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April 30, 2024

VIA EMAIL & CERTIFIED MAIL/RETURN RECEIPT REQUESTED

Hon. Michael S. Regan
Administrator
U.S. Environmental Protection Agency (Mail Code 1101A)
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
Email: Regan.Michael@epa.gov

Joseph M. Goffman, Esq.
Assistant Administrator
Office of Air & Radiation
U.S. Environmental Protection Agency (Mail Code 6103A)
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
Email: Goffman.Joseph@epa.gov

Re: Notice of intent to File Suit Under the Clean Air Act, 42 U.S.C. §7604(a)(2); Request for Reconsideration under Administrative Procedure Act, 5 U.S.C. §555(b); Request for Recusal of Staff under Due Process Clause.

Dear Administrator Regan and Assistant Administrator Goffman:

On behalf of Peter Williams, this notifies you pursuant to 40 C.F.R. pt. 54 and Clean Air Act §304(a)(2), 42 U.S.C. §7604(a)(2), that Mr. Williams intends to file suit to compel the Environmental Protection Agency ("EPA") to respond to his pending administrative petitions for reconsideration of EPA staff's denial of Mr. Williams' application to participate in the Hydro-fluorocarbons Allowance Allocation and Trading Program (the "HFC Program") under the American Innovation and Manufacturing Act program as a new-market entrant. *See* 40 C.F.R. §84.15. Notwithstanding that granting Mr. Williams' application would have spillover effects on the entirety of EPA's final agency action allocating credits under the HFC Program, *RMS of Ga., LLC v. United States EPA*, 64 F.4th 1368, 1374 (11th Cir. 2023) ("the Allocation Notice is better understood as one EPA action, and RMS's allocation an inseparable component of it"), the U.S. Court of Appeals for the District of Columbia Circuit held that Mr. Williams must pursue an unreasonable-delay action in district court. *RMS of Georgia, LLC v. Envtl. Prot. Agency*, Nos. 22-1025, 22-1313, 22-1314 (D.C. Cir. July 7, 2023). A petition for a writ of *certiorari* to review that decision is currently pending as *Williams v. EPA*, No. 23-1059 (U.S.).

At the same time, now that the Office of Air and Radiation has a Senate-confirmed Assistant Administrator, Mr. Williams also asks that Assistant Administrator Goffman—or

Administrator Regan[1]—review this matter and grant the long-pending petitions (enclosed). Given the billions of dollars in valuable allocations dispensed under the HFC Program, it seems clear under the Appointments Clause, U.S. CONST. art. II, §2, that only an officer appointed pursuant to that Clause may constitutionally decide allocation issues. As you likely are aware, Circuit precedent allows you to cure any prior violation of the Appointments Clause by ratifying the prior actions of agency staff. *Jooce v. FDA*, 981 F.3d 26, 28 (D.C. Cir. 2020). If you intend to take that action eventually in opposing Mr. Williams' pending appeal in the D.C Circuit, it would show good faith to do so now.

Moreover, as you may be aware, Mr. Williams has filed a claim (enclosed) under the Federal Tort Claims Act, 28 U.S.C. §§2671-2680 ("FTCA"), against the EPA career staff who previously have addressed his application and administrative petition for reconsideration. Under the Due Process Clause, therefore, Mr. Williams also respectfully requests that EPA recuse staff who face potential liability in this matter. Because the issue to be decided is quasi-judicial and the EPA staff face potential liability, 5 C.F.R. §2635.102(e), the prior EPA staff addressing these issues should be recused, *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1971), and their decisions revisited by unbiased EPA staff.

DISCUSSION

By way of background, this is a case of mistaken identity in which Mr. Williams applied as an individual with the "dba" New Era Group to be a new-market entrant in the HFC Program, but EPA chose to interpret his application to be on behalf of a defunct corporation (New Era Group, Inc.). Misinterpreted as such, EPA staff denied Mr. Williams' application not only because the perceived corporate applicant "share[d] … corporate affiliation … with" an existing market participant within the meaning of 40 C.F.R. §84.15(c)(2) (*i.e.*, the perceived applicant was not a *new* entrant in the market) but also because the application omitted certain corporate information about the perceived corporate applicant.

Through counsel, Mr. Williams quickly administratively petitioned EPA to reconsider EPA's error, but EPA has not acted on the administrative petition for reconsideration in more than two years. In addition to the factual issue (i.e., that Mr. Williams expressly applied as an individual, not a corporation), EPA staff's interpretation is also legally impossible. Indeed, even if Williams owned the nonprofit "New Era Group, Inc." of Georgia—which he never did—his use of "New Era Group" as a "dba" or trade name would not equate the corporation with the

[1] For purposes of Section 304(a)(2) and Part 54, Administrator Regan is this letter's titular addressee. Assistant Administrator Goffman is the Senate-confirmed EPA official closest to the matter.

trade name: "An individual doing business under a trade name is clearly a sole proprietor distinct under Georgia law from a corporation in which that individual holds stock." *Miller v. Harco Nat'l Ins. Co.*, 274 Ga. 387, 390 (2001); *see also BellSouth Corp. v. FCC*, 162 F.3d 678, 684 (D.C. Cir. 1998) ("it is obvious that there are differences between a corporation and an individual under the law"). Moreover, "[c]orporations are creatures of state law," *Cort v. Ash*, 422 U.S. 66, 84 (1975); *Business Roundtable v. SEC*, 905 F.2d 406, 412 (D.C. Cir. 1990); *Doe v. McMaster*, 355 S.C. 306, 313 (2003); *Tr. Co. of Ga. v. State*, 109 Ga. 736, 755 (1900), and no relevant provision of law equates individuals with corporations.

Significantly, prior to the 1977 enactment of the Clean Air Act's abbreviated procedures and its partial exemption from the Administrative Procedure Act ("APA") in §307(d),[2] the APA governed judicial review under §307(b)(1):

> Being silent on the scope of judicial review, the Clean Air Act incorporates the APA's mandate that agency "action, findings, and conclusions" be struck down if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Amoco Oil Co. v. EPA, 501 F.2d 722, 731 (D.C. Cir. 1974) (quoting 5 U.S.C. §706(2)(A)); *accord Ethyl Corp. v. EPA*, 541 F.2d 1, 33-35 (D.C. Cir. 1976); *Nat'l Asphalt Pavement Ass'n v. Train*, 539 F.2d 775, 786 (D.C. Cir. 1976). For Clean Air Act proceedings outside §307(d), the Clean Air Act remains "silent on the scope of judicial review" and thus the APA *still governs* those Clean Air Act actions.

For statutes that are or were enacted after the APA's enactment, the APA applies unless expressly exempted. *See* 5 U.S.C. §559; *Dickinson v. Zurko*, 527 U.S. 150, 154-55 (1999). The Clean Air Act expressly exempts only those EPA actions subject to the provisions of §307(d) from the indicated provisions of the APA (*i.e.*, 5 U.S.C. §§553-557, 706). *See id.*; *Envtl. Integrity Project v. EPA*, 864 F.3d 648, 649 (D.C. Cir. 2017) (Clean Water Act). Even if this were a close case (and it is not), repeals by implication are disfavored, *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007), and "this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman,* 420 U.S. 738, 752 (1975). By negative implication of the Clean Air Act's express terms in §307(d), as well as pursuant to 5 U.S.C. §559, the APA generally and 5 U.S.C. §§555,

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[2] "The provisions of section 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies." 42 U.S.C. §7607(d)(1). Nether EPA's allocations nor Williams' application are within §307(d).

706 specifically remain applicable to EPA action under the Clean Air Act that falls outside the provisions of §307(d).

Source of EPA's Nondiscretionary Duty to Act

The APA—and indeed the First Amendment—authorize "an interested person [to] appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function." 5 U.S.C. §555(b). The APA further imposes a duty of timeliness on EPA both to conclude the matter and to respond:

- "With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." *Id.*.

- "Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding." *Id.* §555(e).

In dismissing petitions to the U.S. Court of Appeals for the District of Columbia Circuit at Court under 42 U.S.C. §7607(b)(1), that Court implicitly held that EPA has a non-discretionary duty to respond to the administrative petitions. *RMS of Georgia, LLC v. Envtl. Prot. Agency*, Nos. 22-1025, 22-1313, 22-1314 (D.C. Cir. July 7, 2023); *In re Williams,* No. 23-1269 (D.C. Cir. Dec. 21, 2023).

EPA's Unlawful Inaction

Pursuant to 40 C.F.R. §54.3, Mr. Williams alleges that EPA has failed to act on the administrative petitions to reconsider the denial of his application to be a new entrant in the HFC Program and the finding that he "share[s] … corporate affiliation … with" RMS of Georgia, LLC, within the meaning of 40 C.F.R. §84.15(c)(2). (Of course, if the applicant is an individual, the application did not improperly omit information about a corporation's particulars.) There are three discrete petitions:

- Letter from J. Gordon Arbuckle to Cynthia A. Newburg, Director, Stratospheric Protection Division, Environmental Protection Agency (Apr. 20, 2022) (enclosed).

- Letter from Lawrence J. Joseph to Cynthia A. Newburg, Director, Stratospheric Protection Division, and Hans Christopher Grundler, Director, Office of Atmospheric Programs, Environmental Protection Agency (Dec. 12, 2022) (enclosed).

- Letter from Kenneth Ponder, President, RMS of Georgia, LLC, to Cynthia A. Newburg, Director, Stratospheric Protection Division, Environmental Protection Agency (Dec. 29, 2022) (enclosed).[3]

EPA's failure to respond to each of these petitions violates EPA's duty of timeliness to conclude a matter set out in 5 U.S.C. §555(b) (quoted *supra*) and to respond set out in 5 U.S.C. §555(e) (quoted *supra*). "The Administrative Procedure Act requires every agency within a reasonable time to proceed to conclude any matter presented to it and provides that the reviewing court shall compel agency action unlawfully withheld or unreasonably delayed." *Envtl. Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 n.29 (D.C. Cir. 1970) (internal quotation marks, citations, and alterations omitted). Accordingly, courts "will interfere with the normal progression of agency proceedings to correct transparent violations of a clear duty to act because it is obvious that the benefits of agency expertise and creation of a record will not be realized if the agency never takes action." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (internal quotation marks and citations omitted).

Name and Address of Party Making Notice of Intent to Sue

Pursuant to 40 C.F.R. §54.3, the party giving notice of his intent to sue is Peter Williams. Mr. Williams is the petitioner in *Williams v. EPA*, No. 22-1314 (D.C. Cir.), *In re Williams*, No. 23-1269 (D.C. Cir.), *Williams v. EPA*, No. 23-1340 (D.C. Cir.), and *Williams v. EPA*, No. 23-1059 (U.S.). He is also the claimant in an FTCA claim submitted to EPA on March 29, 2024, which I understand EPA to have numbered as TOR-24-040021. Pursuant to 5 U.S.C. §555(b), the undersigned counsel represents Mr. Williams in this matter. Further pursuant to 40 C.F.R. §54.3, Mr. Williams' addresses are as follows:

Personal Address	Address for Legal Notices
Peter Williams 709 Pickering Drive Unit B Murrells Inlet, SC 29567	Peter Williams Care of Law Office of Lawrence J. Joseph 1250 Connecticut Ave., NW, Ste. 700-1A Washington, DC 20036 Tel: 202-355-9452 Fax: 202-318-2254 Email: ljoseph@larryjoseph.com

[3] Because the petitions' exhibits are lengthy, I am enclosing only the petitions' main body. Please let me know if you would like me to send copies of the exhibits.

Application of Appointments Clause.

Under the HFC program, EPA career staff disburse allocations worth billions of dollars with no accountability, which violates the Appointments Clause. U.S. CONST. art. II, §2, cl. 2. Under that Clause, the President must appoint principal officers with the advice and consent of the Senate, while the President alone, the head of an executive department, or a court may appoint inferior officers. *Id.* To the extent that agency staff exercise significant governmental authority, *Buckley v. Valeo*, 424 U.S. 1, 126 & n.162 (1976), they qualify as at least inferior officers. *Edmond v. United States*, 520 U.S. 651, 660-62 (1997). Under *United States v. Arthrex, Inc.*, 141 S.Ct. 1970 (2021), however, "[o]nly an officer properly appointed to a principal office may issue a final decision binding the Executive Branch" in such proceedings. *Arthrex*, 141 S.Ct. at 1985. While having unauthorized staff run so important a program is generally problematic, EPA's refrigerant-gas programs are even more problematic given their overreliance on vague discretionary standards such as the staff-controlled selective "special considerations" and "individual accommodation." 86 Fed. Reg. 55,116, 55,146 (2021); 40 C.F.R. §84.11(a).

Although compliance with the Appointments Clause is constitutionally required, compliance need not interrupt the entire HFC Program/ To the contrary, either of you—as Senate-confirmed officers under the Clause—can ratify any or all of EPA staff's prior actions:

> Even assuming for purposes of argument … that [agency staff's action] violated the Appointments Clause …, Commissioner Gottlieb's ratification cured any Appointments Clause defect.

Jooce, 981 F.3d at 28. While ratification of EPA staff's actions would cure violations of the Appointments Clause, ratification of EPA staff's action on Mr. Williams' new-market entrant application would alter the effective date, thus resetting the 60-day window within which he must petition for review of EPA's denial of his application. *See* 42 U.S.C. §7607(b)(1).

Duty to Recuse Conflicted EPA Staff

Under the Due Process Clause, "there are objective standards that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Although *Caperton* involved an allegedly biased judge, *Withrow* involved an allegedly biased administrative decisionmaker. *Cf. Butz v. Economou*, 438 U.S. 478, 513 (1978) ("federal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process"); *Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth.*, 685 F.2d 547, 567 (D.C. Cir.

1982) ("we cannot countenance [issues] that threaten to bias administrative adjudications"). The Circuit test for disqualification is based on an objective standard:

> The test for disqualification has been succinctly stated as being whether a disinterested observer may conclude that the agency has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.

Cinderella Career & Finishing Sch., Inc. v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970) (internal quotation marks, alterations, and citations omitted). Moreover, "an administrative hearing must be attended, not only with every element of fairness but with the *very appearance of complete fairness*." *Id.* (internal quotation marks omitted, emphasis added). Here, two issues require that EPA recuse the EPA staff previously involved in this matter.

First, Mr. Williams was the only Black applicant and the only applicant denied based on a rationale that EPA staff invented with extra-record evidence that EPA staff refused to correct after being shown that their analysis was factually implausible and legally impossible. Under the circumstances, a court can draw negative inferences from EPA's refusal to correct an obvious error. *Garcia v. Veneman*, 224 F.R.D. 8, 12 (D.D.C. 2004) ("a pattern of notice and refusal to correct can serve as proof of the intent element in [a] … discrimination case"). Courts "are not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S.Ct. 2551, 2575 (2019) (internal quotation marks omitted). EPA staff's discrimination against Mr. Williams would be actionable even if not based on *his race*, *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (discrimination against a "class of one"), but rather based on his advocating for a set-aside program for communities of color or any other impermissible basis.[4]

Second, as Mr. Williams' FTCA claim makes clear, the EPA staff heretofore involved have a personal financial interest in this matter. Moreover, even if that action fails, EPA staff nonetheless could have personal liability. *See* 5 C.F.R. §2635.102(e) ("[c]orrective action includes any action necessary to remedy a past violation or prevent a continuing violation of this part, including but not limited to restitution").

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[4] Even if EPA staff did not take *Mr. Williams' race* into account, retaliating against him for advocating for communities of color would qualify as racial discrimination. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005) (retaliation against male coach of female basketball team for advocating for the team is discrimination *because of sex*); *cf.* Respondents' Opp'n, 27-28 (Nov. 17, 2023) (inaction based on First Amendment right of petition) (No. 23-1269).

For both reasons, EPA staff heretofore involved should be recused. In addition to recusal, the remedy for biased decisionmakers is remand to the agency to have unbiased decisionmakers address the issue:

> [A] remand to the Secretary, rather than [reversal of the agency] decisions, is the proper remedy in this case. Assuming the worst—that the letter contributed to the Secretary's decision in these cases—we cannot say that 3 1/2 years later, a new Secretary in a new administration is thereby rendered incapable of giving these cases a fair and dispassionate treatment.

Koniag, Inc., Uyak v. Andrus, 580 F.2d 601, 610-11 (D.C. Cir. 1978). Unlike in *Andrus*, there has not been a change in presidential administrations, but there is no suggestion that the two of you were conflicted or biased in the way that EPA staff appear to have been biased and are conflicted.

REQUESTED RELIEF

In connection with the pending administrative petitions for reconsideration, Mr. Williams respectfully requests that EPA grant those petitions (*i.e.*, approve his entry into the HFC Program as a new-market entrant). If EPA approves Mr. Williams' new-entrant application, the parties could negotiate or litigate his right to retroactive allocations for prior years (*i.e.*, 2022, 2023, and potentially 2024, depending on the timing of relief). Even if EPA denies the pending administrative petitions for reconsideration, however, EPA should do so quickly to enable a direct challenge in the Court of Appeals pursuant to 42 U.S.C. §7606(b)(1), rather than necessitating a citizen suit—and eventually an FTCA suit—to compel EPA to act or to compel the responsible parties to pay damages.

In connection with EPA career staff administering a program dispensing multiple billions of dollars of valuable allocations, Mr. Williams respectfully submits that the Appointments Clause requires that one of you—as the only officers of the United States involved—review EPA staff's actions and either reverse or ratify those actions.

Finally with respect to the Due Process Clause, Mr. Williams respectfully requests that the EPA career staff previously involved in this matter be recused, based on their personal exposure to liability. Recusal relates functionally to the relief requested under the Appointments Clause because—under both the Due Process Clause and the Appointments Clause—a new agency actor should review the action and inaction of EPA staff to date.

CONCLUSION

Thank you for your consideration of these matters. Should you—or your counsel or staff—wish to discuss this issues further, please do not hesitate to contact me.

Yours sincerely,

Lawrence Joseph

Lawrence J. Joseph

Enclosures

cc: Jeffrey M. Prieto, Esq. EPA General Counsel
Sarah A. Buckley, Esq., U.S. Department of Justice, Env't & Natural Resources Div.
Samuel Stratton, Esq., U.S. Department of Justice, Env't & Natural Resources Div.