particulate matter.[93]

The full scope of the Coalition's success in influencing the Trump EPA will become clear as those standards develop, but early signs indicate substantial influence. Thus far, the Trump EPA has adopted at least five of the Coalition's recommended reforms for NAAQS review and implementation:

1. Similar to the Forum, the Coalition asked EPA to expand the Clean Air Act's "International border areas" provisions to reduce air quality protections in states without any international borders. The Trump EPA now states that the weaker "International border area" provision is no longer restricted to areas on the international border. [94]

2. The Coalition asked EPA to change the meaning of "conflict of interest" to remove public health scientists who receive EPA research grants from the agency's science advisory boards, even while adding industry-funded scientists. Five months later, on October 31, 2017, the

[90] https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2060-AU40 (ozone); https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2060-AS50 (particulate matter).

[91] Lisa Friedman, *E.P.A. to Disband a Key Scientific Review Panel on Air Pollution,* N.Y. TIMES, Oct. 11, 2018.

[92] Stuart Parker, *CASAC Research Scientist Attacks Panel Chairman's NAAQS Review Shift*, INSIDEEPA (Mar. 26, 2019).

[93] *See,* U.S. EPA, *Health and Environmental Effects of Particulate Matter (PM)*, https://www.epa.gov/pm-pollution/health-and-environmental-effects-particulate-matter-pm (last visited July 2, 2019).

[94] 83 Fed. Reg. at 63010 (Dec. 6, 2018) ("a demonstration prepared under CAA section 179B [the Clean Air Act's international border areas provision] could consider emissions emanating from . . . intercontinental sources and is not restricted to areas adjoining international border areas . . . .").

Trump EPA changed its conflict of interest rules to exclude any researchers who receive EPA grants to study pollution.[95]

3. The Coalition asked EPA to narrow the meaning of "ambient air," which would reduce the amount of outdoor air protected by the Clean Air Act in the first instance. The Trump EPA publicly circulated draft guidance that would redefine "ambient air" to exempt more outdoor air from pollution protections.[96] Other Hunton-represented industry groups, such as the Forum, submitted comments to EPA supporting this redefinition.

4. The Coalition characterized the main NAAQS science committee as "imbalanced," with members who live in similar parts of the country, and suggested that the members "should be given rotating terms." In October 2017, the Trump EPA called for membership in its scientific committees to "be balanced" with "geographic diversity," and stated that "membership should be rotated regularly." [97]

5. The Coalition criticized efforts of the main NAAQS science committee to develop "consensus" around widely accepted science, stating that members with "minority views" should be allowed to report those to EPA political appointees as alternative takes on the science. In May 2018, the Trump EPA stated that although the committee should "seek to find consensus," individual committee members should be allowed "to share their own individual opinions when they fall outside committee consensus."[98] When coupled with the Trump EPA's replacement of impartial research scientists with industry-backed consultants, this change could allow politics to interfere with the science-based NAAQS-setting process.

d. The CCS Alliance ("the Alliance")

The Alliance describes itself as "a coalition of entities, spanning a number of economic sectors, that share a common interest in removing the impediments to investment in and development of carbon capture and storage ("CCS"), as well as mitigating the potential risks associated with the deployment of this technology."[99]

The Alliance has a website (ccsalliance.net), but the site is currently inactive for "scheduled maintenance."[100] However, the Internet Archive shows what the website looked like before it went

[95] Memorandum from Scott Pruitt, *Strengthening and Improving Membership on EPA Federal Advisory Committees*, at 3 (Oct. 31, 2017).

[96] U.S. EPA, DRAFT REVISED POLICY ON EXCLUSIONS FROM "AMBIENT AIR" (Nov. 2018).

[97] Memorandum from Scott Pruitt, *Strengthening and Improving Membership on EPA Federal Advisory Committees*, at 2 (Oct. 31, 2017).

[98] Memorandum from Scott Pruitt to Asst. Admin'rs, *Back-to-Basics Process for Reviewing National Ambient Air Quality Standards*, at 10 (May 9, 2018).

[99] Comments of the CCS Alliance, Docket Id. No. EPA-HQ-OW-2008-0390-0178, at 1 (Dec. 22, 2008).

[100] www.ccsalliance.net

inactive sometime in late 2016 or early 2017.[101] That website bore the "Hunton & Williams" logo along the top. In addition, "Hunton & Williams" is incorporated into the CCS Alliance logo. The Alliance lists the D.C. office of Hunton & Williams on the front page, along with Hunton's telephone number. For entities seeking to "join the CCS Alliance," the website provided the contact information for Hunton, as well as for a Hunton law partner (Frederick R. Eames), and the Gmail address of an energy lobbyist who does not appear to work at Hunton.[102] Hunton appears to have been paid approximately $860,000 by the Alliance over seven years (2009–2015) to lobby Congress on various pieces of climate change legislation.[103] Hunton terminated its lobbying engagement with the Alliance in early 2016.[104]

In some cases, the Alliance produced white papers that were then cited by other Hunton organizations. For example, UARG cited an Alliance "study" to oppose the use of CCS technology in Clean Air Act rulemakings.[105]

The Alliance – which has called coal "indispensable" to meeting electricity demands – is comprised of entities that would likely lose out financially if EPA required the use of CCS technology to capture and store carbon emissions. In comments submitted to EPA in 2008,[106] the Alliance listed the following as its members:

- Berkshire Hathaway Energy[107]
- MidAmerican Energy Holdings, a Berkshire subsidiary
- National Mining Association (former UARG member)
- National Rural Electric Cooperative Association (former UARG member)
- NRG Energy
- PacifiCorp
- Zurich North America

With respect to EPA rulemakings, the Alliance appears to favor the use of CCS technology – except to the extent it would have an adverse effect on the burning of coal for electricity. For example, in 2008 the Alliance argued that CCS technology is "the only tool now on the horizon" that could address "in a major way and within a mid-term timeframe" the "very large quantities of CO_2 emissions" from fossil fuel power plants.[108] In that rulemaking, the Alliance was urging EPA to authorize the geologic sequestration of CO2 under the Safe Drinking Water Act. But when it came to actually requiring even

[101] https://web.archive.org/web/20150405023737/http://www.ccsalliance.net/

[102] https://web.archive.org/web/20150405023929/http://www.ccsalliance.net/join/

[103] *See* PROPUBLICA, *Lobbying for CCS Alliance by HUNTON & WILLIAMS LLP* (last visited July 2, 2019).

[104] *Id.*

[105] *See* UARG comment, Docket Id. No. EPA-HQ-OAR-2008-0318-1550, at 117 n.29 (Nov. 28, 2008),

[106] Alliance comments, Docket Id. No. EPA-HQ-OW-2008-0390-0178, at 1 n.2 (Dec. 22, 2008).

[107] Comments of Berkshire Hathaway Energy, Docket Id. No. EPA-HQ-OAR-2013-0495-10052, at 2 (May 9, 2014).

[108] Alliance comments, Docket Id. No. EPA-HQ-OW-2008-0390-0178, at 2 (Dec. 22, 2008).

the *partial* use of CCS technology, the Alliance balked, repeatedly arguing that it was not "adequately demonstrated" for even brand new coal plants.

The Alliance's views on partial CCS appear to now be echoed by the Trump EPA air office:

1. In May 2011, the Alliance argued that partial CCS for new coal-fired power plants "is not adequately demonstrated" because it does "not exist in sufficient geographic dispersion." In December 2018, the Trump EPA proposed to revise that Obama EPA standard, with the "primary reason" for its proposed rollback being "the high costs and limited geographic availability of CCS." In proposing the standard, Wehrum stated in a press release that the rollback "reflects our approach of defining new, clean coal standards by data and the latest technological information, not wishful thinking."

2. The Alliance criticized the landmark Boundary Dam power plant, which uses CCS, claiming its first year of operation "offers very little evidence of reliability or efficiency" for regulatory purposes. The Trump EPA's proposed rollback of the standard cited "multiple issues" at the Boundary Dam power plant, and solicited comment on whether the facility's "first year operational problems cast doubt" on the standard.

SECTION #2: While at the Trump EPA, former Hunton lawyers Wehrum and Harlow appear to have violated ethical requirements in their rush to serve former clients and Hunton-represented industry groups

Before becoming EPA's top air pollution regulator on November 20, 2017, Bill Wehrum was a lawyer at the law firm Hunton Andrews Kurth LLP (at the time, Hunton & Williams LLP). Wehrum served as co-chairman of Hunton's environmental practice and led the administrative law group,[109] advocating before EPA and the courts on behalf of some of the biggest polluters in America. One of Wehrum's colleagues at Hunton, a partner named David Harlow, joined EPA as "senior counsel" in the air pollution office on October 1, 2017.[110]

This investigation leads to several ethics-related conclusions:[111]

(a) Wehrum and Harlow appear to have worked improperly to benefit Hunton and a UARG member in an ongoing EPA enforcement action;

(b) Wehrum failed to disclose the existence of at least three former clients in his recusal statement;

(c) Wehrum met at least six times with an undisclosed former client;

(d) Wehrum and Harlow listed only "UARG" as their client, but not its constituent members with whom they likely also developed attorney-client relationships pursuant to D.C.'s attorney ethics rules;

(e) Wehrum met at least nine times with UARG members, almost always in situations that would not comply with ethical rules for former clients, including one meeting at Hunton's office on the same day EPA released the DTE Memo; and

(f) Wehrum held at least two additional apparently improper meetings with a former client, General Electric, which is also a member of a Hunton-represented industry group.

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[109] Q&A With Hunton & Williams' Bill Wehrum, LAW360, May 6, 2013, https://www.huntonak.com/images/content/2/4/v2/2407/Law360_Bill_Wehrum_QA.pdf

[110] Kevin Bogardus, *Chemicals official cleared to weigh in on industry litigation*, E&E NEWS (Mar. 1, 2018).

[111] This report was unable to as comprehensively evaluate David Harlow's ethical conduct while at EPA because of a lack of public records regarding his schedules and communications while at EPA, as compared to William Wehrum.

Introduction

As political appointees at EPA, both Wehrum and Harlow signed "Recusal Statements" drafted with the guidance of agency ethics officials and designed to identify and address conflicts of interests. Although Harlow signed his recusal statement within the requisite 3-month timeframe[112] – and indeed addressed it to Wehrum as his supervisor – Wehrum's own recusal statement was signed after a substantial delay of 10 months and demands from public officials, notably Senator Whitehouse, that he do so.[113] In connection with his nomination to lead the Trump EPA air office, Wehrum further committed to recuse himself from participating personally and substantially in any particular matter involving Hunton or his former clients without obtaining written pre-approval – regardless of whether a reasonable person would question his impartiality.[114]

The recusal statements outline various ethics obligations for Wehrum and Harlow, particularly under the so-called "Trump Ethics Pledge."[115] Similar to the Ethics in Government Act regulations,[116] which also apply to Wehrum and Harlow, the Ethics Pledge prohibits them from participating "for a period of 2 years from the date of [their] appointment[s]" "in any particular matter involving specific parties that is directly and substantially related to [their] former employer or former clients, including regulations . . . ."[117]

Both Wehrum and Harlow understood that this two-year ban applies to interactions with Hunton, their former employer, and with their former clients. To that effect, each included a list of former clients in his recusal statement – 37 for Wehrum, seven for Harlow. In addition, Wehrum and Harlow noted that they have confidential clients (two for Wehrum, one for Harlow) they are contractually prohibited from disclosing.[118] It is unknown whether ethics officials are aware of the identities of those clients, or if Wehrum or Harlow have met with those clients.

Each recusal statement outlines what the so-called Trump Ethics Pledge covers, as Wehrum and Harlow were advised by EPA's ethics officials:

> [F]or the purposes of this pledge obligation, the term "particular matters involving specific parties" is broadened to include any meetings or other communication relating to the performance of my official duties, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested

[112] 5 C.F.R. § 2634.802(b).

[113] *See* Sean Reilly, *Under pressure, Wehrum details recusal obligations*, GREENWIRE, Sept. 18, 2018

[114] *See* Letter from William L. Wehrum to Kevin S. Minoli, Designated Agency Ethics Official, U.S. EPA, at 1 (Aug. 28, 2017).

[115] E.O. 13770, Ethics Commitments by Executive Branch Appointees (Jan. 28, 2017) ("Trump Ethics Pledge").

[116] 5 C.F.R. pt. 2635.

[117] *Id.* § 1, ¶ 6.

[118] Wehrum Recusal at 2 n.1; Harlow Recusal at 2 n.2.

> parties. I am further advised that the term "open to all interested parties" means five or more parties.[119]

Wehrum purportedly delayed signing his recusal statement over confusion regarding these terms. Wehrum asserted that the delay was due to having received, "three different interpretations" about what it meant to be recused from a "particular matter involving specific parties," telling the New York Times, "[W]hat I don't want to do is sign a recusal letter and then have the rules change again."[120] It is unknown what "three different interpretations" Wehrum received, who they came from, and whether in the 10-month interim before signing, Wehrum followed the requirements as they were ultimately outlined in his recusal statement.

Strangely, Wehrum's recusal statement contains a glaring omission when compared with other EPA recusal statements signed both before and after his own. For example, the recusal statements of Andrew Wheeler (signed May 24, 2018),[121] of Peter Wright[122] and Anne Idsal[123] (both signed July 24, 2018), and of David Dunlap[124] (signed Dec. 19, 2019) all state that "open to all interested parties" means at least five parties who "represent a diversity of interests" rather than "one shared perspective" or "the same united perspective." The recusal statement that Wehrum signed September 17, 2018 omitted that critical language.

a. Wehrum and Harlow appear to have violated the terms of the Trump Ethics Pledge and Ethics in Government Act regulations by participating in the development of the DTE Memo.

While at Hunton, David Harlow represented DTE Energy, a UARG member. DTE sought Hunton's assistance in an EPA enforcement case alleging that one of the utility's coal-fired power plants had emitted pollution in violation of the Clean Air Act's New Source Review (NSR) program. In that case, Wehrum personally filed a brief as a lawyer for UARG in support of DTE's position.[125] DTE Energy lost twice before the U.S. Court of Appeals for the 6th Circuit, and faces millions of dollars in penalties. In May 2017, Hunton lawyers lobbied EPA to reform the Clean Air Act's NSR program, stating that the DTE Energy litigation specifically "highlight[ed] the uncertainty these [NSR]

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[119] Wehrum Recusal at 2; Harlow Recusal at 2.

[120] Eric Lipton, *As Trump Dismantles Clean Air Rules, an Industry Lawyer Delivers for Ex-Clients*, N.Y. TIMES (Aug. 19, 2018).

[121] Wheeler Recusal at 2 (May 24, 2018)

[122] Wright Recusal at 1 (July 24, 2018)

[123] Idsal Recusal at 2 (July 24, 2018)

[124] Dunlap Recusal at 2 (Dec. 29, 2018)

[125] Brief Amici Curiae of UARG et al. in Support of Defendants-Appellees, at *2, *United States v. DTE Energy Co. & Detroit Edison Co.*, 2012 WL 1656078 (May 8, 2012) (listing Wehrum as "Counsel for UARG").

regulations have created," and justified reform.[126] In July 2017, DTE filed a petition for certiorari with the U.S. Supreme Court, asking the Court to reverse the judgment against it.

Then, in December 2017, shortly after Harlow and Wehrum left Hunton for EPA, the agency published a memorandum (known as the "DTE Memo"). The DTE Memo reversed the agency's position in Hunton's DTE case, stating (like Hunton had) that the DTE case was evidence of "uncertainty regarding the applicability of NSR permitting requirements": When determining whether a major polluter expected to significantly increase its emissions as a result of a major project, the agency would no longer "'second guess[]' the owner or operator's emissions projections,"[127] as EPA had done in the DTE litigation. The memorandum was issued December 7, 2017, intentionally timed to give DTE's Hunton lawyers time to file it with the U.S. Supreme Court as the Court was considering DTE's petition for certiorari the very next day.[128] That same day, at the request of one of DTE's lawyers in the litigation, Wehrum gave a speech at Hunton before UARG (of which DTE is a member).

Evidence subsequently emerged through the Freedom of Information Act (FOIA) that Wehrum and Harlow appear to have participated in the development of the DTE Memo, despite ethical rules barring their participation in matters involving their particular clients, or in matters where their former employer Hunton represented a client. This evidence, along with other materials, led Senator Sheldon Whitehouse (D-RI), along with Senate Environment and Public Works Committee Ranking Member Tom Carper (D-DE) and House Energy and Commerce Chairman Frank Pallone, Jr. (D-NJ), to ask the Acting Inspector General of the Environmental Protection Agency (EPA) on February 25, 2019 to undertake an investigation of Wehrum's and Harlow's role in helping to reverse EPA's position in the DTE enforcement action to benefit DTE Energy and Hunton.[129]

On March 20, 2019, Senator Whitehouse, Ranking Member Carper, and Chairman Pallone informed the Acting Inspector General in a supplemental letter that, in the DTE Memo, EPA adopted without discussion a novel interpretation of NSR regulations that had previously been enunciated only by Hunton's lawyers in the underlying DTE litigation.[130] On May 6, 2019, the offices of Senators Carper

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[126] Hunton comments for UARG, Docket Id. No. EPA-HQ-OA-2017-0190-40140, at 17 n.37 (May 12, 2017) (citing litigation against DTE Energy in the U.S. Court of Appeals for the Sixth Circuit).

[127] Memorandum from EPA Admin'r Scott Pruitt to Reg'l Administrators, *New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected Actual Applicability Test in Determining Major Modification Applicability*, at 8 (Dec. 7, 2017).

[128] Letter from Senator Whitehouse, Senator Carper, Representative Pallone to Charles J. Sheehan, Acting Inspector General, U.S. EPA, at 7–8 & Exhs. M–N (emails from EPA political appointee Mandy Gunasekara stating that the memorandum "needs to go out before" the Supreme Court considers whether to hear the DTE enforcement case). The May 2019 complaint by CREW also discusses circumstances demonstrating that EPA's memorandum was essentially a litigation memorandum crafted to support Hunton's aims and timed for maximum effect on the DTE litigation.

[129] https://www.whitehouse.senate.gov/news/release/democrats-call-for-investigation-of-top-epa-officials-role-in-reversing-enforcement-position.

[130] https://www.whitehouse.senate.gov/download/wehrum-oig-supplemental-letter

and Whitehouse identified language in the DTE Memo, this time copied verbatim from a document that Hunton had submitted to EPA on behalf of the Air Permitting Forum, a similar Hunton-represented industry group with no existence outside the law firm.[131]

Any involvement by Wehrum or Harlow in the DTE Memo would seem to fit squarely within the prohibition on involvement in particular matters with specific parties who are former clients or represented by former employers: DTE Energy, a former client of Harlow, was a specific party represented by the former employer of both Wehrum and Harlow, facing millions of dollars in penalties and damages in a specific enforcement matter in which Wehrum had personally made an appearance while in private practice.

Although EPA originally stated that Wehrum had no involvement in reviewing the DTE Memo, he subsequently admitted to *The Washington Post* that this was not true, and additional reporting from other sources indicates that the discussion with Wehrum "cover[ed] topics such as the memo's potential impact on future EPA enforcement activities and the need to issue it before the Supreme Court conference on the DTE case."[132]

Indeed, documents obtained under FOIA corroborate those reports by revealing that EPA political appointees were intent on issuing the DTE Memo on a timeframe where it could impact the DTE litigation. For example, one EPA political appointee wrote: "I thought we may have more time, but know now that the cert hearing [Supreme Court's conference to consider which appeals to hear] is planned for Wednesday. This memo needs to go out before."[133] The DTE Memo was posted on EPA's web page sometime during the evening of December 7, 2017,[134] the same day that Wehrum had spoken to a private meeting of UARG members at his old Hunton office. The next morning, DTE's Hunton lawyers – not EPA or the Department of Justice lawyers opposing them in the case – informed the Supreme Court about the DTE Memo.[135]

Wehrum's participation appears to have been both personal and substantial. As the ethics watchdog Citizens for Responsibility and Ethics in Washington (CREW) explained in a complaint it filed with EPA's Acting Inspector General: "OGE's regulations explain that participation 'may be substantial even though it is not determinative of the outcome of a particular matter.'" [136] Moreover, the efforts by Wehrum's deputy to redact "potentially offending language" from a draft of the DTE Memo being reviewed by Wehrum "did not negate his participation" in the DTE Memo's development, "for both

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[131] https://www.epw.senate.gov/public/index.cfm/press-releases-democratic?ID=E598EA19-BB86-4737-ABE8-BE97F356D11E

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

[133] *See* Letter from Sen. Whitehouse, Sen. Carper and Rep. Pallone, to Charles J. Sheehan, Acting Inspector General at 7 & n.19 (Feb. 21, 2019). Gunasekara's email misstates the day of the conference; it was actually scheduled for Friday (December 8), not Wednesday, of that week.

[134] *Id.* at 8.

[135] *Id.* at 101 (Exhibit P).

[136] Letter from Noah Bookbinder to Charles Sheehan at 3–4, 10–13, May 29, 2019 (citing 5 C.F.R. § 2635.401(b)(4)).

his Ethics Pledge and his ethics agreement establish the duty to recuse from a 'particular matter involving specific parties' and not merely parts of the matter."[137]

Federal ethics regulations prohibit officials from taking certain actions where there is and appearance of a lack of impartiality.[138] Accordingly, Wehrum and Harlow should have consulted with ethics officials, which it appears that Wehrum did not do. Specifically, federal ethics regulations require employees to recuse from participation in "a particular matter involving specific parties" that is "likely to have a direct and predictable effect on the financial interest of . . . a person with whom he has a covered relationship," or a person who "represents a party to such a matter."[139] Employees are advised to seek assistance from ethics officials and supervisors in determining "whether a relationship would cause a reasonable person to question his impartiality . . . ."[140] In addition, even if a matter is not "specifically described" in this ethics rule, an employee concerned that circumstances "would raise a question regarding his impartiality should use the [pre-authorization] process to determine whether he should or should not participate in a particular matter."[141] According to EPA's ethics officials, Wehrum had not received any such waivers as of September 29, 2018.[142]

b. In his recusal statement, Wehrum failed to disclose at least three former clients that he previously represented in court – the Alliance of Automobile Manufacturers; the Minnesota Trucking Association; and the Minnesota Automobile Dealers Association.

If an agency's designated ethics official is not made aware of potential conflicts by a political appointee, the recusal statement approved by the official may be both incomplete and inadequate. Wehrum's recusal statement does not list at least three recent former clients he represented in litigation: the Alliance of Automobile Manufacturers; the Minnesota Trucking Association; and the Minnesota Automobile Dealers Association.

In 2015, a number of entities challenged a Minnesota law related to biofuels. In 2016, Wehrum filed a brief in the case along with five other lawyers – including two from Hunton – where they were listed as "Attorneys for Plaintiffs Minnesota Trucking Association, Minnesota Automobile Dealers Association, Alliance of Automobile Manufacturers, American Petroleum Institute, and American Fuel & Petrochemical Manufacturers."[143]

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[137] *Id.*

[138] *See generally* 5 C.F.R. § 2635.502.

[139] *Id.* § 2635.502(a).

[140] *Id.* § 2635.502(a)(1).

[141] *Id.* § 2635.502(a)(2).

[142] Letter from Kevin S. Minoli, Designated EPA Ethics Official, to Sen. Sheldon Whitehouse, at 1 (Sept. 29, 2016) ("To date, Mr. Wehrum has not received any waivers or authorizations issued pursuant to Executive Order 13770, 18 U.S.C. § 207(b)(1), or 5 C.F.R. § 2635.502(d).").

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

Wehrum's recusal statement includes the latter two plaintiffs (American Petroleum Institute and the American Fuel & Petrochemical Manufacturers), but not the other three. Accordingly, there was no way for the EPA air office employees identified in Wehrum's recusal statement to properly screen him from participating in meetings with those clients. As described below, Wehrum has in fact met with one of those undisclosed former clients in a manner that appears to violate the Ethics Pledge and the Ethics in Government Act regulations.

In addition to Wehrum's undisclosed clients, both Wehrum's and Harlow's recusal statements acknowledge that they each have "confidential" clients whose identities they contractually cannot disclose. However, only Harlow's recusal statement further acknowledges that, with respect to "clients who are not listed," he has a personal obligation "not to participate in specific party matters for the duration of my ethics obligation."[144] Wehrum's recusal statement includes no such acknowledgment.

c. Wehrum had at least six meetings with one of his undisclosed clients, the Alliance of Automobile Manufacturers, in violation of the Trump Ethics Pledge and potentially in violation of Ethics in Government Act regulations.

Wehrum had at least six meetings with one of his undisclosed clients, the Alliance of Automobile Manufacturers, including giving a speech before its board. This appears to violate Ethics in Government Act regulations and the Trump Ethics Pledge. Wehrum did not receive an ethics waiver for any of these meetings, and because none of them were "open to all interested parties," they thus appear to have been impermissible even if Wehrum only spoke about generally applicable regulations affecting his former client's interests.

Specifically, according to records obtained via FOIA and the EPA website, Wehrum met with his undisclosed client the Alliance for Automobile Manufacturers on:

- **Nov. 27, 2017,** with one other entity, to discuss fuel economy and greenhouse gas standards;
- **Dec. 27, 2017,** "to meet some of the Auto Alliance Board members";
- **Feb. 21, 2018**, with some of his former client's (current) lawyers and lobbyists, to discuss fuel economy and greenhouse gas testing;
- **Apr. 16, 2018**, to discuss an unknown topic alone with his former client;

Automobile Dealers Association, Alliance of Automobile Manufacturers, American Petroleum Institute, and American Fuel & Petrochemical Manufacturers").

[144] *Compare* Harlow recusal at 2 nn.1–2 ("For my former clients who are not listed, I understand that I am personally obliged not to participate in specific party matters for the duration of my ethics obligations."), *with* Wehrum recusal at 2 n.1 (acknowledging the existence of two "confidential clients" without offering the same assurances).

- **May 22, 2018**, to discuss an unknown topic alone with his former client;
- **May 23, 2018**, to discuss fuel economy standards alone with his former client; and
- **July 16, 2018**, with one other entity, to discuss a model year 2020 fuel economy testing extension related to fuel without ethanol.

Because all of these meeting were either solely with his former client and its representatives, or with just one other entity, they were not "open to all interested parties" and thus violated the Trump Ethics Pledge. The Pledge prohibits Wehrum and Harlow from having any meetings or communications relating to the performance of their official duties with Hunton or their former clients, or from "participating in any particular matter involving" Hunton or their former clients.[145]

Depending on the subject matter discussed at these meetings, which is unknown, the meetings may also have violated Ethics in Government Act regulations.

d. Wehrum and possibly Harlow appear to have artificially – and perhaps improperly – limited their list of former clients from which they are recused.

As noted above, UARG was not incorporated, appears to hold no legal status, and was founded by Hunton. The organization appears to have existed only on paper as part of a coordinated effort by its members to influence EPA through legal services provided by Hunton.

As lawyers admitted to practice in the District of Columbia, Wehrum and Harlow are subject to attorney ethics rules that define who constitutes their clients. Under those rules, "It is well established that neither a written agreement nor the payment of fees is necessary to create an attorney-client relationship."[146] But emails obtained under FOIA reveal that when Wehrum developed his list of former clients, he merely asked Hunton for "a list of all clients to whom I *billed time* for the past 24 months," and then used that Hunton-provided list as the basis for his recusal obligations.[147]

By limiting his recusal list to only those "clients to whom [he] billed time," Wehrum's recusal statement may not include all entities with which he formed an attorney-client relationship. Particularly given Wehrum's management role as co-chairman of Hunton's environmental practice and leader of its administrative law group, he may have provided legal services to numerous additional "clients" who he did not bill directly.

Though Wehrum and Harlow recused themselves from certain meetings with representatives of "UARG," their recusal statements impose no limits on their involvement with the individual corporate members of UARG. Accordingly, the list of former clients from which they should be recused may

[145] Wehrum recusal at 2; Harlow recusal at 2.

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

[147] *See* Maxine Joselow, *Air chief worried about conflicts of interest — emails*, E&E NEWS (Feb. 12, 2019) (emphasis added).

be significantly under-inclusive, particularly since UARG is not incorporated and does not appear to have any other legal status.

This investigation determined that UARG and Hunton have repeatedly argued in court – successfully – that there is "an attorney-client privilege between *UARG members* and UARG's counsel, Hunton & Williams."[148] Their primary argument has been that Hunton and UARG enjoy an attorney-client relationship, and that information shared with UARG members as part of that relationship should be similarly protected from discovery under the "common interest" privilege. But in making those arguments, Hunton and UARG have repeatedly revealed that UARG was a mechanism for individual UARG-member entities to obtain legal advice useful in their day-to-day operations.

UARG has argued, for example, that it "was formed to advance the common legal interests of its members,"[149] that Hunton "provid[ed] legal services to UARG *and its members*,"[150] and that this work exposed Hunton to "confidential information from UARG *and its members*," who are constantly anticipating litigation" under the Clean Air Act.[151]

Similarly, Hunton has argued that a document it shared with UARG members "clearly falls within the attorney-client privilege" because it was about a court case with "ramifications for every *utility company* in the industry," and the document was akin to "advising [] clients about the prospects with respect to *their own potential liability*."[152] UARG, as an abstract group, has no Clean Air Act liability itself – only its individual, dues-paying members do.

An ethics opinion of the D.C. Bar states that although it is permissible for "individual subscribers" to pay a fee to an intermediary entity that entitles the subscriber to contact a law firm regarding legal matters, "the firm's client in each instance would be the subscriber and not [the intermediary]."[153]

Hunton has similarly argued that its work for UARG was not merely providing "general information and legal advice," but that UARG essentially operated as a vehicle for the UARG members to seek and receive legal advice about specific issues of concern to them.[154] In one enforcement case, for example, Hunton lawyers described various documents as containing conversations in which "UARG members" and Hunton lawyers "'agreed' to pursue certain legal strategies"; others describing

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[148] *See United States v. Duke Energy*, 2003 WL 25509097 (M.D.N.C. July 7, 2003) (emphasis added) (listing cases in which Hunton and UARG have successfully made that argument to withhold Hunton-UARG documents from discovery).

[149] UARG Opposition to Motion to Compel UARG to Comply with a Subpoena, *United States v. Duke Energy*, 1:02-mc-00480, at *2 (D.D.C.) (filed Dec. 18, 2002).

[150] *Id.* at *28 (emphasis added).

[151] *Id.* at *3 (emphases added)

[152] Def. Duke Energy Corp.'s Reply, *United States et al. v. Duke Energy Corp.*, 2003 WL 25509066 (M.D.N.C. Feb. 13, 2003) (emphasis added) (citing *Diaz v. Delchamps, Inc.*, 1997 WL 680602 (E.D. La. Oct. 31, 1997).

[153] D.C. Bar, *Ethics Opinion 225, Prepaid Legal Services* (Jan. 1992).

[154] *See, e.g.*, Def. Duke Energy's Reply in Support of its Mot. for Reconsideration, *United States v. Duke Energy*, 2003 WL 25509088 (M.D.N.C. June 6, 2003) (quoting excerpts from an internal UARG documents).

"confidential and privileged discussions" with counsel present in which "UARG members" raised various "problems that arise"; and still other communications in which "UARG members" requested legal advice from Hunton via the UARG organization, and Hunton lawyers "respond[ed] to that request" with written legal opinions.[155]

At least three federal courts have protected UARG documents from discovery in enforcement matters involving UARG members.[156] In a 2003 enforcement case involving Ohio Edison, a subsidiary of former UARG member FirstEnergy, a federal court considered whether certain documents in Ohio Edison's possession were created by Hunton "in response to a request of legal advice from UARG *or any of its members*."[157] The court explained that there "is no dispute that Hunton & Williams is legal counsel to UARG and may be consulted *by UARG members* for legal advice on issues which are common to some or all of the members," including on "issues relating to *whether UARG members are in compliance with federal environmental regulations* and whether those regulations apply to *specific projects being considered by the members* . . . "[158] The court concluded that Hunton "clearly generated these memoranda in response to an ongoing relationship involving the rendition of legal advice *at the request of UARG's members*," and that those communications "would at least arguably reveal client confidences, including the types of subjects about which *the UARG members sought legal advice*."[159] The court upheld Hunton and UARG's claims of privilege.

Hunton has maintained a similar position as late as 2012,[160] as Hunton and continued to characterize its UARG work as "providing legal services to UARG *and its members*," and should thus be considered attorney-client privileged from discovery in Clean Air Act enforcement matters against UARG members – in that case, Duke Energy.[161]

Substantial public evidence indicates that UARG members paid their hefty dues in part to receive individualized legal advice and communications from Hunton attorneys, possibly including Wehrum and Harlow. For example, media obtained a copy of the most recent UARG "membership agreement" for the Tennessee Valley Authority (TVA).[162] That 2015 agreement[163] states that Hunton

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[155] *Id.*

[156] *Id.* n.1 (listing *United States v. Ohio Edison Co., et al.,* Case No. C2-99-1181 (S.D. Ohio Jan. 6, 2003) (denying motion to compel UARG documents) (J. Kemp); *United States v. Illinois Power,* Civil Action No. 99-CV-833-MJR (S.D. III. April 24, 2003) (J. Proud) (denying motion to compel UARG documents); and *United States v. Illinois Power,* Civil Action No. 99-CV-833-MJR (S.D. Ill. May 19, 2003) (J. Reagan denying Government's motion for reconsideration)).

[157] *See* Opinion and Order, *United States v. Ohio Edison Co.*, No. C2–99–1181 at *3–4 (S.D.Ohio Jan. 6, 2003) (J. Kemp).

[158] *Id.* at *3–4 (emphasis added).

[159] *Id.* at *7 (emphasis added).

[160] *See United States v. Duke Energy Corp.*, No. 1-cv-1262, 2012 WL 1565228, at *12 (M.D.N.C. Apr. 30, 2012).

[161] Defendant Duke Energy's Reply to the United States Opposition to Duke Energy's Cross-Motion for Protective Order Regarding UARG, 2003 WL 25509066 (M.D.N.C. Feb. 12, 2003).

[162] *See* Sean Reilly, *TVA defends its role in trade group*, E&E NEWS, May 7, 2019.

[163] TVA-UARG contract, Mar. 10, 2015 (emphasis added).

"serves as counsel to UARG *and its members*" on CAA matters, that Hunton would "provide necessary legal advice to UARG *and its members, including TVA*," and that the information exchanged "among UARG members and its counsel . . . are developed in anticipation of litigation [i.e., attorney work product] and/or constitute attorney-client communications for the purpose of obtaining advice from UARG counsel."[164] The agreement further contemplates that, "as a member of UARG," TVA "may have communications" with Hunton that are "privileged and confidential."[165]

And even in 2017, mere months before Wehrum left Hunton to join EPA, some of UARG's designated "legal" costs went to Hunton to pay for "communications with UARG members"[166] and "responding to members' questions"[167] – questions and communications that Hunton would argue in court are subject to attorney-client privilege.

Further evidence indicates that Hunton and individual UARG members even discussed the matter of payment. An internal UARG document proposes that Hunton would be paid for "[c]ommunications *with individual UARG members* concerning their membership plans for 2018 and the likely level of members' dues for 2018."[168] Although the Hunton may not have "billed time" directly to UARG members, when UARG members then paid those "dues" discussed with Hunton, 97.7% of the total "dues" went to Hunton for legal services.

In the UARG membership agreement documents, the collection of fees from UARG's member entities, and in court filings, Hunton has maintained that both UARG and its individual members create various privileged relationships with the law firm, including in some cases an attorney-client privilege. Under these circumstances, Wehrum's and Harlow's former clients included not only UARG, which has no apparent legal status, but also its individual members. By omitting the full list of UARG members from their list of former clients, Wehrum and Harlow appear to be frustrating – or violating – their ethical obligations.

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[164] *Id.* at 1.

[165] *Id.* at 3.

[166] *See, e.g.*, Leaked UARG Policy Committee document at 13 (request to pay Hunton for "communications with UARG members" regarding potential EPA changes to greenhouse gas rules for new and existing coal-fired power plants).

[167] *See, e.g.*, *id.* at 20 (request to pay Hunton for "responding to members' questions" regarding regional haze requirements).

1. [168] Leaked UARG Policy Committee document at 26 ("PLANNING/GENEAL COORDINATION").

e. Wehrum has repeatedly met with clients he would worked with in private practice – actions that appear to have violated the intent of the Trump Ethics Pledge and Wehrum's own ethics agreement.

Shortly after Bill Wehrum assumed control of the EPA air office, his former law partner, Makram B. Jaber, emailed to invite him "to speak to our group regarding air regulations and regulatory outlook."[169] Nominally, the presentation to "our group" would be on "behalf" of five entities – UARG, plus four UARG members: American Electric Power, Southern Company, Duke Energy, and Dominion Energy. Of those five, Wehrum's recusal statement (which he only agreed to sign ten months later) makes clear that he was recused from individual meetings or communications relating to his EPA work with three of them: UARG, Duke Energy, and Dominion Energy.[170] Wehrum eventually gave that invitation-only briefing on December 7, 2017, less than three weeks after assuming his new role at EPA.

The fact that Hunton partner Makram B. Jaber stated that the meeting was on behalf of five entities is notable. Although Wehrum and Harlow are forbidden by the Trump Ethics Pledge – and by their recusal statements incorporating the Pledge – from meeting in private with any *single* former employer or client, there is a limited exception for events "open to all interested parties," a phrase that means "*five or more* stakeholders," representing a diversity of viewpoints "even if *one* of the stakeholders is a former employer or former client."[171]

With respect to the December 7, 2017 meeting at Hunton, circumstantial evidence indicates that Jaber's characterization of the entities attending may have been a pretense for Wehrum to maintain that the meeting was "open to all interested parties" because there were *exactly five* entities invited, and thus he could argue that his recusal obligations did not apply. Indeed, when confronted about this meeting, Wehrum appeared to believe that it was immaterial that the event would be hosted at and by Hunton, his former employer, and believed it immaterial that the event was being held on behalf of his former clients UARG and four companies that were *also UARG members* – including two, Duke Energy and Dominion, that were former Wehrum clients in their own right. Indeed, Wehrum has stated that it would have been permissible for him to discuss EPA matters behind closed doors with *just his former clients present* – provided there were at least five former clients.[172]

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[169] Email from Jaber Makram to Bill Wehrum, "Invitation to speak," Nov. 21, 2017 (6:21 AM). Mr. Jaber was subsequently named co-leader of Hunton's environmental team.

[170] Wehrum recusal at 2.

[171] Memorandum from Robert I. Cusick, Dir. of U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, DO-09-011, at 1–2 (Mar. 26, 2009) (explaining the meaning of the phrase "open to all interested parties"); Legal Advisory from David J. Apol, General Counsel of U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, LA-17-02, at 1 (Feb. 6, 2017) ("With respect to [President Trump's] Executive Order 13770, ethics officials and employees may continue to rely on OGE's prior guidance regarding [President Obama's] Executive Order 13490 to the extent that such guidance addresses language common to both orders").

[172] Juliet Eilperin, *EPA regulator skirts the line between former clients and current job*, WASH. POST, Feb. 25 ("[Wehrum] said he has concluded that his meetings comply as long as five entities participate. And, he said, it does not matter how many of those entities are former clients.").

Such an argument represents an absurd interpretation of these ethics rules. The "open to all interested parties exception" applies to events that "do not raise concerns about special access."[173] A closed-door meeting at Wehrum's former employer, where the only invitees are Wehrum's former clients and those represented by Wehrum's former employer, is perhaps a paradigmatic example of a case of "special access."

Second, evidence does not substantiate that five stakeholders were actually present. Rather, evidence suggests this December "meeting" was a pre-planned meeting of UARG, in which case under Wehrum's view of "UARG" as his single client, all members present should have been treated as "UARG" – not a collection of independent companies. Internal UARG documents obtained by Politico reference a planned "December 2017 UARG Policy Committee meeting," at which UARG would recommend and vote upon a 2018 budget.[174] That document was itself prepared in advance of a two-day UARG Policy Committee meeting in June 2017, and the meeting that Makram Jaber invited Wehrum to speak at also spanned two days – December 7 and 8.[175] Notably, this double-counting of UARG members as distinct from "UARG" conflicts with Wehrum and Harlow's treatment of UARG members for purposes of defining their former clients: The UARG members are treated as distinct from UARG for purposes of determining whether a meeting is "open to all interested parties," but the companies are indistinguishably lumped together as "UARG" for purposes of escaping individual designation as former clients (see Section 2.d of this report). Wehrum and Harlow cannot have it both ways: Either UARG is a collection of companies, in which case they should have been recused from meeting with them all, or UARG is a single group, in which case this was a meeting with a single client that violated the Trump Ethics Pledge.

Regardless, Wehrum stated that he did not consult with agency ethics personnel about the propriety of the meeting,[176] *despite his schedule showing that he met with ethics officials from 2:00–2:30pm that day, immediately before leaving EPA for Hunton at 2:30pm.*
Wehrum's briefing, obtained via FOIA, was titled, "Clean Air Act: Update on Stationary Source Regulations."[177] Among other issues, Wehrum discussed with his former clients and law partners:

- EPA's proposal to repeal the Clean Power Plan, and his intention to seek information from the public about a replacement that accords with legal interpretations advocated by Hunton;[178]

- EPA's ongoing review of greenhouse gas standards for new coal-fired power plants;[179]

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[173] Memorandum from Robert I. Cusick, Dir. of U.S. Office of Gov't Ethics, to Designated Agency Ethics Officials, DO-09-011 (Mar. 26, 2009).

[174] Leaked UARG Policy Committee document at 4.

[175] Email from Jaber Makram to Bill Wehrum, "Invitation to speak," Nov. 21, 2017 (6:21 AM).

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

[177] Wehrum presentation at Hunton at slide 1.

[178] *See id.* at slide 4.

[179] *Id.*

- Legal challenges to the Mercury and Air Toxics Standards (MATS) Rule, including the ongoing *Murray Energy v. EPA* case being litigated by Hunton;[180]

- EPA's ongoing work to determine which areas of the country are meeting the 2015 National Ambient Air Quality Standards (NAAQS) for ozone;[181]

- EPA's progress reviewing state regional haze plans, and state haze plans currently subject to ongoing litigation[182] – at least some of which was litigation by Hunton attorneys on behalf of UARG;[183]

- Various "Permitting Actions Underway" with implications for major sources of air pollution such as power plants.[184]

Immediately afterwards, Wehrum did a "Q&A" session with his former clients and other participants.[185] There is no public record of what questions Wehrum's former clients and law partners asked him, nor what his answers were.

In addition to the December 7, 2017 meeting at UARG's office, a review of Wehrum's calendar information shows that he has continued to meet in an official capacity with UARG members, including in at least eight meetings open to fewer than five entities. For those meetings held as of September 29, 2018, Wehrum had not received any waiver from EPA's ethics officials.[186] It is unknown whether he obtained waivers before any of the subsequent meetings.

In all, at least 10 different UARG members who arguably should have been included on Wehrum's list of recused former clients were able to gain private access to him when he served at EPA: American Electric Power; Dominion Energy; Duke Energy; Minnesota Power; Otter Tail Power; Southern Company; the American Coalition for Clean Coal Electricity; the Edison Electric Institute; the National Mining Association; and the National Rural Electric Cooperative Association.

A review of Wehrum's November 2017 through May 2019 calendar information – culled from FOIA productions and EPA's website – indicates the following meetings:

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[180] *Id.* at slide 5.

[181] *Id.* at slide 6.

[182] *Id.* at slides 12–13 (noting states with ongoing litigation).

[183] *See, e.g.*, *Texas et. al v. EPA*, 829 F.3d 405 (5th Cir. 2016) (Hunton attorneys Norman W. Fichthorn and Aaron M. Flynn representing UARG).

[184] Wehrum presentation at Hunton at slide 15.

[185] *Id.* at slide 16 ("Q&A"); Makram Jaber, "Event Information Form" at 1 (showing there would be time for "Q&A" moderated by Andrea Field, a Hunton partner).

[186] Letter from Kevin S. Minoli, Designated EPA Ethics Official, to Sen. Sheldon Whitehouse, at 1 (Sept. 29, 2016) ("To date, Mr. Wehrum has not received any waivers or authorizations issued pursuant to Executive Order 13770, 18 U.S.C. § 207(b)(1), or 5 C.F.R. § 2635.502(d).").

- **Dec. 7, 2017:** Wehrum met at the offices of his former employer Hunton, for a private speech before his former client "UARG," as well as four UARG members: American Electric Power, Duke Energy, Dominion, and Southern Company.

- **Jan. 10, 2018:** Wehrum met alone with UARG member the American Coalition for Clean Coal Electricity.

- **Jan. 12, 2018:** Wehrum met alone with UARG member the National Mining Association and its attorneys to discuss the Clean Power Plan, New Source Review, and Ozone Transport – all regulations that UARG proposed weakening.

- **Jan. 24, 2018:** Wehrum met with UARG member the Edison Electric Institute (EEI) to discuss the Mercury and Air Toxics Standards. In attendance on behalf of EEI was John McManus, an American Electric Power employee who chaired UARG's "Policy and Steering Audit" Committee in 2017, as well as representatives from UARG members Duke (from which Wehrum is recused), Ameren, FirstEnergy, and Southern Company. Also in attendance was a representative from Berkshire Hathaway Energy, a member of Hunton's CCS Alliance.

- **March 30, 2018:** Wehrum met alone with UARG member the National Rural Electric Cooperative Association.

- **May 30, 2018:** Wehrum met alone with UARG member the Edison Electric Institute to discuss the Clean Power Plan, Mercury and Air Toxics Standards, Regional Haze, and other matters.

- **July 9, 2018:** Wehrum met alone with UARG member the American Coalition for Clean Coal Electricity.

- **Nov. 28, 2018:** Wehrum met with the "Lignite Energy Council," including representatives from UARG members Otter Tail Power Co. and Minnesota Power.

- **Dec. 11, 2018:** Wehrum met alone with UARG member the National Rural Electric Cooperative Association.

The Trump EPA has not released any information about Harlow's schedule, and this investigation was thus unable to determine whether he met with any former clients or UARG members.

In addition, Wehrum also appears to have held meetings in apparent violation of ethical rules with former clients who he acknowledged the existence of and agreed not to meet with.

Specifically, as Senator Whitehouse noted[187] in letters to President Trump and Andrew Wheeler, Wehrum held two closed-door meetings with his former client General Electric (which is also a member of the Air Permitting Forum) in early 2018 that were not "open to all interested parties," thus violating the prohibition on participating in "any meetings or communications relating to the performance of [his] official duties," even regarding matters of general applicability.

The first meeting, on January 23, 2018, had only one additional entity present (Boeing), and thus did not satisfy the exception for being "open to all interested parties." The second meeting, on January 26, 2018 was with General Electric alone. The purpose of these small meetings with his former client is unknown. Depending on the subject matter discussed at these meetings, which is unknown, the meetings may also have violated Ethics in Government Act regulations.

Wehrum had additional meetings with General Electric representatives that appear to have included representatives of more than five other entities, on November 27, 2017 (with various members of the Association of Home Appliance Manufacturers) and on April 10, 2018 (with various members of the Gas Turbine Association).

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

APPENDICES

APPENDIX 1: Utility Air Regulatory Group

Topic	Sub-topic	UARG's position	Trump EPA's position
Air Toxics	**MATS 2016 Supplemental Finding that it is "appropriate and necessary" to regulate mercury and other toxic air pollution from power plants under CAA section 112.**	**2011:** **Harlow** writes nearly 300 pages of comments opposing the MATS proposal, including that "Regulation of [power plants] Under § 112(n)(1)(A) Is Neither 'Appropriate' Nor 'Necessary'" **2016:** Argued the Obama EPA should not have found that it is "appropriate and necessary" to regulate toxic air pollution from power plants under CAA section 112.[188] "UARG" asked its members to pay money to finance Hunton's legal challenge to this Obama EPA finding.[189]	**2017:** At a closed-door session held for UARG's benefit, Wehrum discussed MATS legal challenges, including the case Hunton itself was litigating against EPA.[190] **2019:** Wehrum signed proposal to reverse the Obama EPA finding, concluding instead that "it is not appropriate and necessary" to regulate toxic air pollution from power plants under CAA section 112.[191]
Air Toxics	**MATS 2016 Supplemental Finding's treatment of co-benefits**	**2016:** While at Hunton, Wehrum stated that, "[If] you look at the benefits generated by the hazardous air pollutant reductions [the MATS] rule would achieve, the costs vastly outweigh the benefits. So from our perspective, it's a regulation that made no sense and wasn't justified."[192] UARG argued in court that, when determining whether it is "appropriate and necessary" to regulate toxic air pollution from power plants under CAA section 112, the Obama EPA should not have considered co-benefits of reducing particulate matter (PM) because PM is "addressed under . . . the § 109 NAAQS program."[193] Wrote that reductions in co-benefits constitute the "overwhelming majority" of the MATS rule benefits.[194]	**2019:** Wehrum signed proposal to "reconsider" Obama EPA finding in part on the basis that co-pollutants are "already addressed" by the NAAQS program.[195] Focused in proposal on the fact that "these projected [PM] co-benefits comprised the overwhelming majority (approximately 99.9 percent" of the monetized benefits of MATS . . . ."[196]

[188] UARG brief challenging the 2016 MATS Supplemental Finding.
[189] Leaked UARG Policy Committee document at p. 19.
[190] Wehrum presentation at Hunton at 5.
[191] 84 Fed. Reg. 2670, 2674 (Feb. 7, 2019).
[192] Juan Carlos Rodriguez, *Environmental Group Of The Year: Hunton & Williams*, LAW360, Jan. 5, 2016 (5:57 PM EST).
[193] UARG brief challenging the 2016 MATS Supplemental Finding at 47.
[194] UARG brief challenging the 2016 MATS Supplemental Finding at 21.
[195] 84 Fed. Reg. at 2677.
[196] 84 Fed. Reg. at 2676.

Topic	Sub-topic	UARG's position	Trump EPA's position
Air Toxics	**MATS Residual Risk & Technology Review to determine whether to require additional health- or environmental-based controls on power plants**	**2011:** "HAP emissions from coal-fired EGUs pose insignificant risks to human health and ecological resources," and on that basis should be de-listed.[197] **2017:** UARG seeks dues from its members to pay Hunton to "Coordinate with EPRI regarding eventual residual risk and technology review (RTR) of MATS rule," which could have imposed additional controls on power plants beyond the MATS rule's MACT standards.[198] In the past, UARG had used EPRI analyses in August 2011 to argue that coal-fired power plants do not pose a legally significant cancer risk, and would not hurt the environment.[199]	**2019 (Wehrum's signed proposal):** "Considering all of the health risk information and [relevant] factors . . . Including the uncertainties . . . the EPA proposes that the risks are acceptable" for HAP emissions from coal- and oil-fired power plants.[200] No additional health- or environmental-based controls should be required: "we are proposing that the current MATS requirements provide an ample margin of safety to protect public health," and "it is not necessary to set a more stringent standard to prevent . . . an adverse environmental effect."[201]

[197] UARG comments at 18. Although this comment urged that power plants be entirely removed from regulation under CAA section 112, the scientific arguments advanced are similar to those in a residual risk and technology review.
[198] Leaked UARG Policy Committee document at p. 19.
[199] UARG comments at 5-14.
[200] 84 Fed. Reg. at 2700.
[201] 84 Fed. Reg. at 2700.

Topic	Sub-topic	UARG's position	Trump EPA's position
Air Toxics	**Withdrawal of "Once In, Always In" (OIAI) policy requiring major sources to continue meeting stringent limits**	**2007:** "EPA's 'once-in-always-in' policy adds a temporal condition to source classification that is not found in the CAA or in EPA's § 112 regulations."[202] Withdrawal of the OIAI policy would be "consistent with language [sic] and structure of the CAA and should be adopted."[203] Withdrawal of the OIAI policy "must be addressed by rulemaking, not by issuance of a guidance memorandum."[204] **2019:** UARG – joined by APG, AIF and NEDACAP (four Hunton lawyers total) – intervene in lawsuit defending Wehrum's withdrawal of the OIAI policy.[205] Made same 3-part argument that EPA does: (1) "The Wehrum Memo is not subject to judicial review at this time," and (2) alternatively, "The Wehrum Memo implements the CAA's plain language," but (3) asked for "remand should the Court find statutory ambiguity."[206]	**2018 (Wehrum memo):** "Congress placed no temporal limitations on the determination of whether a source emits or has the [potential to emit air toxics] in sufficient quantity to qualify as a source. To the extent the OIAI policy imposed such a temporal limitation . . ., EPA had no authority to do so under the plain language of the statute."[207] "Nothing in the structure of the CAA counsels against the plain language reading" advanced by Wehrum.[208] **2019:** EPA files brief arguing that, (1) "The 2018 Guidance is neither a legislative rule nor final agency action," and thus cannot be directly challenged, (2) alternatively, "EPA's plain language reading of the statute should be upheld," but if it's not clear from the plain text then (3) "EPA must be given the first opportunity to consider how best to resolve that ambiguity."[209] **June 2019:** EPA proposes rule to codify the Wehrum memo. "We are proposing to make clear in this rulemaking [such sources] will not be subject to the CAA section 112 requirements applicable to the source as a major source . . . ."[210]

[202] UARG comment on OIAI proposal at 2.
[203] *Id.* at 3.
[204] *Id.* at 1.
[205] California Communities Against Toxics v. EPA, 18-1085 (D.C. Cir.) (briefs for Hunton-aligned groups filed in January 2019 in Feb. 2019).
[206] UARG OIAI brief, 2019 WL 858013.
[207] Wehrum OIAI memo at 3.
[208] *Id.* at 4.
[209] EPA OIAI brief, 2019 WL 858006.
[210] https://www.epa.gov/sites/production/files/2019-06/documents/frn_mm2a_proposal_and_reg_text_6_25_19.pdf

Topic	Sub-topic	UARG's position	Trump EPA's position
Climate	**GHG NSPS for new power plants; decision to base the "best system of emission reduction" (BSER) for power plants in part on what can be achieved using partial carbon capture and storage (CCS) technology**	**2012 (Wehrum):** "There is no doubt that CCS [carbon capture and storage] cannot possibly be considered to be the BSER [best system of emission reduction] at the present time . . . ."[211] **2014:** "CCS has not been shown to meet the CAA's criteria for determining whether technology has been adequately demonstrated."[212] **2015:** "[O]perational experience to date at Boundary Dam does not support finding that CCS is adequately demonstrated or that it is the BSER for coal-fired EGUs."[213] **2017:** UARG files briefs in lawsuit challenging the Obama EPA rule. UARG sought dues from its members for "preparation of a possible replacement" of the Obama EPA rule.[214] **2019:** "UARG supports EPA's proposed finding that neither 'full' nor 'partial' CCS constitutes the BSER for new coal-fired EGUs."[215]	**2017:** "EPA . . . is reviewing the [2015 Rule] and, if appropriate, will as soon as practicable and consistent with law, initiate reconsideration proceedings to suspend, revise or rescind the rule."[216] **2018:** "EPA is proposing to revise its [2015] analysis and determine that CCS is not adequately demonstrated . . . ."[217] "[T]he EPA proposes to revise to the BSER . . . . The primary reason for this proposed revision is the high costs and limited geographic availability of CCS."[218] "While the carbon capture technology at the Boundary Dam is currently operating, that project experienced multiple issues with [the CCS technology] during its first year of operation . . . . EPA solicits comment on whether Boundary Dam's first-year operational problems cast doubt on the technical feasibility of fully integrated CCS."[219] ***Wehrum*:** "Today's actions reflect our approach of defining new, clean coal standards by data and the latest technological information, not wishful thinking."[220]

[211] Comments of Bill Wehrum et al. for UARG, Docket Id. No. EPA-HQ-OAR-2011-0660-9995, at 77 (June 25, 2012).
[212] UARG Comments, Docket Id. No. EPA-HQ-OAR-2013-0495-9666, at 41–42 (May 9, 2014).
[213] UARG petition for reconsideration, Docket Id. No. EPA-HQ-OAR-2013-0495-11894, at 5 (Dec. 22, 2015).
[214] Leaked UARG Policy Committee document at 13.
[215] UARG comments, Docket Id. No. EPA-HQ-OAR-2013-0495-12621, at 14 (Mar. 18, 2019).
[216] 82 Fed. Reg. 16330 (Apr. 4, 2017).
[217] 83 Fed. Reg. at 65441 (Dec. 20, 2018).
[218] *Id.* at 65426.
[219] *Id.* at 65444.
[220] https://www.epa.gov/newsreleases/epa-proposes-111b-revisions-advance-clean-energy-technology

Topic	Sub-topic	UARG's position	Trump EPA's position
Climate	**Clean Power Plan; determination of the "best system of emission reduction" (BSER) for reducing GHGs from power plants**	**2014:** "A standard of performance under section 111 must be achievable for individual sources based on measures the source's owner can integrate into the design or production process of the source itself."[221] "[T]he plain text of section 111 of the CAA establishes a program that is focused on reducing the rate of emissions . . . through the application of systems that can be integrated into the design or operation of the source itself."[222] "Likewise, the CAA's other similar programs . . . are limited to measures incorporated into the design or production processes of individual sources."[223] **2017:** "Any replacement or revision to the Clean Power Plan under CAA § 11(d) must . . . be based on a 'best system of emission reduction' that can be applied at the individual [sources] subject to the rule . . . "[224]	**2017:** "[T]he Agency proposes to return to a reading of CAA section 111(a)(1) (and its constituent term, 'best system of emission reduction') as being limited to emission reduction measures that can be *applied to or at* an individual stationary source. That is, such measures must be based on a physical or operational change to a building, structure, facility, or installation at that source, rather than measures that the source's owner or operator *can implement on behalf of* the source at another location."[225] This "source-specific approach" includes measures "integrated into its design or operation."[226] **2019:** The word "system" is "limited to lower-emitting processes, practices, designs, and add-on controls that are applied at the level of the individual facility."[227]

[221] UARG CPP comments, Docket Id. No. EPA-HQ-OAR-2013-0602-22768, at 17 (Dec. 1, 2014).
[222] *Id.* at 28.
[223] *Id.* at 36.
[224] UARG comments, Docket Id. No. EPA-HQ-OA-2017-0190-40140, at 5 (May 12, 2017).
[225] 82 Fed. Reg. 48035, 48309 (Oct. 16, 2017).
[226] *See* 82 Fed. Reg. at 48037.
[227] Repeal of Clean Power Plan at 99 (July 19, 2019) (pre-publication).

Topic	Sub-topic	UARG's position	Trump EPA's position
Climate / permitting	**Clean Power Plan; exemption from New Source Review (NSR) permitting requirements**	**2007:** "UARG members strongly support EPA's proposal to adopt an hourly emissions increase test as a threshold requirement for what is a 'modification' under the NSR program . . . ."[228] **2014:** "EPA's failure to account for the potential cost of NSR—and NSR uncertainty" in the Clean Power Plan is unlawful.[229] **2018:** "Adopting a maximum hourly emission rate increase threshold test for major modifications will promote the safe, reliable, and efficient operation of [power plants]. * * * UARG supports the proposed scope of EPA's revisions to the NSR applicability test . . . ."[230]	**2017:** "We are interested in actions that be taken to harmonize and streamline the NSR applicability and/or the NSR permitting process with a potential new rule. * * * What rule or policy changes or flexibilities can EPA provide as part of the NSR program that would enable [power plants] to . . . not trigger major NSR permitting while maintaining environmental protections? * * * What other approaches would minimize the impact of the NSR program on the implementation of [greenhouse gas standards for power plants]?"[231] **2018:** "EPA is proposing to amend the NSR regulations to include an hourly emissions increase test for [power plants]."[232] "EPA has historically not considered the costs of complying with other CAA programs, like NSR, when determining BSER for a source category under section 111. * * * However, due to the nature of the electric utility industry and the types of candidate control measures being considered in this proposal, it may be appropriate to consider NSR compliance costs in this instance."[233]

[228] UARG NSR comments, Docket Id. No. EPA-HQ-OAR-2005-0163-0319, at 3 (Aug. 8, 2007).
[229] UARG CPP comments, Docket Id. No. EPA-HQ-OAR-2013-0602-22768, at 177 (Dec. 1, 2014).
[230] UARG ACE comments, Docket Id. No. EPA-HQ-OAR-2017-0355-24421, at 99 (Oct. 31, 2018).
[231] 82 Fed. Reg. 61507, 61519 (Dec. 28, 2019) (ANPR).
[232] 83 Fed. Reg. 44746, 44780 (Aug. 31, 2018) (proposal).
[233] *Id.* at 44777.

Topic	Sub-topic	UARG's position	Trump EPA's position
Climate	**Emission guidelines for methane from existing landfills, and EPA's authority to revise such guidelines**	**2015:** Opposes updates to landfill emission guidelines because EPA "lacks authority under the CAA to revise the emission guidelines to make them more stringent."[234]	**2017:** Pruitt delays effective date of the rules, but this is struck down in court. **2018:** EPA asks court to hold litigation challenging the landfill rule "in indefinite abeyance" while the agency reconsiders the rule.[235]
NAAQS	**Primary (health-based) SO2 NAAQS, and Trump EPA's decision not to strengthen it**	"UARG supports EPA's proposal to retain the primary SO_2 NAAQS without change."[236] "[T]he current NAAQS is more protective than was recognized when it was adopted. This means that the margin of safety is greater than was previously considered adequate."[237]	"[T]he Administrator has concluded that the current primary SO_2 standard is requisite to protect public health, with an adequate margin of safety, from effects of SO_X in ambient air and should be retained, without revision."[238] **Wehrum:** "[W]e have concluded that the existing standard continues to provide adequate health protection to our most vulnerable populations."[239]
NAAQS	**Primary (health-based) NO2 NAAQS, and Trump EPA's decision not to strengthen it**	"UARG supports the proposal to retain the primary NO_2 NAAQS . . . ."[240] "In fact, the present standards are even more protective than the Administrator recognizes."[241]	"EPA is retaining the current primary NO_2 standards, without revision."[242]

[234] UARG Comments, Docket Id. No. EPA-HQ-OAR-2014-0451-0198, at 1 (Oct. 26, 2015).
[235] Joint Motion to Govern Further Proceedings, *Nat'l Waste & Recycling Ass'n v. EPA*, No. 16-1372 (D.C. Cir. Apr. 3, 2018).
[236] UARG Comments, Docket Id. No. EPA-HQ-OAR-2013-0566-0207, at 2 (Aug. 9, 2018).
[237] UARG Comments, Docket Id. No. EPA-HQ-OAR-2013-0566-0207 at 10 (Aug. 9, 2018).
[238] 84 Fed. Reg. 9866, 9867 (Mar. 18, 2019).
[239] https://www.epa.gov/newsreleases/epa-retains-national-ambient-air-quality-standards-sulfur-dioxide
[240] UARG Comment, Docket. ID No. EPA-HQ-OAR-2013-0146-0150, at 1 (Sept. 25, 2017).
[241] *Id.* at 10.
[242] 83 Fed. Reg. 17226, 17227 (Apr. 18, 2018)

Topic	Sub-topic	UARG's position	Trump EPA's position
NAAQS	**Review of ozone NAAQS, sidelining of independent science**	**May 2011**: "Recent research on morbidity effects" of ozone exposure "is inconsistent and unremarkable,"[243] and "recent research on mortality effects is inconsistent and inconclusive."[244] **Dec. 2011:** "EPA staff continues in [the draft Integrated Science Assessment] to present new research in a manner that suggests that the new science changes what was known previously about the effects of ozone exposure on public health. . . . This biased approach is highly inappropriate, contrary to the purpose of the NAAQS review process," and illegal.[245] **Aug. 2012:** "Unfortunately, EPA staff takes the same . . . biased approach" in the Third Draft ISA, again "present[ing] the recent research in a manner that suggested that the new science changes what was known" in 2008.[246] **Oct. 2012:** EPA's draft Health Risk and Exposure Assessment (HREA) for ozone pollution is "overly complex and inaccessible . . . 533 pages long and well over one-inch thick when printed double-sided."[247]	**April 2018:** Wehrum publicly advocates a faster NAAQS review process by "reducing some scientific advisory input and accepting data that is 'close enough' to justify a review rather than 'perfect,' . . . ."[248] **Oct. 2018:** EPA eliminates plans for an Ozone Review Panel, which would have provided expert scientific advice for purposes of considering whether to update the NAAQS.[249]

[243] UARG comment on draft Integrated Science Assessment, Docket Id. No. EPA-HQ-ORD-2011-0050-0009, at 6 (May 5, 2011).
[244] *Id.* at 21.
[245] UARG comment on Second External Review of the draft ISA, Docket Id. No. EPA-HQ-ORD-2011-0050-0031, at 6, (Dec. 30, 2011).
[246] UARG Comment on Third External Review of the draft ISA, Docket Id. No. EPA-HQ-ORD-2011-0050-0046, at 3 (Aug. 20, 2012).
[247] UARG comment, Docket Id. No. EPA-HQ-OAR-2008-0699-0096, at 8 (Oct. 12, 2012).
[248] *EPA Air Chief Plans To Speed NAAQS Reviews Using 'Close Enough' Data*, INSIDEEPA (Apr. 19, 2018).
[249] *See* Dino Grandoni & Juliet Eilperin, *EPA scraps pair of air pollution science panels*, WASH. POST (Oct. 13, 2018).

Topic	Sub-topic	UARG's position	Trump EPA's position
NAAQS	**Startup, Shutdown, and Malfunction (SSM) Rule**[250]	**2013:** "UARG members have a significant, direct interest in EPA's proposal and the CAA interpretations on which it is based. * * * UARG disagrees that EPA has demonstrated that the identified SIP provisions are 'substantially inadequate.' * * * UARG also disagrees with many of the CAA interpretations that EPA suggests justify the proposed result."[251] **2016**: "EPA has not met its burden to justify a SIP call."[252] **2017:** "EPA should convene a proceeding to withdraw the SSM SIP calls by applying a SIP call standard that is consistent with its limited authority under the CAA and obligation to consider the impacts of its exercise of that authority."[253]	**Oct. 2018:** "Region 6 has received concurrence from the relevant office in EPA's Office of Air and Radiation to convene a proceeding for reconsideration of the Texas SIP call, the outcome of which may potentially entail Region 6 proposing an action inconsistent with EPA's interpretation in the 2015 SSM SIP Action when acting pursuant to the reconsideration of the Texas SIP call. * * * EPA will conduct notice-and-comment proceedings as part of that reconsideration process if the Agency proposes to change the Texas SIP call."[254] **Apr. 2019:** "[EPA Region 6] is considering an alternative interpretation regarding affirmative defense provisions in [SIPs] . . . that departs from the EPA's 2015 policy on this subject. * * * EPA Region 6 proposes to withdraw the 2015 determination that the Texas SIP is substantially inadequate . . . ."[255] **June 2019:** "[EPA] Region 4 is considering changing the finding . . . that certain SIP provisions in the North Carolina SIP are substantially inadequate to meet CAA requirements."[256]
NSR	**DTE "second-guessing"**	**2012:** "[T]he causation standard is whether the 'change' was the 'predominant cause' of the increase."[257]	**2017:** "Because increased emissions may be caused by multiple factors . . . the source must exercise judgment to exclude increases for which the project is not the 'predominant cause.'"[258]

[250] https://eelp.law.harvard.edu/2017/09/power-plant-startup-shutdown-and-malfunction-rule/
[251] UARG comments, Docket Id. No. EPA-HQ-OAR-2012-0322-0556, at 4 (May 13, 2013).
[252] Brief of UARG and other industry petitioners, *Walter Coke, Inc. v. EPA*, No. 15-1166, at 23 (D.C. Cir. Oct. 31, 2016).
[253] UARG comments, Docket Id. No. EPA-HQ-OA-2017-0190-40140, at 25 (May 12, 2017).
[254] Letter from Anne Idsall, Reg'l Admin'r, to Jon Niermann and Janis Hudson, at 2 (Oct. 16, 2018).
[255] 84 Fed. Reg. 17986, 17987 (Apr. 29, 2019).
[256] 84 Fed. Reg. 26031, 26036 (June 5, 2019).
[257] UARG brief at 20 (Feb. 27, 2015); UARG brief at 15 & n.8 (May 1, 2012).
[258] Memorandum from EPA Admin'r Scott Pruitt to Reg'l Administrators, *New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected Actual Applicability Test in Determining Major Modification Applicability*, at 7 (Dec. 7, 2017)..

Topic	Sub-topic	UARG's position	Trump EPA's position
NSR	**Source aggregation**	**June 2010:** "[T]he final Aggregation Rule is a step in the right direction and should not be revoked."[259]	**Nov. 2018:** "On April 15, 2010, the EPA proposed to revoke the 2009 NSR Aggregation Action. After a review of the public comments . . . the EPA has now decided not to revoke the 2009 Aggregation Action."[260]
Interstate pollution	**Rejection of "section 126" petitions from downwind states**	**July 2018:** "UARG and UARG members have a strong, direct interest in supporting EPA's proposed denial of the section 126 petitions at issue in this proceeding."[261] "[E]ach of the petitions is insufficient to support a section 126(b) finding."[262] "Although the Administrator could, in his discretion, choose to undertake a separate analysis . . . section 126(b) does not obligate or direct the Administrator to conduct such an analysis."[263]	**Oct. 2018:** "Delaware's petition provides insufficient evidence of a requisite air quality problem with respect to the 2008 ozone NAAQS within the state."[264] "The EPA has no obligation to prepare an analysis to supplement a petition that fails, on its face, to include an initial technical demonstration. Such a petition, or a petition that fails to identify the specific finding requested, can be denied as insufficient." [265]
Interstate pollution	**CSAPR close-out**	**2018:** "EPA reasonably and properly concluded" that it would evaluate downwind conditions based on projected air quality in 2023, rather than a sooner date.[266]	**2018:** "EPA is finalizing a determination that 2023 is an appropriate future analytic year to evaluate remaining good neighbor obligations."[267]

[259] UARG Aggregation Rule comments, Docket Id. No. EPA-HQ-OAR-2003-0064-0157, at 2 (June 16, 2010).
[260] 83 Fed. Reg. 57324, 57324 (Nov. 15, 2018).
[261] UARG 126 comments, Docket Id. No. EPA-HQ-OAR-2018-0295-0077, at 3 (July 23, 2018).
[262] *Id.* at 11.
[263] *Id.* at 7.
[264] 83 Fed. Reg. 50444, 50456 (Oct. 5, 2018).
[265] 83 Fed. Reg. 50444, 50452 (Oct. 5, 2018).
[266] *See* UARG CSAPR Close-Out comments, Docket Id. No. EPA-HQ-OAR-2018-0225-0319, at 8 (Aug. 31, 2018).
[267] 83 Fed. Reg. 65878 (Dec. 21, 2018).

Topic	Sub-topic	UARG's position	Trump EPA's position
Visibility	**Changes to weaken the Regional Haze Rule**	**Mar. 2017:** "UARG requests that EPA reconsider provisions of the [Regional Haze] Rule," including "Revisions to the 'reasonably attributable visibility impairment'. . . ."[268] **May 2017:** "EPA should reconsider and modify . . . provisions concerning the 'uniform rate of progress' and provisions addressing states' consultation processes . . . with federal land management agencies."[269] **June 2017:** UARG sought additional money from its members to pay Hunton for "[p]articipation as necessary . . . proceedings regarding implementation of the regional haze rules," and "[m]onitoring and reporting on EPA activities and guidance concerning regional haze requirements . . . ."[270]	**Jan. 2018**: "We intend to commence a notice-and-comment rulemaking in which we will address portions of the [Regional Haze] rule, including but not limited to the Reasonably Attributable Visibility Impairment provisions, the provisions regarding Federal Land Manager consultation and any other elements of the rule we may identify for additional consideration," which "will provide UARG and the public an opportunity to comment on the issues . . . ."[271] **Dec. 2018:** "This guidance document includes EPA's final recommendations on . . . methods for accounting for total international impacts to adjust the uniform rate of progress . . ."[272]
NAAQS	**Manipulating data from days with bad air quality, even *without* an "exceptional event" like wildfires or volcanoes**[273]	**2016:** "UARG recommends that EPA consider making the [Exceptional Events] Rule applicable to more circumstances than the Agency has proposed."[274]	**2019:** "[This] document identifies other determinations, actions, and analyses that are not covered by the scope of the Exceptional Events Rule, but for which the exclusion, selection, or adjustment of monitoring data may be appropriate and allowable under other sections of the Clean Air Act . . . and EPA rules or guidance."[275]

[268] UARG petition for reconsideration, Docket Id. No. EPA-HQ-OAR-2015-0531-0642, at 1 (Mar. 13, 2017).
[269] UARG comments, Docket Id. No. EPA-HQ-OA-2017-0190-40140, at 11–12 (May 12, 2017).
[270] Leaked UARG Policy Committee document at 20.
[271] Letter from Scott Pruitt, Admin'r, to Hunton counsel for UARG, Jan. 17, 2018.
[272] Memorandum from Richard Wayland to Reg'l Air Division Dirs., *Technical Guidance on Tracking Visibility Progress for the Second Implementation Period of the Regional Haze Program*, at 1 (Dec. 20, 2018).
[273] *See EPA Expands Air Data Waivers For 'Exceptional' Events, Sparking Criticism*, INSIDEEPA, Apr. 11, 2019.
[274] UARG comments, Docket Id. No. EPA-HQ-OAR-2013-0572-0161, at 1 (Feb. 3, 2016).
[275] U.S. EPA, Additional Methods, Determinations, and Analyses to Modify Air Quality Data Beyond Exceptional Events, EPA-457/B-19-002, at 1 (Apr. 2019).

APPENDIX 2: The Air Permitting Forum and its sub-coalition, the Auto Industry Forum

Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
Climate	**Hydro-fluorocarbons (HFCs); opposition to rules restricting refrigerant substitutes, and extension of compliance deadline**	***Filed with Auto Industry Forum*** **Jan. 2017:** "[E]xpanding the rule to include chemicals that have a high global warming potential, but no or limited impact on stratospheric ozone, is inconsistent with the intent of section 608 of the CAA."[276] "That Congress did not provide any explicit grant of authority for EPA to establish a regulatory program for substitutes indicates that no such authority exists . . . ."[277] **Nov. 2018:** "Like the Agency, the Forum believes the 2016 interpretation led to EPA exceeding its authority in extending . . . requirements to substitutes."[278] "The Forum recommends a twelve month extension [of the compliance date] . . . * * * EPA should issue a separate final rule that specifically extends the compliance date."[279]	**Aug. 2017:** "The EPA is planning to issue a proposed rule to revisit aspects of the 2016 rule's extension of . . . refrigerant management requirements to non-exempt substitutes. We are also aware of your concerns regarding the feasibility of meeting the January 1, 2018, compliance dates and will consider options for relief if we receive adequate information from you to substantiate the basis for such relief."[280] **Oct. 2018:** "Based on feedback from some in the regulated community, the Agency reviewed the 2016 Rule, focusing in particular on whether the Agency had statutory authority to extend the full set of . . . regulations to non-exempt substitute refrigerants, such as HFCs and HFOs. * * * [T]he Agency is now proposing to withdraw the recent extension of the appliance maintenance and leak repair provisions . . . ."[281] "EPA is proposing to take final action to extend the compliance date . . . . EPA anticipates the extension would be between six to twelve months . . . . If needed, EPA intends to take final action on the proposed extension of the compliance date separate from, and before, taking action on other proposals in this document."[282]

[276] APF HFC petition for reconsideration, Docket Id. No. EPA-HQ-OAR-2017-0629-0006, at 1 (Jan. 17, 2017).
[277] *Id.* at 4.
[278] APF HFC rollback comments, Docket Id. No. EPA-HQ-OAR-2017-0629-0295, at 4 (Oct. 1, 2018).
[279] *Id.* at 12.
[280] Letters from Scott Pruitt, EPA Admin'r, to Hunton counsel for the Air Permitting Forum, Aug. 10, 2017.
[281] 83 Fed. Reg. 49332, 49333 (Oct. 1, 2018).
[282] *Id.* at 49341.

Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
NAAQS	**Narrowing the meaning of "ambient air"**	***Filed with Auto Industry Forum*** **2019:** "The Draft Revised Policy would appropriately recognize that modern measures, such as surveillance technology, should be on the same footing as fences or physical barriers in determining ambient air exclusions"[283]	**2018:** "[S]takeholders have argued that the application of the ambient air policy is overly restrictive and that . . . the restrictive language from the 1980 letter that solely focuses on the use of a 'fence or other physical barriers' to preclude public access should be updated to provide for consideration of additional types of measures that are effective in deterring or precluding access to the land by the general public . . . . "[284] "The EPA's [draft] revised ambient air policy replaces 'a fence or other physical barriers' with 'measures, which may include physical barriers, that are effective in deterring or precluding access to the land by the general public.'"[285]

[283] APF ambient air comments at 5 (Jan. 11, 2019), https://insideepa.com/sites/insideepa.com/files/documents/2019/feb/epa2019_0278b.pdf
[284] U.S. EPA, DRAFT REVISED POLICY ON EXCLUSIONS FROM "AMBIENT AIR" at 2 (Nov. 2018), https://www.epa.gov/sites/production/files/2018-11/documents/draft_ambient_air_guidance_110818.pdf
[285] *Id.* at 5.

Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
NAAQS	**Co-benefits**	**May 2017:** "EPA's reliance on $PM_{2.5}$ co-benefits in issuing regulations has had a profound effect in not only justifying EPA regulations but in supporting the overall value of the government's regulatory enterprise. * * * [O]ver 99 percent of the projected benefits from [the Mercury and Air Toxics Standards (MATS) rule] are based on reductions in $PM_{2.5}$ exposures projected to occur in areas where the $PM_{2.5}$ levels are already below the $PM_{2.5}$ NAAQS. "The Forum recommends that EPA undertake a review of the use of co-benefits including co-benefits that derived from reductions in exposures that are well below the levels deemed safe by EPA [*i.e.*, the NAAQS]."[286]	**Oct. 2017:** Under one approach to estimating the health consequences of repealing the "Forgone $PM_{2.5}$ co-benefits fall to zero in areas whose model-predicted air quality is at or below the annual average $PM_{2.5}$ NAAQS of 12 [micrograms per cubic meter of air]."[287] **May 2019:** "A longstanding and important question is how much benefit is derived by further reducing ambient levels [of pollution] below the national standards. We are considering changes to how such benefits are calculated."[288] **May 2019 (Wehrum):** "How in the world can you get $30 or $40 billion of benefit to public health [from the MATS rule] when most of that is attributable to reductions in areas that already meet a health-based standard . . . . That doesn't make any sense."[289] **June 2019:** "EPA invites the public to nominate scientific experts to be considered as peer reviewers for the EPA-drafted report titled, 'Potential Approaches for Characterizing the Estimated Benefits of Reducing PM2.5 at Low Concentrations.'"[290]
NSR	**Reduce EPA oversight of state programs**	**May 2017:** "EPA . . . has repeatedly second-guessed the purpose, content, and timing of state permit decisions. * * * The Forum . . . recommends that EPA respect decisions made by its state partners as Congress originally intended and reduce, if not eliminate, federal second-guessing."[291]	**Oct. 2018:** Wheeler issues memorandum, "Principles and Best Practices for Oversight of Federal Environmental Programs."[292] Among other things, the memo calls for, "General Deference to States and Tribes Implementing Federally Delegated Programs."[293]

[286] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 29 (May 15, 2017)
[287] 82 Fed. Reg. at 48044 (Oct. 16, 2017).
[288] https://insideepa.com/daily-news/epa-said-cut-pm-benefits-final-ace-rule-reduce-premature-deaths
[289] Lisa Friedman, *E.P.A. Plans to Get Thousands of Pollution Deaths Off the Books by Changing Its Math*, N.Y. TIMES, May 20, 2019.
[290] https://insideepa.com/sites/insideepa.com/files/documents/2019/jun/epa2019_1027a.pdf
[291] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 7 (May 15, 2017)
[292] https://www.acwa-us.org/wp-content/uploads/2018/11/State-Oversight-Memo.pdf
[293] *Id.* at 3.

Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
NSR	**Weaken or eliminate the independent EPA enforcement office**	**May 2017:** "Implement structural changes within the Agency for how enforcement is initiated and managed . . . . [T]he essence of a successful reorganization will be that those involved in enforcement are more connected to the standards they enforce, and those that set the standards are more connected to the enforcement of the standards they established."[294]	InsideEPA: Trump EPA Weighs Shuttering Enforcement Office By Prospects Unclear[295] *"A source familiar with the plan says Trump EPA officials intend to 'disassemble the enforcement office. They are going to take it, break it up and move it back into the program offices.'"*
NSR	**Demand-growth exclusion; DTE "second-guessing"**	**May 2017:** "The Forum recommends that EPA clarify its position on the Demand Growth Exclusion/causation requirement . . . ."[296] "While historically EPA has recognized that a source must exercise judgment to exclude increases for which the project is not the 'predominant cause,' more recent EPA actions reflect the view that all emission increases are presumed to be caused by the change."[297]	**Dec. 2017:** "We believe this memorandum is necessary to provide greater clarity for sources and states implementing the NSR regulations."[298] "Because increased emissions may be caused by multiple factors, the EPA has recognized that the source must exercise judgment to exclude increases for which the project is not the 'predominant cause.'"[299]

[294] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 9 (May 15, 2017)
[295] https://insideepa.com/daily-news/trump-epa-weighs-shuttering-enforcement-office-prospects-unclear
[296] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 13 (May 15, 2017).
[297] *Id.* at 12.
[298] Memorandum from EPA Admin'r Scott Pruitt to Reg'l Administrators, "New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected Actual Applicability Test in Determining Major Modification Applicability," at 2 (Dec. 7, 2017), *available at* https://www.epa.gov/sites/production/files/2017-12/documents/nsr_policy_memo.12.7.17.pdf.
[299] Memorandum from EPA Admin'r Scott Pruitt to Reg'l Administrators, "New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected Actual Applicability Test in Determining Major Modification Applicability," at 7 (Dec. 7, 2017), *available at* https://www.epa.gov/sites/production/files/2017-12/documents/nsr_policy_memo.12.7.17.pdf.

Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
NSR	**Expansion of "netting" to allow old sources to avoid CAA controls when they upgrade equipment**	**May 2017:** "EPA should clearly state that emission decreases are allowed in determining project emissions changes without triggering full netting of all contemporaneous projects."[300]	**Mar. 2018:** "Based on reconsideration of some previous conclusions and an examination of the regulations as a whole, the EPA now interprets [certain NSR rules] as providing that any emissions *decreases* that may result from a given proposed project are to be considered when calculating at Step 1 whether the proposed project will result in a significant emissions increase."[301] **Mar. 2019 (InsideEPA):** "EPA has sent for [OMB] review its proposal to revise Clean Air Act new source review (NSR) permit 'project emissions accounting,' or 'netting,' one of several piecemeal NSR reforms that critics say will make it easier for companies to avoid strict air permits."[302]
NSR	**Aggregation; reinstatement of rule finalized in last week of George W. Bush Administration but never made effective by the Obama Administration**	**May 2017:** "Aggregating projects that independent, for the purposes of determining NSR applicability, increases the likelihood of triggering the cumbersome NSR process beyond what was originally intended. * * * EPA guidance has expanded the 'aggregation' criteria well beyond what is needed . . . . Had it not been put on hold, the 2009 final rule would have brought needed clarity and simplified administration of the program. EPA should remove the stay of the final [2009] rule . . . ."	**Nov. 2018:** "The Environmental Protection Agency (EPA) is concluding the reconsideration of an earlier action that the EPA published on January 15, 2009, titled 'Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation and Project Netting.' The 2009 action . . .clarified implementation of the [NSR] permitting program under the [CAA] with respect to treating related physical or operational changes as a single 'modification' for the purpose of determining NSR applicability at a stationary source. . . . [T]he EPA has now decided to not revoke the 2009 NSR Aggregation Action."
NSR	**Debottlenecking**	**May 2017:** EPA should "issue a rule to clearly state that only emission increases related to units actually being modified should be analyzed," rather than considering "upstream and downstream units (referred to as debottlenecked units) [that] have previously obtained [NSR] permits . . . ."[303]	**Oct. 2017:** Pruitt report noted that commenters recommended "reviewing the debottlenecking rule and re-proposing it to address NSR requirements for modifying sources," and that he would be convening an "NSR Reform Task Force" to "address these important areas and achieve meaningful NSR Reform . . . ."[304]

[300] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 14 (May 15, 2017)
[301] Memorandum from Scott Pruitt, Admin'r, to Reg'l Admin'rs, *Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program* (Mar. 13, 2018), at 6, https://www.epa.gov/sites/production/files/2018-03/documents/pea_nsr_memo_03-13-2018.pdf
[302] https://insideepa.com/daily-feed/epa-sends-nsr-air-permit-%E2%80%98netting%E2%80%99-proposal-omb-review
[303] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 16 (May 15, 2017).
[304] https://www.epa.gov/sites/production/files/2017-10/documents/eo-13783-final-report-10-25-2017.pdf

Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
NSR	**Expansion of "routine maintenance" exception**	**May 2017:** "EPA continues to inappropriately interpret [the routine maintenance, repair, and replacement (RMRR)] exclusion narrowly. * * * EPA should clarify that replacements and repairs that are routine in the industry, even if they may occur only once or twice during the life of a plant . . . are considered 'routine' within the meaning of the RMRR exclusion."[305]	**Apr. 2018:** "EPA believes there is uncertainty regarding the interpretation of the Routine Maintenance, Repair and Replacement (RMRR) provisions in the New Source Review Program. * * * EPA is evaluating the need to clarify the interpretation and appropriate application of the RMRR provision . . . ."[306]
NSR	**Significant Emissions Rate (SER) for greenhouse gases**	**May 2017:** "In October 2016, EPA proposed a rule to establish a significant emission rate [SER] for GHGs of 75,000 tons per year (tpy) of carbon dioxide equivalent . . . . The Forum submitted comments on the proposed rule recommending that EPA finalize a SER value much higher than 75,000 tpy . . . ."[307]	The Obama Administration proposed a rule establishing an SER of 75,000 tons per year of CO2-equivalent emissions.[308] As of April 2019, the Trump Administration has not taken action on that proposal.[309]
NSR	**Control technology determination process; "presumptive BACT"**	**May 2017:** "[T]he Forum recommends that EPA undertake administrative changes to the NSR program to reduce uncertainty, by adopting approaches like 'presumptive BACT' and giving states the flexibility to make expeditious permitting decisions without second-guessing by EPA."[310] **Dec. 2017:** Reporting indicates that "industry officials are stepping up their push" for "presumptive BACT guidance."[311]	Unknown

[305] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 18 (May 15, 2017).
[306] Presentation by Anna Marie Wood, Dir. Air Quality Policy Div., *NAAQS and Other Implementation Updates* (Apr. 5, 2018), slide 33, https://insideepa.com/sites/insideepa.com/files/documents/2018/apr/epa2018_0631.pdf.
[307] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 18 (May 15, 2017).
[308] 81 Fed. Reg. 68110, 68113 (Oct. 3, 2016).
[309] https://www.epa.gov/nsr/prevention-significant-deterioration-and-title-v-permitting-regulations-greenhouse-gases-ghg-and (last visited Apr. 26, 2019).
[310] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 20 (May 15, 2017)
[311] https://insideepa.com/daily-news/industry-seeks-presumptive-bact-guide-bid-extend-epas-nsr-relief

Topic	Sub-topic	"Air Permitting Forum" position	Trump EPA's position
Title V	**Limit review of preconstruction permits**	**May 2017:** "ENGO [environmental organizations] have filed numerous petitions for objection to Title V permits based on their disagreement with the underlying construction permit . . . ."[312] The Forum's "highest-priority Title V item" is for EPA to "make clear that challenges to the construction of a new project or new plant must be resolved at the construction permit stage and a Title V permit does not offer protestants a second bite at the apple . . . ."[313] **Jan. 2019:** "EPA's [October 2017] interpretation of the proper scope of Title V review was eminently reasonable, if not compelled by statute and regulation."[314]	**Oct. 2017:** "[P]reconstruction permit terms and conditions should be incorporated [in Title V permits] without further review . . . ."[315] "[T]itle V permitting is not intended to second-guess the results of state preconstruction permit programs . . . ."[316] "The [Sierra Club] is now, in essence, asking for a 'second bite at the apple' through EPA oversight in title V. The availability of notice, opportunity to comment, and ability to seek judicial review of the underlying preconstruction permit . . . weighs heavily against an interpretation of title V as being an appropriate avenue to reevaluate these previous permitting authority decisions . . . ."[317]
Regional consistency rule	**N/A**	**Nov. 2015:** "The Forum questions the need for this rulemaking and believes that fairness and uniformity are best served by the continued application of existing rules. * * * The proposed rule is inconsistent with . . . the CAA and is not legally plausible on its face." [318] **May 2017:** "The Forum is currently litigating EPA's recently issued rule allowing for inconsistent policy and practice . . . . As stated in our [November 2015] comments on this final rule, inconsistency on fundamental issues like this violates the CAA."[319]	**Nov. 2017:** EPA is defending the Obama Admin's rule in court,[320] against a brief filed by Wehrum (on behalf of American Petroleum Institute) with two other Hunton lawyers (on behalf of the Air Permitting Forum).

[312] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 33 (May 15, 2017)
[313] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 32 (May 15, 2017)
[314] APF amicus brief supporting EPA, *Sierra Club v. EPA*, No. 18-1038, at 4 (D.C. Cir. Jan. 16, 2019).
[315] In the Matter of PacificCorp Energy Hunter Power Plant, Order on Petition No. VIII-2016-4 (Oct. 16, 2017), at 13, https://www.epa.gov/sites/production/files/2017-10/documents/pacificorp_hunter_order_denying_title_v_petition.pdf
[316] *Id.* at 14.
[317] *Id.* at 17.
[318] APF regional consistency comments, Docket Id. No. EPA-HQ-OAR-2014-0616-0016, at 1–2 (Nov. 3, 2015).
[319] Comments of the Air Permitting Forum, Docket Id. No. EPA-HQ-OA-2017-0190-35020, at 34 (May 15, 2017).
[320] Proof Response Brief for EPA, *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, No. 16-1344 (D.C. Cir. Nov. 20, 2017).

APPENDIX 3: The NAAQS Implementation Coalition

Topic	Sub-topic	"NAAQS Implementation Coalition" position	Trump EPA's position
NAAQS	**Narrowing the meaning of "ambient air"**[321]	**May 2017:** "Long-standing EPA policy . . . unrealistically requires evaluation of ambient air impacts at locations where individuals would not reasonably be allowed access, much less be exposed to emissions (*e.g.*, on a waterway, roadway, railway, or within a posted/patrolled property boundary) for the duration or averaging time . . . and frequency . . . of the current probabilistic NAAQS. * * * Modeling should not be required if human exposure at a site is unrealistic for the period addressed by a NAAQS."[322] **2019:** "[W]e support EPA's review of its ambient air policy."[323]	**May 2018:** "We are evaluating several key terms associated with the definition [of 'ambient air'] including 'general public,' 'access,' and 'building' to determine where additional flexibility may be appropriate."[324] **Nov. 2018:** "[S]takeholders have argued that the application of the ambient air policy is overly restrictive and that . . . the restrictive language from the 1980 letter that solely focuses on the use of a 'fence or other physical barriers' to preclude public access should be updated to provide for consideration of additional types of measures that are effective in deterring or precluding access to the land by the general public . . . ."[325] "The EPA's [draft] revised ambient air policy replaces 'a fence or other physical barriers' with 'measures, which may include physical barriers, that are effective in deterring or precluding access to the land by the general public.'"[326]

[321] *See, e.g.*, Sean Reilly, *Wehrum's old clients back 'ambient air' plan — documents*, GREENWIRE, Mar. 7, 2019, https://www.eenews.net/stories/1060123437
[322] Coalition comments, EPA-HQ-OA-2017-0190-36049, at A-4 to A-5 (May 15, 2017).
[323] NIC ambient air comments at 5 (Jan. 10, 2019), *available at* https://www.eenews.net/assets/2019/03/06/document_pm_01.pdf.
[324] Presentation by Anna Marie Wood, *NAAQS and Other Implementation Updates*, at slide 30 (Apr. 5, 2018).
[325] U.S. EPA, DRAFT REVISED POLICY ON EXCLUSIONS FROM "AMBIENT AIR" at 2 (Nov. 2018).
[326] U.S. EPA, DRAFT REVISED POLICY ON EXCLUSIONS FROM "AMBIENT AIR" at 5 (Nov. 2018).

Topic	Sub-topic	"NAAQS Implementation Coalition" position	Trump EPA's position
NAAQS	**International emissions under CAA section 179B ("International border areas")**	**Feb. 2017:** "[EPA] requests comment on whether it is appropriate to limit CAA § 179B demonstrations to nonattainment areas adjoining international borders. We believe it is not."[327] **May 2017:** "EPA should not constrain 179B to border regions."[328]	**Presidential Memorandum, Apr. 2018:** "[W]ith respect to section 179B demonstrations or petitions, the Administrator shall ensure that EPA does not limit its consideration to emissions emanating from Mexico or Canada, but rather considers, where appropriate, emissions that may emanate from any location outside the United States . . . ."[329] **Dec. 2018:** "[A] demonstration prepared under CAA section 179B could consider emissions emanating from North America or intercontinental sources and is not restricted to areas adjoining international border areas . . . ."[330]
NAAQS	**CASAC composition**	**May 2017:** "CASAC has in recent years been imbalanced, being composed of members with generally similar backgrounds in terms of geography, background, and research interests. * * * There should be a better balance of representation on CASAC between academia, environmental and non-governmental organizations, states, and industry. * * * Consideration should be given to rotating terms . . . ."[331]	**Oct. 2017:** "[Federal Advisory Committee] membership should be balanced with persons from different parts of the country to create geographic diversity. * * * [M]embership should be rotated regularly."[332]
NASAC	**CASAC, removing academic researchers**	**May 2017:** "EPA should review and revise CASAC's 'conflict of interest' standards, particularly those relating to receiving EPA funding, in order to promote increased transparency in CASAC's review process."[333]	**Oct. 2017:** "[I]n addition to EPA's existing policies and legal requirements preventing conflicts of interest . . . it shall be the policy of the Agency that no member of an EPA federal advisory committee currently receive EPA grants . . . or in a position that otherwise would reap substantial direct benefit from an EPA grant."[334]

[327] Comments of NAAQS Implementation Coal., Docket Id. No. EPA-HQ-OAR-2016-0202, at 9 (Feb. 12, 2017).
[328] Coalition comments, EPA-HQ-OA-2017-0190-36049, at A-7 (May 15, 2017).
[329] Presidential Memorandum for the Administrator of the Environmental Protection Agency (Apr. 12, 2018).
[330] 83 Fed. Reg. at 63010 (Dec. 6, 2018).
[331] Coalition comments, EPA-HQ-OA-2017-0190-36049, at A-13 (May 15, 2017).
[332] Memorandum from Scott Pruitt, *Strengthening and Improving Membership on EPA Federal Advisory Committees*, at 2 (Oct. 31, 2017).
[333] Coalition comments, EPA-HQ-OA-2017-0190-36049, at A-13 to A-14 (May 15, 2017).
[334] Memorandum from Scott Pruitt, *Strengthening and Improving Membership on EPA Federal Advisory Committees*, at 3 (Oct. 31, 2017).

Topic	Sub-topic	"NAAQS Implementation Coalition" position	Trump EPA's position
NAAQS	**CASAC; encouragement of fringe views**	**May 2017:** "[I]n recent years, the process has been to drive CASAC members towards consensus on a single response. This has served to hide the full range of interpretation that can be supported by the scientific evidence. * * * EPA should encourage CASAC letters that reflect the full range of viewpoints by CASAC members, including reporting minority views and the reasoning behind them."[335]	**May 2018:** "CASAC and EPA should, consistent with CASAC's charter, seek to find consensus, but should allow for individual CASAC members to share their own individual opinions when they fall outside committee consensus."[336]
NAAQS	**Primary (health-based) NO2 NAAQS, and Trump EPA's decision not to strengthen it**	**Sept. 2017:** "We support EPA's decision in the NO_2 Proposal to retain the current NO_2 NAAQS."[337]	"EPA is retaining the current primary NO_2 standards, without revision."[338]

[335] Coalition comments, EPA-HQ-OA-2017-0190-36049, at A-14 (May 15, 2017).
[336] Memorandum from Scott Pruitt to Asst. Admin'rs, *Back-to-Basics Process for Reviewing National Ambient Air Quality Standards*, at 10 (May 9, 2018).
[337] NIC comment, Docket Id. No. EPA-HQ-OAR-2013-0146-0145, at 1 (Sept. 25, 2017).
[338] 83 Fed. Reg. 17226, 17227 (Apr. 18, 2018)

APPENDIX 4: The CCS Alliance

Topic	Sub-topic	"CCS Alliance" position	Trump EPA's position
Climate	**GHG NSPS for new power plants; decision to base the "best system of emission reduction" (BSER) for power plants in part on what can be achieved using partial carbon capture and storage (CCS) technology**	**May 2011:** "[C]arbon capture and sequestration (CCS) is not yet adequately demonstrated."[339] **June 2012:** "EPA's proposed GHG emission limits [based on CCS] will deter CCS rather than promote it."[340] **May 2014:** "There is not nearly enough experience with carbon capture to reasonably determine that it is adequately demonstrated. * * * EPA should withdraw the proposed rule. * * * Only in depleted oil and gas formations is there the variety of experience to show that large amounts of CO2 can be stored safely over the long term. Those formations do not exist in sufficient geographic dispersion throughout the United States to be considered broadly available."[341] **Nov. 2014:** "The Boundary Dam facility . . . has been operating only since October of this year. Thus, it offers very little evidence of reliability or efficiency on which to legally base a new rule."[342]	**2017:** "EPA . . . is reviewing the [2015 Rule] and, if appropriate, will as soon as practicable and consistent with law, initiate reconsideration proceedings to suspend, revise or rescind the rule."[343] **2018:** "EPA is proposing to revise its [2015] analysis and determine that CCS is not adequately demonstrated . . . ."[344] "[T]he EPA proposes to revise to the BSER . . . . The primary reason for this proposed revision is the high costs and limited geographic availability of CCS."[345] "While the carbon capture technology at the Boundary Dam is currently operating, that project experienced multiple issues with [the CCS technology] during its first year of operation . . . . EPA solicits comment on whether Boundary Dam's first-year operational problems cast doubt on the technical feasibility of fully integrated CCS."[346] **Wehrum:** "Today's actions reflect our approach of defining new, clean coal standards by data and the latest technological information, not wishful thinking."[347]

[339] Alliance comments, Docket Id. No. EPA-HQ-OAR-2011-0090-3120, at 1 (Mar. 18, 2011).
[340] Alliance comments, Docket Id. No. EPA-HQ-OAR-2011-0660-10070, at 1 (June 25, 2012).
[341] Alliance comments, Docket Id. No. EPA-HQ-OAR-2013-0495-9683, at 1–2, 6 (May 9, 2014).
[342] Alliance comments, Docket Id. No. EPA-HQ-OAR-2013-0602-23551, at 3 (Nov. 26, 2014).
[343] 82 Fed. Reg. 16330 (Apr. 4, 2017).
[344] 83 Fed. Reg. at 65441 (Dec. 20, 2018).
[345] *Id.* at 65426 (Dec. 20, 2018).
[346] *Id.* at 65444 (Dec. 20, 2018).
[347] https://www.epa.gov/newsreleases/epa-proposes-111b-revisions-advance-clean-energy-technology