Congress of the United States

Washington, DC 20510

March 20, 2019

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

Dear Acting Inspector General Sheehan,

We write to bring additional information to your attention regarding our February 21, 2019, request that you open an investigation into improper involvement of William Wehrum and David Harlow in the Environmental Protection Agency's (EPA) December 7, 2017 memo regarding EPA's New Source Review (NSR) program ("DTE Memo").[1]

It has been brought to our attention that EPA's DTE Memo adopts, without discussion, a novel interpretation of an EPA NSR regulation known as the "demand growth exclusion," based on a single sentence from a 1992 EPA preamble. This interpretation, it appears, was previously enunciated only by lawyers from Hunton, Andrews, Kurth [Hunton]—Mr. Wehrum's and Mr. Harlow's former law firm—in two briefs submitted to the Sixth Circuit on behalf of DTE Energy on February 27, 2015, and May 1, 2012. If this is accurate, an argument advanced only by Hunton lawyers in specific litigation was recently adopted by EPA in a memo whose issuance appears to have been timed to affect the outcome of litigation involving Hunton's current client.

It appears unlikely that an arcane application of a single sentence from a 1992 preamble notice (a) suddenly became known to EPA authors of the DTE memo, and (b) was adopted as formal EPA policy in that memo without further explanation, absent the direct involvement of lawyers knowledgeable of DTE Energy's position in the DTE litigation—Mr. Wehrum and Mr. Harlow.

Mr. Wehrum and Mr. Harlow were barred by ethics rules from participating in the development of the DTE Memo because it concerned ongoing EPA litigation against DTE Energy, in which DTE Energy is represented by their former law firm. DTE Energy had been a client of Mr. Harlow himself at Hunton. This information, taken together with information and documents presented in our February 21 letter, further suggests that Mr. Wehrum and Mr. Harlow may have violated federal ethics rules by participating in the development of the DTE Memo.

Attached as an appendix is an analysis of the provisions in question. As you consider our February 21 request, we urge you to consider this additional information. EPA OIG is in the best

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[1] U.S. Environmental Protection Agency, Memorandum from Administrator Scott Pruitt to Regional Administrators, (Dec. 7, 2017).

position to analyze this collection of information and interview key staff to evaluate whether violations of federal ethics rules occurred.

Sincerely,

Sheldon Whitehouse
United States Senator

Thomas R. Carper
United States Senator

Frank Pallone, Jr.
United States Representative

Appendix

In 1992, EPA issued a final rule adopting several changes to the New Source Review (NSR) regulations, including establishing what EPA calls the "demand growth exclusion" for utility projects. The 1992 rule provides that, in projecting future emissions after a physical change or method of operation, the regulatory authority shall

> *[e]xclude . . . that portion of the unit's emissions* following the change that could have been accommodated during the representative baseline period and is *attributable to an increase in projected capacity utilization at the unit that is* ***unrelated to the particular change,*** *including any increased utilization due to the rate of electricity demand growth for the utility system as a whole.*

(40 CFR 51.165(a)(1)(xxi)(B) (emphases added)). In responding to comments, EPA rejected an argument from an environmental commenter that EPA should always assume that increased operations result from a physical change, rather than independent factors. Instead, EPA chose to retain its requirement for a case-by-case determination reflected in the regulatory text. In rejecting the commenter's argument, EPA cites an example: "[i]f efficiency improvements are the predominant cause of the change in emissions and demand growth is not, the exclusion does not apply. But this is a question of fact which must be resolved on a case-by-case basis...." (57 Fed. Reg. 32327 (July 21, 1992)).

In the DTE Memo, EPA references this language to conclude: "Because increased emissions may be caused by multiple factors, the EPA has recognized that the source must exercise judgement to exclude increases for which the project is not the 'predominant cause.' 45 Fed. Reg. 32,327 (1992)." (DTE Memo at 7)[2] This reading misapplies language in the 1992 preamble by transforming the "unrelated" prong into a "predominant cause" test, reflecting neither the language itself nor the underlying regulatory text. Put differently, the preamble text merely identifies one situation in which the demand growth exclusion does not apply to support EPA's rejection of an across-the-board rule – it does not state that if the project is not the "predominant cause" of the increased emissions the exemption applies, as the DTE Memo suggests.

This same seemingly erroneous interpretation of the 1992 language was used by Hunton lawyers in their briefs for DTE Energy before the Sixth Circuit. The briefs both refer to the "'causation' test" allegedly established by the 1992 NSR rules and reference the "predominant cause" language, stating: "For the second prong (i.e., 'unrelated to the change'), the causation standard is whether the 'change' was the 'predominant cause' of the increase. *Id.* at 32,327." (Feb. 27, 2015 Brief at 20) and (May 1, 2012 Brief at 15 & fn.8.) The 2015 brief also references a "'predominant cause' test" in a footnote. (Feb. 27, 2015 Brief at 58, fn. 18.)

This is not a reading that EPA enunciated or recognized prior to the DTE memo, to the best of our knowledge. This conclusion is shared by John Walke and Bruce Buckheit, two NSR experts we consulted in the preparation of this letter. At various times, Mr. Walke and Mr.

[2] Note that the citation in the DTE Memo to "45 Fed. Reg." is incorrect.

Buckheit previously worked on NSR at EPA (Mr. Walke at the Office of General Counsel, and Mr. Buckheit at the Office of Enforcement and Compliance Assurance), and Mr. Buckheit also worked on these issues at the Department of Justice. They do not believe EPA intended this position in 1992, and have never seen it advanced other than by Hunton lawyers in the DTE litigation.