

September 19, 2017

Dear Senator:

On behalf of our millions of members, Earthjustice, the League of Conservation Voters, the Natural Resources Defense Council and the Sierra Club oppose the nomination of William Wehrum to be the Assistant Administrator for the Office of Air & Radiation for the United States Environmental Protection Agency. We are national nonprofit organizations dedicated to improving the quality of the human environment, protecting public health and safeguarding the nation's natural resources.

Mr. Wehrum has a long record of working to weaken public health and clean air protections for Americans. While he served in senior leadership positions with the EPA air program, courts held the agency in violation of the federal Clean Air Act 30 times. In private practice with corporate law firms, Mr. Wehrum has represented industrial interests in nearly 35 lawsuits that sought to weaken or void EPA clean air and public health safeguards. Americans deserve better for the nation's chief clean air official. Senators should not confirm him.

A Record of Lawbreaking

Mr. Wehrum was a political appointee in the Bush EPA's Office of Air & Radiation from 2001 to 2007. He served as chief legal counsel to the head of the air program for nearly 5 years and as acting assistant administrator of that program for almost 2 years.

During Mr. Wehrum's tenure, federal courts found that EPA violated the Clean Air Act repeatedly and egregiously. In fact, federal courts found EPA in violation of the Clean Air Act while Mr. Wehrum was serving in these senior legal and leadership capacities more often than in any other administration before or since. Courts determined that EPA violated the Clean Air Act an astonishing 30 times, according to data compiled by EPA's Office of General Counsel for Congress.¹ Of these, 27 losses in court involved retreats from the law's protections for clean air and Americans' health, and unlawful exemptions and amnesty for regulated pollution sources. *Id.*

Few of EPA's court losses during Mr. Wehrum's tenure involved procedural or analytic transgressions. Instead, federal courts found again and again that EPA contradicted and violated the "plain language" of the Clean Air Act. This is the most egregious way for agencies to violate congressionally-enacted laws and repudiate their requirements. For example, the D.C. Circuit Court of Appeals found at least *three* times that EPA air pollution rules contradicted the plain

¹ Letter from U.S. EPA General Counsel, Roger Martella, to the Honorable Henry Waxman (April 18, 2008), with attached spreadsheet (both attached here as Attachments 1 & 2).

meaning of the statutory term, “any.”² Exasperated judges took to quoting Lewis Carroll to criticize the upside-down, “Humpty Dumpty” legal arguments advanced by the EPA air program under Mr. Wehrum.³ In a 2007 decision late in Mr. Wehrum’s tenure, irritated D.C. Circuit judges reproached EPA for violating the same congressional command and ignoring plain statutory language in three prior D.C. Circuit decisions, reminding EPA how our constitutional system of laws works.⁴

In 2006, while Mr. Wehrum was the acting head of EPA’s air program, a federal court found that EPA’s implementation of key air toxics requirements in the Clean Air Act had been “grossly delinquent.”⁵ The court found that, “EPA ... currently devotes substantial resources to discretionary rulemakings, many of which make existing regulations more congenial to industry, and several of which since have been found unlawful.” *Id.* The judge ordered EPA to issue long overdue air toxic regulations by 2009, denying the agency’s request for a 2012 deadline. *Id.*

Mr. Wehrum also played a key role in defending the Bush EPA’s refusal to act on the carbon pollution that drives dangerous climate change. The Bush EPA air program fought the plain language of the Clean Air Act for more than seven years, disputing that the law characterizes carbon pollution as an “air pollutant.” The Supreme Court decisively rejected that position in 2007 in *Massachusetts v. EPA*, ruling that carbon dioxide and other greenhouse gases are “air pollutants,” just like carbon monoxide or sulfur dioxide, and that the Clean Air Act gives EPA the authority and responsibility to regulate them all.⁶

Mr. Wehrum departed the agency one month after the Supreme Court’s decision. By the end of the Bush administration, EPA still had done nothing to regulate the carbon pollution that drives dangerous climate change.

² See, e.g., *New Jersey v. EPA*, No. 05-1097 *et al.* (Feb. 8, 2008), <http://caselaw.findlaw.com/us-dc-circuit/1236563.html>; *Natural Resources Defense Council v. EPA*, No. 04-1385 *et. al* (June 8, 2007), <http://caselaw.findlaw.com/us-dc-circuit/1024879.html>; & *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006), <https://casetext.com/case/new-york-v-epa>.

³ In one case, DC Circuit federal appellate judges wrote that EPA’s explanation “deploy[ed] the logic of the Queen of Hearts, substituting EPA’s desires for the plain text of” the law. In another decision, judges rejected EPA’s arguments and cited Carroll’s “Through the Looking Glass,” writing “[o]nly in a Humpty Dumpty world would Congress be required to use superfluous words while an agency could ignore an expansive word that Congress did use. We decline to adopt such a world-view.”

⁴ *Sierra Club v. EPA*, 03-1202 (March 13, 2007), [https://www.cadc.uscourts.gov/internet/opinions.nsf/3DE6EA395F4B40A685257440004537C7/\\$file/03-1202a.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/3DE6EA395F4B40A685257440004537C7/$file/03-1202a.pdf).

⁵ *Judge blasts EPA's efforts. He denies request for later deadline, says agency is 'foot dragging' on air standards*, San Francisco Chronicle (Aug. 4, 2006), <http://www.sfgate.com/green/article/Judge-blasts-EPA-s-efforts-He-denies-request-2514695.php>

⁶ No. 05-1120 (April 2, 2007), <https://www.law.cornell.edu/supct/pdf/05-1120P.ZO>.

A Record of Harming Americans' Health and Air Quality

Undermining National Health Standard for Fine Particulate Matter

During Mr. Wehrum's tenure leading EPA's air office, the agency issued a watered-down air pollution standard for deadly fine particulate matter, PM_{2.5}. The Clean Air Act requires that standard to protect the health of children, elders, and people with heart and lung ailments. Mr. Wehrum contradicted the unanimous recommendation of EPA's external science advisors that a more protective health standard was needed based on overwhelming medical science. The D.C. Circuit Court of Appeals found this rule arbitrary, capricious and unlawful because it inadequately protected Americans' health and air quality.⁷

Rolling Back Hazardous Air Pollution Controls for Dirty Power Plants

Mr. Wehrum's actions in the Bush EPA delivered an illegal, 8-year amnesty period to dirty power plants for their emissions of mercury and over seven dozen hazardous air pollutants, like lead and arsenic. EPA illegally evaded the protective Clean Air Act safeguards requiring deep and timely reductions in all toxic air pollution from each of the nation's coal-burning power plant generating units.

When EPA released its controversial proposal in 2004, it was discovered that industry attorneys—from Mr. Wehrum's former law firm—had drafted key language that EPA included verbatim in the proposal to let power plant companies off the hook.⁸ Then, an explosive 2005 report by EPA's Office of Inspector General found that "EPA senior management" had instructed staff to work backward from a pre-determined political outcome, "instead of basing the standard on an unbiased determination of what the top performing units were achieving in practice," essentially sabotaging the standards that the Clean Air Act required.⁹ The Inspector General also faulted EPA for "not fully analyzing the cost-benefit of regulatory alternatives and not fully assessing the rule's impact on children's health."¹⁰

Mr. Wehrum's air office then developed a "cap-and-trade" approach for mercury, a potent neurotoxin that affects local populations and thus is inappropriate for regional emissions trading. His regulation exempted more than seven dozen other hazardous air pollutants emitted by power plants, including other neurotoxins such as lead, and carcinogens such as arsenic, benzene and

⁷ *American Farm Bureau Federation v. EPA*, No. 06-1410 *et al.* (Feb. 24, 2009), <http://caselaw.findlaw.com/us-dc-circuit/1209595.html>.

⁸ Eric Pianin, *Proposed Mercury Rules Bear Industry Mark*, Washington Post (Jan. 31, 2004), https://www.washingtonpost.com/archive/politics/2004/01/31/proposed-mercury-rules-bear-industry-mark/028e1379-0026-4bcb-b7ce-192bbae7b4c6/?utm_term=.c0cd6bb0d656.

⁹ U.S. EPA, Office of Inspector General, *Additional Analyses of Mercury Emissions Needed Before EPA Finalizes Rules for Coal-Fired Electric Utilities* (Feb. 3, 2005), at 11, <https://www.epa.gov/sites/production/files/2015-12/documents/20050203-2005-p-00003.pdf>.

¹⁰ *Id.*, at 3.

dioxins.¹¹ The cap-and-trade program even allowed individual power plants to *increase* their mercury emissions.¹² EPA emails uncovered through a Freedom of Information Act request revealed that agency officials pressured states into participating in the mercury trading program, by threatening to disapprove state programs that adopted more stringent mercury safeguards—despite the Clean Air Act’s legal guarantee that states may adopt standards more protective than federal ones.¹³

The Clean Air Act requires coal-burning and oil-burning power plants to install and operate modern pollution controls to reduce *all* their hazardous air pollutants. The law required EPA to adopt those standards no later than 2004 and ensure compliance no later than 2007. Due to Bush EPA lawbreaking led by Mr. Wehrum, however, EPA flouted this schedule. Following a federal court ruling that invalidated the Bush EPA’s lawbreaking,¹⁴ the Obama EPA adopted the legally required standards in 2012. Thus, EPA lawbreaking fostered by Mr. Wehrum meant that coal- and oil-burning power plants did not end up complying with the Clean Air Act until 2015 to reduce their dangerous hazardous air pollution.

In 2012, EPA projected that by 2016 the Obama-issued standards would avoid up to 11,000 premature deaths and 130,000 asthma attacks *every year*.¹⁵ The net health benefits to Americans are over \$80 billion annually. *Id.* And each year, the Obama EPA standards are reducing coal-burning power plants mercury emissions by 90%, acid gas emissions by 88% and sulfur dioxide emissions by 41% beyond what other regulations would have required.¹⁶ The illegal rollback by Mr. Wehrum and the Bush EPA denied Americans the totality of these health, environmental and economic benefits *for eight years*.

Rolling Back Hazardous Air Pollution Controls for All Other Industries

Mr. Wehrum also pushed a clean air rollback in early 2006 that would have allowed oil refineries, chemical plants and other industrial facilities to increase emissions of lead, mercury,

¹¹ U.S. EPA, Clean Air Mercury Rule (March 15, 2005), <https://archive.epa.gov/mercuryrule/web/html/rule.html>, & Mercury Delisting Rule (March 15, 2007), https://archive.epa.gov/mercuryrule/web/pdf/camr_final_regfinding.pdf.

¹² U.S. EPA, *Regulatory Impact Analysis of the Final Clean Air Mercury Rule*, EPA-452/R-05-003 (March 2005), https://www3.epa.gov/ttnecas1/regdata/RIAs/mercury_ria_final.pdf.

¹³ Testimony of John Walke, NRDC, *The Overturning of EPA's "Clean Air Interstate Rule": Consequences and Opportunities* (July 29, 2008), at 7-8, https://www.epw.senate.gov/public/_cache/files/6/e/6e18496c-3193-4f13-85d4-c79a947f4020/01AFD79733D77F24A71FEF9DAFCCB056.walketestimonyoncair72908.pdf.

¹⁴ *See supra note 2, New Jersey v. EPA.*

¹⁵ U.S. EPA, FACT SHEET: MERCURY AND AIR TOXICS STANDARDS FOR POWER PLANTS,

<https://www.epa.gov/sites/production/files/2015-11/documents/20111221matssummaryfs.pdf>.

¹⁶ U.S. EPA, *Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards*, EPA-452/R-11-011 (Dec. 2011), <https://www3.epa.gov/ttnecas1/regdata/RIAs/matsriafinal.pdf>.

arsenic, benzene and other hazardous air pollutants by many thousands of pounds each.¹⁷ Officials in 9 of 10 EPA regional offices criticized Mr. Wehrum's plan, calling it "detrimental to the environment" and a "drastic change in interpretation" of clean air regulations. *Id.* The draft rollback claimed that even if corporations were given legal permission to save money by increasing hazardous air pollution, they would not do so, voluntarily, "to avoid negative publicity and to maintain their appearance as responsible businesses." *Id.* Following public and congressional outcries, EPA dropped this air toxics rollback plan.

Rolling Back Need for Modern Pollution Controls That Apply to Increases in Harmful Air Pollution

The Clean Air Act requires industries to install modern pollution controls when they build new facilities, or modify existing ones, in ways that lead to significantly higher annual emissions. Mr. Wehrum tried to make regulatory changes in 2002-2003 that would have dramatically weakened this clean air program.¹⁸ In a 2004 report, the U.S. General Accounting Office reported that 27 of 44 state officials surveyed "expected the [EPA] rule to increase emissions of harmful air pollutants, thereby hindering areas' efforts to meet air quality standards and potentially creating or exacerbating public health risks."¹⁹ Thirty "of the officials expected their agency's workload would increase." *Id.*

The D.C. Circuit was so concerned that it issued a judicial stay of this EPA rollback rule two days before it was to take effect.²⁰ Such stays are very rare. The judges subsequently held that the rollback, once again, violated the plain language of the Clean Air Act. *Id.* Parties had presented evidence to the court that the rollback was so drastic, it would have eliminated the requirement to install pollution controls at one power plant increasing harmful emissions, like smog-forming nitrogen oxides, by over 21,000 tons per year.²¹

¹⁷ *E.P.A. Emissions Plan Is Criticized as Harmful to the Environment*, N.Y. Times (April 4, 2006),

<http://query.nytimes.com/gst/fullpage.html?res=9C06E3D61330F937A35757C0A9609C8B63>.

¹⁸ U.S. EPA, Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion (Oct. 27, 2003),

<https://www.federalregister.gov/documents/2003/10/27/03-26320/prevention-of-significant-deterioration-psd-and-non-attainment-new-source-review-nsr-equipment>.

¹⁹ U.S. GAO, *Key Stakeholders' Views on Revisions to the New Source Review Program*, GAO-04-274 (Feb. 2004), at 2 <https://www.gao.gov/assets/250/241349.pdf>

²⁰ See *New York v. EPA*, No. 03-1380 (March 17, 2006), at 6 (noting judicial stay of rule in December 2003),

[https://www.cadc.uscourts.gov/internet/opinions.nsf/DD611C38CF556DD6852574400044D637/\\$file/03-1380a.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/DD611C38CF556DD6852574400044D637/$file/03-1380a.pdf).

²¹ Opening Brief of Environmental Petitioners and Intervenors, *State of New York v. EPA*, No. 03-1380 *et al.* (Sept. 8, 2005), at 14-15. For comparison, this amount is nearly one-and-a-half times the total amount of nitrogen oxides emissions annually by *all* sources located in the District of Columbia. *State Emissions Totals* (NEI 1999 v3), www.emissionsonline.org/nei99v3/state/stindex.htm.

Undermining Clean Air Act Enforcement

Even the Bush EPA's own enforcement office protested Mr. Wehrum's 2003 rollback of these new source review regulations, finding that an astonishing "88 percent of [EPA's] pending enforcement cases" against coal-burning power plants would have been impossible under the expansive amnesty that the rollback conferred.²² The political appointee heading EPA's enforcement office argued internally that these rollbacks would "eviscerate the air enforcement program," particularly as it impacts coal-fired utilities.²³

A subsequent politically appointed head of the Bush EPA enforcement office related that the goal of Mr. Wehrum's air program clean air rollbacks "was to prevent any enforcement case from going forward. Some people thought the [agency's power plant enforcement initiative] should never have been brought. [The air program's] reform was really designed to thwart our ability to do it."²⁴ As noted, the D.C. Circuit subsequently stayed, then vacated, the rollback unanimously.²⁵

Undermining States' Rights to Regulate Motor Vehicle Greenhouse Gas Emissions

As acting administrator of the EPA air office, Mr. Wehrum recommended against granting California's Clean Air Act Section 209 waiver to regulate greenhouse gas emissions from vehicles.²⁶ This decision had negative implications for a third of the nation's vehicle market, and represented the first and only time EPA has denied a waiver since California was granted pre-emption authority in 1967.

A Record of Advancing a Polluting Agenda for Industries

EPA lawbreaking during Mr. Wehrum's tenure in the Bush administration advanced an industry agenda to increase harmful air pollution and weaken clean air protections for all Americans. Mr. Wehrum has continued to pursue that agenda in his role as a corporate attorney representing industry.

²² EPA, Office of the Inspector General, *New Source Review Rule Change Harms EPA's Ability to Enforce Against Coal-fired Electric Utilities*, Evaluation Report No. 2004-P-00034 (Sept. 30, 2004), at 18 ("2004 NSR OIG Report").

²³ *Id.*, at 11.

²⁴ Joel A. Mintz, *'Treading Water': A Preliminary Assessment of EPA Enforcement During the Bush II Administration*, 34 ELR 10933, 10937-40 (Oct. 1, 2004) (quoting J.P. Suarez).

²⁵ See *supra* note 20.

²⁶ Richard Simon & Janet Wilson, *EPA staff turned to former chief on warming*, L.A. Times (Feb. 27, 2008) (discussing email in which Wehrum argued against granting the waiver as far back as 2006). <http://articles.latimes.com/2008/feb/27/nation/na-waiver27>; *Global Warming Waiver Documents Show "An Environmental Protection Agency in Crisis"* (Feb. 26, 2008), <https://www.epw.senate.gov/public/index.cfm/press-releases-democratic?ID=5688A360-802A-23AD-4441-77F52C3C17B6>.

As a private attorney, Mr. Wehrum has represented corporations and trade associations in 34 lawsuits involving the EPA. Attachment 3 to this letter lists these cases.²⁷ The clear majority of the cases were lawsuits against EPA to weaken or overturn clean air and health protections. A few cases involved intervening on EPA's side to defend weak requirements that the petitioners believed the law requires to be strengthened.

We have not identified any case in which Mr. Wehrum represented a client that sought to strengthen clean air protections. Mr. Wehrum even sued the Occupational Health and Safety Administration opposing workplace exposure safeguards for dangerous respirable silica.²⁸

Mr. Wehrum's conflicts of interest letter to EPA's Designated Agency Ethics Official indicates no intention to recuse himself from the large number of Clean Air Act matters that he is currently suing to overturn or weaken on behalf of industry clients.²⁹ Mr. Wehrum does not have an open mind about these standards and the legal, scientific and policy elements that contradict his private clients' positions and interests. Moreover, Mr. Wehrum's letter indicates an intention to recuse himself for only a limited duration from actual litigation against EPA in which he has participated personally and substantially. *Id.* If he is confirmed, Mr. Wehrum should recuse himself permanently from all future aspects of EPA Clean Air Act standards that are the subject of all his lawsuits against EPA on behalf of private clients.

A Mixed Record of Improving Public Health and Air Quality

EPA's air program did achieve some important air pollution reductions during Mr. Wehrum's tenure. The Bush EPA continued the Clinton administration's successful diesel emissions work, and launched their own efforts to control previously unregulated diesel engines. Building on interstate pollution reductions for smog-forming nitrogen oxides in the Clinton administration, and acting in response to petitions by frustrated downwind states, the Bush EPA's Clean Air Interstate Rule accomplished significant reductions in deadly sulfur dioxide and nitrogen oxides emissions from coal-burning power plants in the eastern U.S. A unanimous D.C. Circuit did find this rule unlawful, however, after concluding that the Clean Air Act requires power plants to make more reductions in these pollutants than the rule accomplished, in order to help downwind states like North Carolina.³⁰ Mr. Wehrum and the Bush EPA deserve credit for these achievements, even though the law required, and the Obama administration delivered, deeper pollution reductions.

²⁷ The list in Attachment 3 is limited to cases in the federal appellate courts in which Mr. Wehrum represented a party. It does not include any cases in federal district courts or state courts in which he may have participated. In addition, the list exceeds 34 EPA cases, because some of the cases were consolidated into a single case. This reduces the 68 listed cases involving EPA to 34 overall cases.

²⁸ See Attachment 3; <https://www.hunton.com/en/people/william-wehrum.html>.

²⁹ Letter from William Wehrum to Kevin Minoli, Designated Agency Ethics Official, U.S. EPA (undated), https://www.eenews.net/assets/2017/09/15/document_pm_04.pdf.

³⁰ *North Carolina v. EPA*, <http://caselaw.findlaw.com/us-dc-circuit/1336309.html>.

A Record of Damning Government Investigations

During Mr. Wehrum's tenure at EPA, there was an explosion of critical investigations and reports by independent watchdogs in the agency's Office of Inspector General (OIG) and by the Government Accountability Office. These government auditors directed sharp criticism at the harmful and frequently illegal clean air rollbacks overseen by Mr. Wehrum. Some of these examples include:

- The General Accounting Office's 2003 report, *EPA Should Use Available Data to Monitor the Effects of Its Revisions to the New Source Review Program*, determined that EPA's justifications for 2002 rollbacks to a clean air program were based on self-serving, unsubstantiated anecdotes submitted by industry, rather than on reliable data.³¹
- The EPA Office of the Inspector General's 2004 report, *New Source Review Rule Change Harms EPA's Ability to Enforce Against Coal-fired Electric Utilities*, found that a 2003 clean air rollback shepherded by Mr. Wehrum had "seriously hampered [EPA enforcement office] settlement activities, existing enforcement cases, and the development of future cases."³² The OIG related that "[t]hree of nine utilities in ongoing active litigation with EPA [had] asserted that enforcement actions should cease or be significantly reduced" because their alleged violations would be acceptable under the rollback. *Id.* Soon after the rollback was made public, "a major utility ceased negotiations with EPA" and "[n]o new enforcement actions [were] taken against coal-fired utilities alleged to have violated the [old rule] due to the new rule's adverse impact on [the EPA enforcement office's] leverage in settlements or court remedies." *Id.* at ii-iii. As noted above, a federal court stayed and subsequently vacated the 2003 rollback.³³
- The Government Accountability Office's 2005 report, *Observations on EPA's Cost-Benefit Analysis of Its Mercury Control Options*, identified major shortcomings in the economic analysis for EPA's proposed mercury cap-and-trade program.³⁴ For example, EPA examined the costs and benefits of the trading approach, but not the actual Clean Air Act requirement that EPA chose to roll back. This skirted examining which approach produced the greatest net benefits, leading GAO to conclude, "EPA's estimates are not comparable and are of limited use for assessing economic trade-offs." *Id.*
- The Government Accountability Office's 2006 report, *EPA Should Improve the Management of Its Air Toxics Program*, strongly criticized EPA for failing to act on scores of specific toxic air pollution control measures that Congress required the agency to complete years earlier.³⁵ GAO concluded that "as a result of EPA's limited progress, the agency has not addressed health risks from air toxics to the extent or in the time frames envisioned in the Clean Air Act." *Id.*
- The Government Accountability Office's 2006 report, *Particulate Matter: EPA Needs to Make More Progress in Addressing the National Academies' Recommendations on Estimating Health Benefits*, found EPA had failed to fully apply 26 recommendations by

³¹ GAO-03-947 (Aug. 2003), at 4-5, 16-25, <http://www.gao.gov/assets/240/239346.pdf>.

³² 2004 NSR OIG Report, *supra* note 22, at ii.

³³ *See supra* note 20, *New York v. EPA*.

³⁴ GAO-05-252 (Feb. 2005), <http://www.gao.gov/new.items/d05252.pdf>.

³⁵ GAO-06-669 (June 2006), <https://www.gao.gov/assets/260/250607.pdf>.

the National Academies for improving its benefits analysis for the national health standards for particulate matter pollution.³⁶

CONCLUSION

Mr. Wehrum has dedicated his career to rolling back EPA health and clean air protections for Americans, both while at EPA and in service of industry clients. His record does not show the necessary dedication to achieving the Clean Air Act's imperative to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of the population."³⁷

During Mr. Wehrum's prior tenure in EPA's air office, the agency's accomplishments were overshadowed by extraordinarily harmful rollbacks and delays, and frequent court losses and rebukes from judges. He left Americans to suffer from dangerous and unlawful air pollution for many years after his tenure ended.

Mr. Wehrum is a knowledgeable air pollution attorney, but he is not fit for the job as the nation's chief air quality official. We respectfully urge Senators not to confirm him to this position.

Sincerely,

Earthjustice
League of Conservation Voters
NRDC
Sierra Club

³⁶ GAO-06-992T (July 2006), <http://www.gao.gov/assets/120/114447.pdf>.

³⁷ 42 U.S.C. § 7401(b).