

**Senate Committee on Environment & Public Works**  
**Hearing entitled, “Hearing on the Nominations of Michael Dourson, Matthew Leopold,**  
**David Ross, and William Wehrum to be Assistant Administrators of the Environmental**  
**Protection Agency, and Jeffery Baran to be a Member of the Nuclear Regulatory**  
**Commission.”**

**October 4, 2017**

**Questions for the Record for Mr. Matthew Leopold**

**Ranking Member Carper:**

1. For decades, both Republican and Democratic administrations alike have had written policies limiting White House contacts with agencies that have investigatory and enforcement responsibilities. These policies have recognized that even a simple phone call from the White House to an agency inquiring about or flagging a specific matter can upset the evenhanded application of the law. I recently learned that Devon Energy, a strong political supporter of Administrator Pruitt’s, informed the EPA just 5 days after Mr. Pruitt was sworn in as Administrator that it was no longer willing to install air pollution technology or pay a high penalty to EPA for its illegal air emissions of cancer-causing benzene and other chemicals. We also know that Trump family casinos, hotels and golf courses have been the subject of EPA enforcement actions for violations of the Clean Air Act and Clean Water Act.

- a. Do you agree that it is essential that in making decisions, EPA’s Office of General Counsel (OGC) must be shielded from political influence and spared even the appearance of being subject to political influence or considerations?

**If confirmed, I commit to work with Administrator Pruitt and his team to ensure strict compliance with all legal and ethical obligations.**

- b. Will you commit to restricting communications between OGC and the White House staff regarding specific matters under the authority of OGC?

**If confirmed, I commit to work with Administrator Pruitt and his team to ensure strict compliance with all legal and ethical obligations.**

- c. Will you commit to ensuring the staff of OGC is familiar with those restrictions?

**If confirmed, I commit to work with Administrator Pruitt and his team to ensure strict compliance with all legal and ethical obligations.**

- d. Will you commit to advising this Committee within one week if any inappropriate communications from White House staff to OGC staff, including you, occur?

**If confirmed, I commit to work with Administrator Pruitt and his team to ensure strict compliance with all legal and ethical obligations.**

2. Recently, EPA conducted “anti-leaking” training for its employees<sup>1</sup>. According to EPA sources, the briefing stated that “Prohibitions we will discuss do not refer to “Whistleblowing”. Agency employees have the right to make lawful disclosures to anyone, including, for example, management officials, the Inspector General, and/or the Office of Special Counsel. Employees may make disclosures to the EPA Office of the Inspector General through the EPA OIG Hotline at 888-546-8740.” This presentation evidently failed to note the rights of federal employees have to make disclosures to Congress.

5 U.S.C. § 7211, provides that: The right of employees, individually or collectively, to petition Congress or a Member of Congress or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied. Pursuant to 5 U.S.C. § 2302(b)(8), it is a violation of federal law to retaliate against whistleblowers. That law states: Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority ... take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of. ... (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences- (i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences a violation of any law, rule, or regulation... " In addition, pursuant to 18 U.S.C. § 1505, it is against federal law to interfere with a Congressional inquiry: Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress.

- a. If you are confirmed, will you commit to protect the rights of all career employees in OGC to make lawful disclosures, including their right to speak with Congress?

**If confirmed, I commit to protecting the rights of all EPA employees and will follow the law.**

- b. Will you commit to communicate employees’ whistleblower rights via email to all OGC employees within a week of being sworn in?

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<sup>1</sup> [https://www.washingtonpost.com/politics/whitehouse/federal-employees-are-ordered-to-attend-anti-leaking-classes/2017/09/21/032b40d6-9edd-11e7-b2a7-bc70b6f98089\\_story.html?utm\\_term=.e2bfc5e54d95](https://www.washingtonpost.com/politics/whitehouse/federal-employees-are-ordered-to-attend-anti-leaking-classes/2017/09/21/032b40d6-9edd-11e7-b2a7-bc70b6f98089_story.html?utm_term=.e2bfc5e54d95)

**If confirmed, I commit to protecting the rights of all EPA employees and will follow the law.**

3. In the wake of Hurricane Irma, at least 11 deaths and numerous injuries have been reported in Florida due to accidental carbon monoxide poisoning from gasoline-powered portable generators.<sup>2</sup> One additional death has also been reported in North Carolina, along with other injuries throughout the Southeastern United States.<sup>3</sup> Many of these deaths and injuries could have been prevented had stronger safety standards been in place for portable gasoline generators. In November 2016, the U.S. Consumer Product Safety Commission (CPSC), following years of work on the issue, voted to issue a Notice of Proposed Rulemaking (NPRM) to implement a mandatory safety standard for portable generators.<sup>4</sup> Since then, Administrator Pruitt and Acting CPSC Chairman Buerkle have separately said that section 213 of the Clean Air Act precludes CPSC action.

- a. Section 213 of the Clean Air Act is intended to regulate emissions from non-road engines or vehicles when the EPA determines that such emissions “are significant contributors to ozone or carbon monoxide concentrations in more than 1 area which has failed to attain the national ambient air quality standards for ozone or carbon monoxide.” In your opinion, would the occasional indoor use of portable generators following a power outage be likely to be a significant contributor to ambient carbon monoxide concentrations in more than 1 area that has failed to attain the national ambient air quality standards for carbon monoxide? Why or why not?

**It would be inappropriate for me to prejudge the outcome of a matter that may come before me if confirmed as General Counsel.**

- b. There are currently no areas in the United States that have failed to attain the national ambient air quality standards for carbon monoxide, and this has been the case since 2010<sup>5</sup>. As a matter of law, could section 213 of the Clean Air Act be used to regulate carbon monoxide emissions due to the indoor use of portable generators if there are no areas in the United States that fail to attain the national ambient air quality standards for carbon monoxide? Why or why not?

**It would be inappropriate for me to prejudge the outcome of a matter that may come before me if confirmed as General Counsel.**

4. You spent more time – 6 years – as an attorney in the Environment and Natural Resources Division of the Department of Justice than in any other position. Based on your experience, to what extent do you believe that the work of the Environment and

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<sup>2</sup> <http://www.miamiherald.com/news/weather/hurricane/article174097351.html> <http://www.sun-sentinel.com/news/weather/hurricane/fl-carbon-monoxide-deaths-20170914-story.html>

<sup>3</sup> <http://www.charlotteobserver.com/news/article173612361.html>

<sup>4</sup> <https://www.federalregister.gov/documents/2016/11/21/2016-26962/safety-standard-for-portable-generators>

<sup>5</sup> <https://www.epa.gov/green-book/green-book-carbon-monoxide-1971-area-information>

Natural Resources Division makes an important contribution to the protection of public health and the environment? Please explain and describe your views of the contributions the work of the Division makes.

**The Environment and Natural Resources Division (ENRD) is the nation's environmental law firm handling work arising from approximately 150 federal civil and criminal statutes, including the Clean Air Act, Clean Water Act, CERCLA, and Safe Drinking Water Act. It serves as counsel to EPA, the Department of the Interior, and other federal agencies that have environmental or natural resource issues. ENRD is important to protecting human health and the environment as it enforces the federal pollution-control laws EPA oversees.**

5. Earlier this year, the fiscal year 2018 budget proposal<sup>6</sup> submitted to Congress sought to eliminate the \$20 million in funding the EPA provides for the Justice Department's Environment and Natural Resources Division. EPA has historically provided about 27 percent of that office's budget. Based on your experience as an attorney in the Environment and Natural Resources Division, please describe the potential impact on the work of the Division of such a reduction in funding. Do you support such a reduction in funding? Please provide your reasoning and any information you have supporting your answer. Since 2005, how much funding has been provided to ENRD by EPA? How much money has DOJ secured through fines, penalties, and commitments to remediate contamination and pollution during this same time period?

**I support the important work done by ENRD. It would be inappropriate for me to prejudge the outcome of a matter that may come before me if confirmed as General Counsel. If confirmed, I would manage OGC's functions, including its reliance on ENRD as outside counsel, within the authority and budget provided by Congress.**

6. On February 28, 2017, President Trump directed EPA and the Army Corps to review and possibly rescind or repeal the Clean Water Rule in Executive Order 13776. EPA recently ended the public comment process on the first step of a two-step process to repeal the rule and replace it with a rule that will protect far fewer sources of drinking water. Individuals with first-hand knowledge of the process EPA utilized to prepare its have informed my staff that:
  - i) When EPA first submitted the proposed repeal rule to OMB, the draft stated that the agency would undertake a new cost-benefit analysis as part of the second step of its process.
  - ii) OMB interpreted EPA's first proposal to mean that the rule's repeal would not avoid any costs to industry or have any economic impact at all. EPA's political staff then directed the career staff to undertake a new economic analysis. In response to this direction, EPA career staff reportedly changed the table included in the 2015 rule to a) reflect 2016 dollars instead of 2014 dollars, b) convert

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<sup>6</sup> <https://www.documentcloud.org/documents/4061910-EPA-Superfund-reimbursements-to-DOJ-documents.html#document/p7/a378119>

“annual costs incurred” under the Clean Water Rule to “annual costs avoided” due to its repeal and c) convert “annual benefits gained” under the Clean Water Rule to “annual benefits forgone” due to its repeal. This new table was sent to OMB on June 8, 2017.

- iii) OMB correctly concluded from EPA’s June 8 submittal that repealing the rule would cost more in lost benefits than it would save industry in compliance costs. On June 13, 2017, presumably to avoid such an admission on the part of EPA, EPA career staff were verbally directed by political staff to solve this ‘problem’ by simply deleting the majority of the benefits of the rule from the table and re-submitting it to OMB, which they did<sup>7</sup>.
- a) If the events above occurred as described to my staff, do you agree that EPA’s failure to even attempt to undertake a credible cost-benefit analysis of its proposal to repeal the Clean Water Rule would be vulnerable to assertions that the agency ran afoul of both the Clean Water Act and the Administrative Procedure Act? Why or why not?

**I am not able to speculate about what may or may not have occurred in this instance. If confirmed, I would work to ensure that the legal requirements for analyzing the cost-benefit of EPA rules are adhered to.**

- b) The direction that was reportedly provided to the EPA career staff to make the various revisions to what was submitted to OMB was verbal, not written. If you are confirmed, do you commit to ensure that career staff in OGC will receive appropriately documented, rather than verbal, direction from political officials before they take action? If not, why not?

**I support the appropriate use of both written and oral guidance and would endeavor to use each in appropriate circumstances.**

8. Do you agree to provide complete, accurate and timely responses to requests for information submitted to you by any Member of the Environment and Public Works Committee? If not, why not?

**Yes.**

9. Recently, EPA announced that Administrator Pruitt would be publishing brief summaries of his calendars biweekly, after dozens of Freedom of Information Act requests for this information as well as a March request by me and my colleagues that he do so. During the Obama Administration, the Administrator, regional Administrators and all those serving in confirmed roles published their calendars daily<sup>8</sup>. If you are confirmed, will you commit to publishing your calendars daily? If not, why not?

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<sup>7</sup> [https://www.epa.gov/sites/production/files/2017-06/documents/economic\\_analysis\\_proposed\\_step1\\_rule.pdf](https://www.epa.gov/sites/production/files/2017-06/documents/economic_analysis_proposed_step1_rule.pdf)  
See Table 1

<sup>8</sup> <https://yosemite.epa.gov/opa/admpress.nsf/Calendars?OpenView>

**If confirmed, I will make my calendar available on a timely basis.**

**Senator Cardin:**

10. The people of Baltimore must be able to rest assured that the facilities covered by Risk Management Plans under CAA §112(r) will have to evaluate implementing safer measures protections, and that first responders will have the information they need to respond to chemical disasters. In your capacity as General Counsel for EPA, while facing a law suit from various state Attorneys General, including Attorney General Frosh of Maryland, how will you counsel Administrator Pruitt on the question of implementing the original January 2017 Environmental Protection Agency Amendments to the Accidental Release Prevention Requirements for Risk Management Programs under the Clean Air Act without further delay?

CAA §112(r)(3) provides EPA the authority to amend the List of Regulated Substances. Would you counsel Administrator Pruitt to add chlorosulfonic acid to the List of Regulated Substances?

**Risk Management Plans under CAA §112(r) are an important tool provided by Congress for facilities using substances “known to cause or may reasonably be anticipated to cause death, injury, or serious adverse effects to human health or the environment.” The plans include information on the potential effects of an accidental release, the steps a facility is taking to prevent such a release, and directions for those that respond if a release occurs. I am unfamiliar with the specific legal issues raised in the litigation referenced. Also, it would be inappropriate for me to prejudge the outcome of a matter that may come before me if confirmed as General Counsel. If confirmed, I would request a briefing by EPA staff on the issues and EPA legal authorities.**

11. Attorney General Jeff Sessions issued a memo on June 7, 2017, prohibiting all Department of Justice components and United States Attorney’s Offices from entering into any settlement agreement that directs or provides for a settlement payment to non-governmental, third parties that were not directly harmed by the conduct. As you know, this is commonplace practice in cases where the environmental harm is irreparable—like the BP oil spill or the Volkswagen diesel emissions case. Please provide your understanding of the legal basis, if any, for prohibiting payments to third parties that will mitigate environmental harms?

**The Department of Justice has certain legal authority to conduct and settle litigation matters. In litigation matters where the Department of Justice is counsel to EPA, I would respect the legal authority of the Department as appropriate.**

**Senator Markey:**

12. In the past, you stated that the EPA was regulating beyond its authority in terms of the Clean Power Plan, however you also said that it’s “settled law EPA can regulate

greenhouse gases.” Given this and the intentions of the EPA to repeal the CPP, what suggestions would you make to Administrator Pruitt in terms of the Plan’s replacement?

**It would be inappropriate for me to prejudge the outcome of a matter that may come before me if confirmed as General Counsel. If confirmed, I would request a briefing by EPA staff on the issues and EPA legal authorities, and I would commit to offer counsel supporting the rule of law in this or any other EPA action.**

**Senator Sanders:**

**Climate Change**

13. President Trump has suggested in the past that climate change is a hoax. Is the President correct? Is climate change a hoax?

**I believe that climate change is real and human activity contributes to climate change.**

14. Do you agree with the vast majority of scientists that climate change is real, it is caused by human activity, and that we must aggressively transition away from fossil fuels and toward energy efficiency and sustainable energy like wind, solar, and geothermal?

**I believe that climate change is real and human activity contributes to climate change.**

**Science**

15. At the EPA, science provides the foundation for Agency policies, actions, and decisions made on behalf of the American people. What should the role of science be in the interpretation and implementation of EPA policies, rules, and regulations?

**High quality science is an essential predicate to many of the decisions that EPA makes. The role of science is critical to EPA’s essential mission of protecting human health and the environment.**

16. Do you support relying on independent scientists with relevant expertise to evaluate and review the data that the EPA uses when making decisions related to the implementation of environmental regulations?

**I support the roles of scientists in helping EPA in its mission of protecting human health and the environment.**

**Congressional Relations**

17. If confirmed, do you commit to assuring staff in the Office of the General Counsel will respond to all relevant inquiries from all Members of Congress, regardless of party or position?

Yes.

### **Most Pressing Challenges**

18. The EPA's FY18 budget lists the following as priorities: clean water and drinking water, infrastructure, work at Brownfields and Superfund projects, improving and protecting air quality, and ensuring the safety of chemicals. If confirmed, would these also be the most pressing challenges that deserve your and OGC's attention? If confirmed, how will you ensure OGC better addresses these challenges?

**If confirmed, I would manage OGC's functions within the authority and budget provided by Congress. I would request a full briefing by OGC staff on the ongoing work of the office and after understanding the scope of its current commitments set priorities based on legal requirements, the needs of the client program offices, and the priorities of the Administrator.**

### **Primary Environmental Enforcement by the States**

19. When giving advice to the EPA's staff, how will you balance the EPA's obligation to enforce the nation's environmental laws and regulations where the state and federal governments share authority?

**If confirmed, I would advise EPA staff that it is essential for the federal government and state governments to work together to provide the environmental protection that our laws demand and that the American people deserve. Many federal environmental statutes are designed with states as a primary implementer. EPA and the states should respect the design of cooperative federalism inherent in the law and leverage the assets of each other to achieve greater outcomes.**

### **Environmental Regulations**

20. As you may know, the EPA proposed to repeal the Obama Administration's Clean Power plan regulations to address atmospheric carbon pollution. If you are confirmed, will you commit to ensuring that in whatever replacement the Trump Administration makes to the Clean Power Plan, the EPA continues to fulfill its obligations under *Massachusetts v. EPA*?

**It would be inappropriate for me to prejudge the outcome of a matter that may come before me if confirmed as General Counsel. If confirmed, I would commit to offer counsel supporting the rule of law in this or any other EPA action, including advising the Agency on Supreme Court precedent, such as *Massachusetts v. EPA*.**

### **Senator Whitehouse:**

21. Administrator Pruitt has been criticized for spending a disproportionate amount of his time meeting with industry and virtually no time with public-interest groups. If confirmed, will you commit to meet with and listen to all parties in a balanced fashion?

**It is important for EPA to be accessible to the public and the regulated community. While the primary role of the General Counsel is to advise EPA policy-makers, if confirmed, I would attempt to meet with entities affected by the Office of General Counsel, while abiding by all legal and ethical limitations.**

22. The President's budget proposes to cut EPA's budget by 30%. The Office of General Counsel oversees ethics and FOIA. Based on what I've seen, EPA's Office of General Counsel is struggling to keep its head above water with current resources. For example, I've sent ethics-related inquiries to EPA, including one in May about an appointee with extensive conflicts of interest, that EPA has either not responded to or provided slow and incomplete responses. I've seen one inadequate recusal for former Baker Hostetler attorney Justin Schwab that took six months to fix. In the update recusal statement we learned that one of Mr. Schwab's clients was the State of Oklahoma. As of September 29, 2017, EPA had over 2,100 open FOIA requests and outside groups, including the California Attorney General have filed suit over long-languishing requests.

- a. Do you believe these response times to Congress and the public are acceptable?

**I am not familiar with the specific details of these requests. If confirmed, I would request a briefing by EPA staff on OGC's history in responding to Congressional and FOIA requests.**

- b. Do you believe the President's budget, if enacted, would provide enough money for your office to fulfill its ethics requirements and respond to Congress and FOIA requests from the public?

**If confirmed, I will manage OGC's functions within the authorities and budget provided by Congress.**

- c. What specific steps will you take as General Counsel to ensure that responses to congressional inquiries and FOIA requests are made in the most expeditious manner possible?

**If confirmed, I would request a full briefing by OGC staff on the ongoing work of the office and after understanding the scope of its current commitments set priorities as appropriate for responses to requests for information. I would work with members of Congress to provide requested information, while respecting legal privileges and the role of the Executive branch.**

23. If confirmed, do you commit to notifying the Committee of all of the email addresses you plan to use upon confirmation and within seven days of using a new email address, including any aliases or pseudonyms? Do you commit to conducting all business using official email addresses and other means and to refrain from any mediums that are outside the Freedom of Information Act's reach?

**If confirmed, I commit to notifying the Committee of the e-mail address I use for official business. If confirmed, I commit to following EPA's Records Policy and the Federal Records Act.**

24. Have you heard anything to suggest that EPA may close or consolidate any Regional Offices?
- a. What is your opinion of such a proposal?

**I am not aware of any such plans.**

25. Do you believe that climate change is real?

**Yes.**

26. EPA Administrator Pruitt recently told CNBC that "I would not agree that [carbon dioxide's] a primary contributor to the global warming that we see." Based on the scientific findings from experts such as NOAA and statements on EPA's website, including "Carbon dioxide is the primary greenhouse gas that is contributing to recent climate change," Politifact determined that statement to be false. Do you agree with Administrator Pruitt or scientific experts regarding whether carbon dioxide is the primary greenhouse gas that is contributing to climate change?

**I believe that carbon dioxide contributes to climate change.**

27. In 2009, as mandated by the Supreme Court and backed by a robust scientific and technical review, the Environmental Protection Agency produced the Endangerment and Cause or Contribute Findings for Greenhouse Gases (GHGs) under Section 202(a) of the Clean Air Act. It found six greenhouse gases - carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride - "taken in combination endanger both the public health and the public welfare of current and future generations." Do you agree with the EPA's endangerment finding? Why or why not?

**If confirmed, I would commit to advising the Agency on Supreme court precedent, such as *Massachusetts v. EPA* and the Agency's Endangerment Finding on Greenhouse Gases respective to the relative statutory framework established by Congress.**

28. Do you believe the U.S. should remain a party to the United Nations Framework Convention on Climate Change?

**The United Nations Framework Convention on Climate Change is an international agreement. The US Department of State has primary responsibility for such matters. I defer to the State Department on this issue.**

29. Do you believe the U.S. should remain a party to the Paris Agreement?

**The Paris Agreement is an international agreement. The US Department of State has primary responsibility for such matters. I defer to the State Department on this issue.**

30. Do you support the amendment to the Montreal Protocol to phase down HFCs?

**The Montreal Protocol is an international agreement. The US Department of State has primary responsibility for such matters. I defer to the State Department on this issue.**

31. If confirmed, do you commit to providing complete and accurate responses to inquiries from EPW members in a timely fashion?

**Yes.**