

August 7, 2019

VIA ELECTRONIC SUBMISSION

Andrew R. Wheeler
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attn: Docket No. NHTSA-2018-0067
Docket No. NHTSA-2017-0069
Docket No. EPA-HQ-OAR-2018-0283

Re: EPA’s Unlawful Failure to Disclose Meetings Between Agency Officials and Industry Regarding the Proposed Rule, “The Safer Affordable Fuel-Efficient (‘SAFE’) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks,” 83 Fed. Reg. 42,986 (Aug. 24, 2018)

Dear Administrator Wheeler:

It has come to the attention of the Environmental Defense Fund (EDF) via a recently released congressional report that the Environmental Protection Agency (EPA) failed to disclose multiple meetings between senior agency officials and industry representatives related to its proposed rule, “The Safer Affordable Fuel-Efficient (‘SAFE’) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks,” 83 Fed. Reg. 42,986 (Aug. 24, 2018), which is a joint rulemaking with the National Highway Traffic Safety Administration (NHTSA). In particular, former EPA Assistant Administrator William Wehrum participated in meetings with the Alliance of Automobile Manufacturers—his former client—during the time that EPA was finalizing its Revised Final Determination for the Mid-Term Evaluation of the Clean Car Standards, and preparing its Proposed Rule to significantly weaken the Clean Car Standards.

EDF calls on EPA to immediately publicly disclose the details of all meetings between Mr. Wehrum and the Alliance and to add those records to the docket for the Proposed Rule. Furthermore, EDF calls on EPA to release any documents or other records that were exchanged during, or created as a result of, those meetings. As you stated in your e-mail to all EPA employees on August 2, 2018:

Finally, it is essential to ensure that the public receives timely notice, as far as practicable, of information or views that have influenced the EPA’s decisions. This means that EPA employees must summarize in writing and place in the rulemaking docket any oral communication during a meeting or telephone discussion – with a

member of the public or an interested group – that contains significant new factual information regarding a proposed rule.¹

Senator Carper, ranking member of the Environment and Public Works Committee, and Senator Whitehouse, ranking member of the Clean Air and Nuclear Safety Subcommittee, recently published a report, *Redefining Air: Industry’s Pipeline to Power at EPA’s Office of Air and Radiation*, analyzing the close connection between Mr. Wehrum and his former clients from the law firm of Hunton Andrews Kurth LLP.² The report identifies numerous unethical practices by Mr. Wehrum and others and, combined with EDF’s review of available records, reveals that the existence of and crucial information about meetings relating to EPA’s Proposed Rule have been withheld from the public.

The Carper-Whitehouse Report details *seven* meetings between Mr. Wehrum and the Alliance, only one of which is (possibly) disclosed in the rulemaking docket for the Proposed Rule.³ None of these meetings were announced, documented, or open to the public. The meetings took place as EPA was in the midst of preparing its rollback of the Clean Car Standards:

- *Aug. 21, 2017* – EPA publishes Request for Comment on Reconsideration of the Final Determination of the Mid-Term Evaluation, 82 Fed. Reg. 39,551.
- *Oct. 5, 2017* – Comment period closes on Reconsideration of the MTE Final Determination
- *Nov. 27, 2017* – **Undisclosed Meeting:** Mr. Wehrum met with the Alliance and one other entity, to discuss fuel economy and greenhouse gas standards.
- *Dec. 27, 2017* – **Undisclosed Meeting:** Mr. Wehrum met with “some of the Auto Alliance Board members.”
- *Feb. 21, 2018* – **Undisclosed Meeting:** Mr. Wehrum met with some of the Alliance lawyers and lobbyists, to discuss fuel economy and greenhouse gas testing.
- *Apr. 13, 2018* – EPA publishes its Revised Final Determination, Mid-Term Evaluation of GHG Emissions Standards for Model Year 2022-2025 Light-Duty Vehicles, 83 Fed. Reg. 16,077.

¹ Message from the Acting Administrator Andrew R. Wheeler, <https://www.epa.gov/sites/production/files/2018-08/documents/wheeler-messageontransparency-august022018.pdf>. Your message employed the same strong language on transparency as Administrator Lisa Jackson employed in her April 23, 2009, message to agency staff (“Transparency in EPA’s Operations” at page 3, https://www.epa.gov/sites/production/files/2014-02/documents/transparency_in_epas_operations.pdf). Both your communication and Administrator Jackson’s referenced Administrator Ruckelshaus’ pledge, in his landmark May 19, 1983 memorandum, that EPA operations would be “in a fishbowl”.

² Senators Thomas Carper & Sheldon Whitehouse, *Redefining Air: Industry’s Pipeline to Power at EPA’s Office of Air and Radiation* at 32-33 (July 2019) (“Report”), https://www.epw.senate.gov/public/_cache/files/2/d/2d7a4d97-5260-4be1-92bf-152ac5d7cd21/020F44F63FF7BAC62FBDC77C0C55D82F.epw-report-carper-whitehouse-redefining-air-wehrum-7-2019.pdf (Attachment A hereto).

³ Report at 33-34.

- *Apr. 16, 2018 – Possibly Partly Disclosed Meeting:* Mr. Wehrum met with the Alliance. EPA Environmental Engineer Christopher Lieske reported a meeting with the Alliance on the same day, April 16, in a memorandum to the docket.⁴
- *May 22, 2018 – Undisclosed Meeting:* Mr. Wehrum met with the Alliance to discuss an unknown topic alone with his former client.
- *May 23, 2018 – Undisclosed Meeting:* Mr. Wehrum met with the Alliance to discuss fuel economy standards.
- *May 25, 2018 – Auto Alliance files a Motion to Intervene in support of Respondent EPA in the litigation where a group of public interest petitioners (including EDF) and states challenge EPA’s Revised Final Determination.*⁵
- *July 16, 2018 – Undisclosed Meeting:* Mr. Wehrum met with the Alliance and one other entity, to discuss a model year 2020 fuel economy testing extension related to fuel without ethanol.
- *Aug. 24, 2018 – EPA publishes its Proposed Rule, “The Safer Affordable Fuel-Efficient (‘SAFE’) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks,” 83 Fed. Reg. 42,986.*

The Report concludes that Mr. Wehrum’s actions appear to have violated governing ethics requirements, including the Trump Administration’s Ethics Pledge.⁶ In addition to the secret meetings, Mr. Wehrum failed to disclose his prior relationship with the Auto Alliance—one of his former clients at Hunton—in his recusal statement.⁷ The Carper-Whitehouse Report concludes that: “Wehrum’s failure to disclose his recent former clients frustrates the ‘screening arrangement’ in his recusal statement, which stated that his subordinates would ‘assist in screening EPA matters’ involving the entities he listed to ensure his compliance with ethical rules.”⁸

EPA must immediately publicly disclose the complete details of these improperly undisclosed meetings between Mr. Wehrum (and any other agency officials) and the Alliance, and EPA must add those records to the docket for the Proposed Rule, and must identify (and publish the details of) any other such meetings beyond those enumerated in the Report. Furthermore, EDF calls on EPA to publicly release any documents or other records that were exchanged during, or created as a result of, those meetings.

⁴ Memorandum from Mr. Christopher Lieske to Docket EPA-HQ-OAR-2018-0283 (July 11, 2018), Docket ID No. EPA-HQ-OAR-2018-0283-0022 (detailing an April 16, 2018, meeting between EPA and the Alliance, as well as a meeting with the Association of Global Automakers the following day). The memorandum does not list the individual participants, so it is unclear if this describes the same meeting that Mr. Wehrum attended. The memorandum also fails to disclose either the subject matter of the meeting, or any details of what was discussed, and so is deficient in any case.

⁵ Motion of the Alliance of Automobile Manufacturers to Intervene in Support of Respondents, *California v. EPA*, Case No. 18-1114 (D.C. Cir., filed May 25, 2018), Document # 1732890.

⁶ See Report at 33; see also Exec. Order No. 13770, Ethics Commitments by Executive Branch Appointees, § 1(6) (Jan. 28, 2017), <https://www.federalregister.gov/documents/2017/02/03/2017-02450/ethics-commitments-by-executive-branch-appointees>.

⁷ See Report at 8 n.27 (citing Mem. of Law in Support of Mot. For Partial Summary Judgment, Doc. 47 at *27, *Minn. Trucking Ass’n et al. v. Stine et al.*, No. 15-cv-2045-JRT-KMM (D. Minn. Sept. 29, 2016) (listing Wehrum as one of the attorneys representing the Auto Alliance)).

⁸ Report at 9.

EPA must also add the details and materials of the meetings into the relevant public rulemaking docket, and thus into the administrative record, for the relevant agency actions. EPA's failure to publicly disclose the complete records and documents of these meetings between Mr. Wehrum and the Alliance is in contravention of the requirements of the Clean Air Act and the Administrative Procedure Act.⁹ The meetings documented in the Carper-Whitehouse Report took place before the Proposed Rule was published in the Federal Register, provided information and other data on which the proposed rule relied, and thus was required to be included in the rulemaking docket at the publication of the proposal.¹⁰ Based on the information currently available, the content of the meetings between Mr. Wehrum and his former client, the Auto Alliance, are "of central relevance" to the rulemaking and were a source of information on which the proposed rule relied, and therefore must be placed in the docket immediately.¹¹

Copies of this letter are being submitted to the NHTSA dockets and the EPA Inspector General, which currently has before it a complaint concerning Mr. Wehrum's contacts with his former law firm and its clients.¹²

Please contact Alice Henderson, ahenderson@edf.org, (303) 447-7205, if you have any questions concerning the concerns raised in this letter.

Sincerely,

Alice Henderson
Environmental Defense Fund
2060 Broadway, Suite 300
Boulder, CO 80302

cc: Acting Inspector General Charles J. Sheehan
EPA Office of Inspector General
1200 Pennsylvania Avenue, NW
Washington, DC 20460

⁹ 42 U.S.C. § 7607(d)(3); 5 U.S.C. § 553(b).

¹⁰ 42 U.S.C. § 7607(d)(3). The preamble to the proposed rule cites comments from the Alliance 83 times, far more than comments from any other entity, and includes numerous citations to pre-proposal Alliance comments (see, e.g. proposed rule at footnotes 8, 70, 114, 142, and 204). It would appear extremely likely that in-person meetings between the Alliance or its board members and a top agency official concerning the rulemaking produced information relied on in the proposal.

¹¹ *Id.*; see also 42 U.S.C. § 7607(d)(4)(B)(i).

¹² Letter from Noah Bookbinder, Executive Director, Citizens for Responsibility and Ethics in Washington, to Acting Inspector General Charles J. Sheehan, Environmental Protection Agency, Re: Request for Investigation of EPA Assistant Administrator William Wehrum's Apparent Violation of His Ethics Agreement and Ethics Pledge, (May 29, 2019) (Attachment B hereto).