



PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY

962 Wayne Ave • Suite 610 • Silver Spring, MD 20910

May 14, 2020

Administrator Andrew Wheeler
U.S. Environmental Protection Agency
USEPA William Jefferson Clinton Building
Mail Code 1101A
1200 Pennsylvania Avenue N.W.
Washington, DC 20004

Dear Administrator Wheeler:

The undersigned organizations urge you to reverse an action that you have taken that appears to undermine the independence and efficacy of EPA's Office of Inspector General (OIG). As we understand your current posture, EPA political appointees are free to ignore requests to submit to investigatory interviews from the Inspector General (IG).

The undersigned believe that this stance creates a questionable double standard which inappropriately shields political appointees from review. As explained below, this position creates needless confusion but is completely within your power to remedy.

As you know, your then-Chief of Staff Ryan Jackson had reportedly refused to submit to an interview with IG investigators. That refusal prompted the OIG on October 29, 2019 to send you a "Seven Day Letter" charging Mr. Jackson with refusal to cooperate with the OIG in violation of the Inspector General Act of 1978.

You then asked the EPA General Counsel, Matt Leopold, for a legal opinion on whether the IG's Seven Day Letter was correct in charging that the EPA and Mr. Jackson were not in compliance with the requirements of the IG Act. In a November 5, 2019 memo to you, Mr. Leopold sided with Mr. Jackson, opining that "It is ultimately the Administrator that maintains control of the [IG] information sought and decides what constitutes an adequate accommodation by the Agency" and the law "does not authorize the OIG to take oral interviews."

In a letter dated April 3, 2020, three House Committee chairs wrote you urging that you "immediately revoke and remove from your agency's website a legally deficient memorandum issued by your General Counsel that purports to limit the authority of the Office of Inspector General (OIG) to conduct investigations under federal law. We also ask that you instruct all agency employees to fully cooperate with the OIG's audits and investigations."

While we have yet to see your written response to this congressional request, an E&E News story dated April 6, 2020 (“Wheeler spurns calls to scrap memo that would limit IG”) quoted a statement from your agency spokesperson, Andrea Woods, that the congressional letter “mischaracterized the narrowly tailored legal approach in the [Leopold] memo” and suggested a future clarification would be issued “to correct the record.”

To our knowledge, and to the knowledge of EPA staff with whom we have communicated, no such clarification has been issued. As a result, a state of confusion reigns in which there appears to be an “upstairs-downstairs” system of accountability at EPA, where political appointees are exempt from review. That confusion is both unfortunate and unnecessary.

Apart from the narrow legal point of whether the OIG has the power to compel interviews, you, as Administrator, unquestionably have that power. You could moot this dispute by issuing a directive that requires all staff, including political appointees, submit for IG interviews and answer questions truthfully or face discipline, including removal.

Moreover, your current stance appears to contrast with your own “Message to EPA Employees on Cooperating with EPA’s Inspector General” issued as Acting Administrator on August 8, 2018, stating:

“The OIG [Office of Inspector General] is an independent office within the EPA and, to meet its statutory mandate under the Inspector General Act, the OIG requires information and assistance from EPA managers and staff on a regular basis. *It is imperative and expected that agency personnel provide the OIG with access to personnel, facilities and records or other information or material that is needed by the OIG to accomplish its mission.*” (emphasis added)

Reiterating this earlier position and dispelling the false implication that EPA political appointees are beyond the reach of the OIG is clearly needed. Moreover, such an action is not without precedent. On August 7, 2009, your predecessor Lisa Jackson issued an “All-Hands” memo to EPA staff stating that –

“It is imperative that, upon request, Agency personnel provide OIG auditors, evaluators and investigators with full and unrestricted access to personnel, facilities, records (including, but not limited to, reports, databases and documents), or other information or material that is needed by the OIG to accomplish its mission. Unrestricted access means that managers and staff are not to impose burdensome administrative requirements or screening procedures that could impede OIG access to needed employees and materials.”

Ms. Jackson’s action functionally rescinded a 2008 directive issued to EPA enforcement staff that they “not respond to questions or make any statements” from investigators of either the Government Accountability Office or the IG.

In addition to the issue of requiring all EPA staff to participate in IG interviews in a forthcoming manner, there is another issue that raises troubling questions about the

independence of the OIG. In his legal opinion, Mr. Leopold contended that due to “fundamental Constitutional limits” the OIG cannot be considered independent and, therefore, “a right to request does not equate to the [IG] right to receive all information requested.”

This observation by Mr. Leopold is overbroad surplusage. Moreover, it flatly contradicts your 2018 memo to staff in which you declare: “The OIG [Office of Inspector General] is an independent office within the EPA.”

In order to dispel the confusion which your seemingly shifting stance appears to convey, we would urge you to –

1. Issue and display on the agency website a clear statement that all employees, including political appointees, must fully cooperate with OIG requests, including, but not limited to, submitting to interview requests, or risk facing appropriate disciplinary action, up to and including removal; and
2. Reaffirm the independence of the OIG and reiterate that agency management should not attempt to control or influence the free flow of information to and from the OIG or to frustrate the full and unfettered exchange between EPA personnel, including political appointees, and the OIG during audits or investigations.

The circumstances recounted above make these requested statements both necessary and timely. Thank you in advance for your attention to this matter.

Sincerely,

Public Employees for Environmental Responsibility, Silver Spring, MD
Open The Government, WASHINGTON, DC
Whistleblowers of America, WASHINGTON, DC
MRSA Survivors Network, MORRIS, IL
National Center for Health Research, WASHINGTON, DC
Project On Government Oversight, WASHINGTON, DC, DC
CREW, WASHINGTON, DC
Government Accountability Project, WASHINGTON, DC
Pesticide Action Network, BERKELEY, CA
Food & Water Action, WASHINGTON, DC
Government Information Watch, SILVER SPRING, MD