U.S. ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF INSPECTOR GENERAL

Catalyst for Improving the Environment

Office of Counsel Legal Review

Response to Congressional Inquiry Concerning EPA's Conduct Related to Draft/Proposed Legislative Amendments

Report No. 10-N-0148

June 21, 2010

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
INSPECTOR GENERAL

June 21, 2010

The Honorable Lisa Murkowski
Committee on Energy and Natural Resources
United States Senate
Washington, DC 20510

Dear Senator Murkowski:

In response to your request of November 12, 2009, the Office of Inspector General, Office of Counsel reviewed the conduct of certain U.S. Environmental Protection Agency (EPA) officials related to the handling of your proposed amendment to H.R. 2996.[1] Specifically, we addressed your questions regarding (1) whether the head of EPA's Office of Congressional and Intergovernmental Relations (OCIR) attempted contact with Shell Oil Company regarding Amendment Number 2530 to H.R. 2996 constituted a violation of law, regulation, or policy; and (2) whether EPA solicited the Alliance of Automobile Manufacturers (Automobile Alliance) and the Association of International Automobile Manufacturers (AIAM) to lobby on its behalf, in violation of law, regulation, or policy.

I. Summary of Conclusion

We found no violations of law, regulation, or policy related to contact by the OCIR Associate Administrator, with either the Shell Oil Company or the Automobile Alliance, regarding Amendment Number 2530 to H.R. 2996.[2] The OCIR Associate Administrator called a representative of Shell Oil Company when the amendment was in draft, prior to its introduction; he also called and exchanged several e-mail messages with a representative at the Automobile Alliance after the proposed amendment was introduced in Congress. The OCIR Associate Administrator's contact with the automobile industry regarding your proposed amendment was limited to his contact with the Automobile Alliance, and was the only such EPA contact with either the Automobile Alliance or AIAM that we identified in our review. We found that the OCIR Associate Administrator did not request Shell or Automobile Alliance representatives to lobby Congress on the amendment and, therefore, found no violation of grassroots lobbying prohibitions in statutes or policy. Further, we found no violation of policy or standards of conduct in the contact with Shell Oil Company, as described in detail below.

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[1] The Department of Interior, Environment and Related Agencies Appropriations Act, 2010.
[2] As described herein, the OCIR Associate Administrator did not contact AIAM.

II. Background

A. EPA Contact with Shell Oil Company

On or around September 17, 2009, the OCIR Associate Administrator, David McIntosh, received a copy of a draft of an amendment to the Appropriations bill that you were planning to propose related to EPA's authority to regulate greenhouse gases (GHG). OCIR leads EPA's review of legislation, coordinates EPA's formal positions and technical assistance to Congress, and monitors all legislative actions relevant to EPA programs. The OCIR Associate Administrator is the principal advisor to the EPA Administrator on all congressional affairs and regional, State, and local governmental relations. Mr. McIntosh is also the primary political advisor on GHG-related issues and handles related requests from Congress. Having received the draft of the amendment, Mr. McIntosh initiated his usual review process for proposed legislation; that is, he provided it to two program offices, the Office of Air and Radiation (OAR) and Office of General Counsel (OGC), for review. These two offices notified Mr. McIntosh that the draft contained what he described as "unintended consequences" – namely, that the draft of the amendment would prevent EPA from processing certain air permits, including permits related to drilling on the outer-continental shelf. Because the unintended consequences were not immediately apparent on the face of the draft, Mr. McIntosh was concerned about the possibility of unnecessary public confusion if government affairs staff in the affected industry did not recognize the issue when responding to inquiries about the draft amendment and EPA's interpretation of the draft.

To avoid this potential confusion, Mr. McIntosh decided to contact a representative of the affected industry to request feedback from industry attorneys on EPA's interpretation of the draft amendment as having unintended consequences. On or around September 17, after he received the draft amendment and was notified about the unintended consequences by OAR and OGC, Mr. McIntosh called a government affairs representative at Shell Oil Company whom he knew from his prior work on the Hill. During the telephone conversation, Mr. McIntosh described EPA's interpretation of the potential effects of the draft amendment, indicating that the amendment, as drafted, could impact offshore drilling. He recalled requesting that the Shell lawyers provide feedback if their interpretation differed from EPA's.[3] Both Mr. McIntosh and the Shell representative recalled only this one conversation on this matter. Neither recalled any additional communications.

Mr. McIntosh does not recall contacting anyone else outside EPA about your early version of the draft amendment, explaining that it would have been unlikely because the unintended consequences were specific to the oil industry. He stated that, when he called the Shell representative, he had no intention of trying to generate opposition to the amendment. He wanted to establish whether Shell experts disagreed with EPA's interpretation before EPA communicated its position to the Hill. Mr. McIntosh explained that, if EPA were missing something in its interpretation, he wanted to stop any broadcast of that interpretation before it created confusion. If Shell disagreed with EPA's interpretation, and convinced Mr. McIntosh of its position, then he did not want the concept of the unintended consequences to be part of a

[3] The contact at Shell recalls the conversation with Mr. McIntosh on this matter, but does not recall Mr. McIntosh having made a request for feedback.

debate over the proposed amendment. Mr. McIntosh also said that his contact with Shell put Shell on notice to examine the draft amendment language so that it could be prepared for a call from Congress.

The Shell representative did not have the impression that Mr. McIntosh had made the contact because he wanted Shell to contact Congress and object to the amendment. Mr. McIntosh did not ask or imply that the Shell representative should contact Congress to assert EPA's position. Acting on her own accord, following her conversation with Mr. McIntosh, the Shell representative contacted your office, recounted what she had heard from Mr. McIntosh about EPA's interpretation of the amendment, and was told that your office did not agree with what she had recounted to them. She confirmed to us that Mr. McIntosh did not ask Shell to contact your office.

Mr. McIntosh was confident that based on their professional interactions prior to his position at EPA, his contact at Shell would not perceive his call to in any way be a threat to any of Shell's air permits; the Shell representative confirmed this position. The Shell representative understood that Mr. McIntosh was merely expressing the possibility that the Agency might not have the authority to issue permits if the amendment were enacted.

B. EPA Contact with the Automobile Industry

About a week later, on September 23, 2009, you introduced a revised version of the amendment in Congress which eliminated the earlier unintended consequences but created a new one. Shortly after it was introduced, Mr. McIntosh shared the filed version with EPA program offices for their review. Mr. McIntosh also reviewed the language of the proposed amendment and concluded that the unintended consequence of this version of the proposed amendment was that EPA would be prevented from finalizing the proposed rule for GHG emissions for light-duty vehicles.[4]

Based on this conclusion, Mr. McIntosh decided to contact the affected industry, provide EPA's interpretation, and ask for a response.[5] As in the situation with the previous draft of the amendment, Mr. McIntosh felt that busy government affairs representatives would not necessarily see the unintended consequence of the amendment immediately, especially because it contained language that appeared to disclaim the impact that he identified. Mr. McIntosh thought it was likely that the federal government affairs representative for the Automobile Alliance, whom he knew from prior work on the Hill and at EPA, would be called by the media or a Hill staff member for his reaction to the amendment. Mr. McIntosh stated he did not contact any other representatives of the automotive industry (which would include AIAM). AIAM confirmed that Mr. McIntosh had not contacted them. Mr. McIntosh contacted the Automobile

[4] His interpretation of the amendment was later confirmed by staff in the program offices.

[5] Mr. McIntosh's contact with the automobile industry regarding your proposed amendment was limited to his contact with the Automobile Alliance; he did not contact AIAM. In addition, his contact with the Automobile Alliance was the only such EPA contact that we identified during the course of our review. We did not find any evidence that the Automobile Alliance or AIAM was contacted by anyone else from EPA. Also, no other EPA communications with the automotive industry were identified in our review of documents the Agency gathered to respond to a request from your office and a related Freedom of Information Act request for documents and correspondence regarding your amendment.

Alliance representative because he wanted to confer with him prior to the representative potentially receiving a call from the Hill or the media, which could affect the public's understanding of the issues.

Mr. McIntosh recalled having only one telephone conversation with the Automobile Alliance representative and that the remainder of their communication was via e-mail. Mr. McIntosh indicated that, in their conversation, he asked the Automobile Alliance representative to contact his association's attorneys and to call him if they disagreed with EPA's interpretation of the amendment. He further recalled being clear in the conversation that he did not ask the representative to do anything other than get back to him with any concerns about EPA's interpretation.

The Automobile Alliance representative confirmed that Mr. McIntosh shared EPA's preliminary legal interpretation of the amendment. The Automobile Alliance representative also stated that Mr. McIntosh wanted to know if the Automobile Alliance had taken any sort of position – legal or political – on the proposed amendment. When they spoke, the Automobile Alliance had not formulated its position, and the representative did not tell Mr. McIntosh whether he agreed with EPA's interpretation.

Shortly before or after their call on September 23, 2009, at 3:22 pm, Mr. McIntosh sent the Automobile Alliance representative an e-mail, attaching the amendment. About 20 minutes after Mr. McIntosh sent the e-mail with the proposed amendment attached, the Automobile Alliance representative responded in the very manner Mr. McIntosh was concerned about; i.e., failing to recognize the impact of the proposed amendment. The Automobile Alliance also requested clarification of EPA's interpretation of the unintended consequence of the proposed amendment. In response, at approximately 4:05 pm via e-mail, Mr. McIntosh explained how the amendment, if enacted, would prevent EPA from promulgating rules related to light-duty vehicles.[6]

On September 23, 2009, the EPA Administrator issued a letter that responded to an inquiry from Senator Feinstein about the impact of the proposed amendment. On September 24, 2009, after seeing the Administrator's letter on the matter, the Automobile Alliance and AIAM co-signed a letter to Senator Feinstein opposing the amendment. The letter contained a quote from the EPA Administrator's September 23, 2009 letter.[7] The Automobile Alliance representative explained that, as a matter of courtesy, he forwarded a copy of the September 24 letter to Mr. McIntosh in an e-mail addressed to undisclosed recipients; it was not sent in response to any request. Mr. McIntosh also stated that he did not know of, nor did he request a copy of, the letter, and we identified no evidence demonstrating that Mr. McIntosh knew that AIAM and the Automobile Alliance were writing a letter. Beyond an acknowledgement of receiving the e-mail,

[6] They subsequently exchanged two brief e-mails at or around 4:08 pm, one from the Automobile Alliance representative that included his thanks to Mr. McIntosh for the information, and a brief acknowledgement reply e-mail from Mr. McIntosh.

[7] The Automobile Alliance representative could not clearly recall how he obtained a copy of the September 23 letter, but he did not believe Mr. McIntosh had either told him about it or given it to him. Mr. McIntosh stated that he did not provide a copy of the September 23 letter to the Automobile Alliance, and no evidence has been identified to indicate that he did.

we did not find evidence of any further communications on this matter between Mr. McIntosh and the Automobile Alliance representative.

III. Legal Discussion

A. Summary of Findings

We found no violations of grassroots anti-lobbying provisions[8] in the contacts made by Mr. McIntosh with Shell or the Automobile Alliance, and we found that Mr. McIntosh had no contact with AIAM. In his communication with Shell Oil Company, Mr. McIntosh requested feedback on EPA's legal interpretation of the impact of your proposed amendment, but did not make any express request to the representative to lobby Congress on the matter, which would have violated the grassroots lobbying prohibitions. We found no violation of the Anti-Lobbying Act[9] nor of Agency guidance[10] in this contact with Shell.

We also reviewed Mr. McIntosh's contact with the Automobile Alliance, which occurred after your amendment was introduced, under the applicable prohibitions against grassroots lobbying in the Anti-Lobbying Act, the government-wide prohibitions in the Financial Services and General Government Appropriations Act, as well as the prohibitions in EPA's annual appropriations,[11] and EPA guidance. These prohibitions were triggered after your amendment was introduced. We did not identify any explicit or implicit request to contact the Hill regarding the amendment in Mr. McIntosh's communications with the Automobile Alliance, which would have constituted a violation of statutory grassroots lobbying prohibitions. Furthermore, we found no violation of EPA's grassroots lobbying guidance in Mr. McIntosh's contact with either organization.

B. Analysis of the OCIR Associate Administrator's Contact with Shell

The Anti-Lobbying Act, and the Agency's August 2007 guidance related to that statute, generally prohibit express appeals to the public to support or oppose legislation before or after introduction. Mr. McIntosh's contact with Shell prior to the introduction of the amendment falls within this timeframe.[12] We found no evidence of such an express request by Mr. McIntosh. The Shell representative did contact your office after Mr. McIntosh's telephone call; however, this contact did not result from a request by Mr. McIntosh. Therefore, no violation of the

[8] Grassroots or indirect lobbying, as applicable to this review, refers to a request made by a federal agency to the public or special interest groups to lobby on its behalf. Direct lobbying is where an agency employee directly lobbies Congress and is not at issue in this review.
[9] 18 U.S.C. § 1913.
[10] Memorandum from the EPA General Counsel, "Annual Update on Indirect Lobbying Prohibitions" (Aug. 29, 2007). ("August 2007 guidance memorandum").
[11] These prohibitions can be found in the Omnibus Appropriations Act, 2009, in different provisions. See Section 402 of Div. E ("Department of the Interior, Environment, and Related Agencies Appropriation Act, 2009") and Section 717 of Div. D ("Financial Services and General Government Appropriations Act, 2009"), respectively, of Pub. L. 111-008 (Mar. 11, 2009).
[12] At the time of Mr. McIntosh's one contact with Shell on or around September 17, 2009, the draft amendment had not been officially introduced in Congress.

Anti-Lobbying Act or of the Agency's 2007 guidance was found for Mr. McIntosh's contact with Shell Oil Company.

In addition, to fully respond to your request, we reviewed the contact with Shell for any policy or ethical violations related to the outstanding permit application you referenced. We did not find an Agency policy that would change the application of the grassroots lobbying guidance depending on whether an entity has submitted an application for an EPA permit. Agency employees also are governed by standards of ethical conduct that include employees endeavoring to avoid actions that create an appearance they are violating the law or ethical standards. [13] Given the circumstances of the contact with Shell, as described above, we conclude that there was no appearance of a violation of grassroots anti-lobbying provisions, and therefore no violation of the standards of ethical conduct.

C. Analysis of Contact with Automobile Industry

Three statutes containing prohibitions on grassroots lobbying govern communications after legislation has been introduced in Congress.[14] As stated above, we determined that Mr. McIntosh's only contact with the automotive industry regarding the proposed amendment was his contact with the Automobile Alliance, and that he did not contact AIAM. The September 23, 2009, telephone contact and associated e-mail communications with the Automobile Alliance occurred after your amendment was officially introduced on September 23. Therefore, we reviewed the contact with the Automobile Alliance under the three statutory provisions[15] as well as the applicable Agency guidance. The statutory grassroots-lobbying-related provisions governing communication occurring after formal introduction of an amendment prohibit not only express requests, but also implicit requests, as well as provision of assistance (such as fact sheets), when EPA has reason to know that assistance will be used to lobby Congress. Analysis of the relevant provisions is provided below.[16]

1. Analysis of Prohibitions on Express Requests

As described in detail above, we found that Mr. McIntosh's communications with the Automobile Alliance contained no express request to lobby Congress on the proposed amendment. Therefore, we found no violation of prohibitions on express appeals to the public to contact Congress established in provisions of the Anti-Lobbying Act, the government-wide prohibitions, EPA's appropriations provision, or Agency guidance on the matter.

2. Analysis of Prohibitions on Implicit Requests

The Agency appropriations provision and the Agency's related guidance also prohibit implicit requests to contact Congress on the Agency's behalf. After reviewing the totality of the

[13] 5 CFR 2635.101(b)(14).
[14] Included among the three is the Anti-Lobbying Act, which governs grassroots lobbying activities before and after introduction of legislation.
[15] The Anti-Lobbying Act, the government-wide prohibitions, and prohibitions in the annual Agency appropriations.
[16] The transmittal of the Administrator's September 23, 2009, letter responding to Senator Feinstein was not included in this analysis as we found no evidence that the head of OCIR transmitted the letter to the Automobile Alliance.

circumstances and considering the applicable factors used by the Government Accountability Office for analyzing whether communications are implicit grassroots lobbying requests,[17] no violation of the Agency appropriations provision or the related Agency guidance on the matter was found.

The Government Accountability Office has identified a set of factors useful for analyzing whether contacts are implicit grassroots lobbying requests, including "timing, setting, audience, content, the reasonably anticipated effect of the questioned activity, and whether the communication was intended to promote support or opposition to a legislative proposal."[18] We determined Mr. McIntosh's intent in contacting the Automobile Alliance to be the critical factor in our analysis of whether, under all the facts and circumstances present, the communication tended to promote public support or opposition by the Automobile Alliance to the amendment. When Mr. McIntosh contacted the Automobile Alliance, he intended to seek feedback on EPA's interpretation of the amendment's impact on EPA's regulatory authority. He did not intend, nor did the Automobile Alliance representative perceive any intent, to urge any contact with Congress. To obtain that feedback on the Agency's interpretation, Mr. McIntosh had to contact an industry representative, which he did by phone and subsequent e-mail exchange, and therefore, the setting, timing, and audience of the communication, as well as the reasonably anticipated effect of the contact, were incidental to achieving his purpose, and are not considered dispositive to our analysis. Lastly, the content of Mr. McIntosh's e-mail communications with the Automobile Alliance representative support our conclusion that his stated intent for the contact – getting feedback – does not demonstrate an intent to engage in grassroots lobbying. Specifically, after providing the proposed amendment, Mr. McIntosh responded to a question posed by the Automobile Alliance representative concerning the Agency's interpretation of sections of the Clean Air Act and the impact the proposed amendment would have on EPA's regulatory authority for GHGs. He did not state a position on the proposed amendment, nor did he encourage any action on the amendment itself.

Based on a review of applicable factors and considering the totality of the circumstances, we conclude that Mr. McIntosh's communication with the Automobile Alliance did not constitute an implicit request to the public to lobby Congress on the proposed amendment. Therefore, we concluded there were no violations of the prohibitions on implicit grassroots lobbying requests in either the Agency appropriations act or the associated Agency guidance.

IV. Conclusion

Our review of the OCIR Associate Administrator's contacts with Shell Oil Company and the Alliance of Automobile Manufacturers revealed no violations of grassroots lobbying prohibitions, as described in detail above.[19]

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[17] Office of the General Counsel Opinion, Government Accountability Office, B-281637 (May 14, 1999), p.6. EPA guidance also refers to the Government Accountability Office's decisions and factors which, while not binding on EPA, were relied on in the 2007 guidance memorandum. See August 2007 guidance memorandum, p.2, footnote 2.
[18] Office of the General Counsel Opinion, Government Accountability Office, B-281637 (May 14, 1999), p.6.
[19] As explained above, Mr. McIntosh's contact with the automobile industry was limited to his contact with the Automobile Alliance, and was the only such EPA contact that we identified with either the Automobile Alliance or AIAM during our review.

The estimated cost of this report – calculated by multiplying the project's staff days by the applicable daily full cost billing rates in effect at the time – is $33,019.

If you have any questions or need additional information, please do not hesitate to contact my Associate Deputy Inspector General and Counsel, Mark Bialek, at (202) 566-0861.

Sincerely,

Bill A. Roderick
Acting Inspector General