



**Back To Square One:  
Unlawful Collusion With Green  
Pressure Groups Should Doom U.S.  
EPA's Greenhouse Gas Regulation  
As Revealed by Freedom of Information Act Requests**



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## Introduction

The Energy and Environment Legal Institute (E&E Legal) is a 501(c)(3) organization engaged in strategic litigation, policy research, and public education on important energy and environmental issues. Through its strategic litigation efforts, E&E Legal addresses, and seeks to alter, onerous federal and state governmental actions that negatively impact the nation's energy supply, and the environment. E&E Legal advocates responsible resource development, sound science, respect for property rights, and a commitment to markets as it holds accountable those who seek excessive, destructive, and agenda-driven government regulation.

This targeted report details very timely fruits of E&E Legal's Strategic Litigation and Transparency projects, **specifically records showing illegal activities by EPA staff, colluding with certain environmental group lobbyists to draft EPA's greenhouse gas (GHG) rules behind the scenes and outside of public view.**<sup>1</sup> This report details further emails that E&E Legal has obtained showing this unprecedented level of collusion and the improper role green groups played in crating the GHG rules. These emails show that **EPA must start anew if it wishes to regulate GHGs**: EPA is allowed to regulate, but not these people who wrote the rules with an impermissible "unalterably closed mind", and not the way we have exposed them doing so. Reports on other EPA, State, SEC, DoE and state-level revelations are in the works. This report makes clear that the entire coal industry has been targeted by EPA and green activists just as the Pebble Mine was. Just as the court are unlikely to allow illegal collusion to destroy Pebble Mine, so should the courts strike down GHG rules developed in the same fashion.

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<sup>1</sup> E&E Legal would like to thank Chris Horner, lead attorney on its FOIA campaigns and author of this report, and Matthew Hardin and Chaim Mandelbaum, attorney reviewers.

Strategic litigation is the cornerstone of E&E Legal’s program, pursued through two practice areas: Petition Litigation (lawsuits) and Transparency (FOIA filings). E&E Legal is dedicated to originating and supporting actions to protect against government overreach, restoring a healthy relationship between responsibility to the environment and the free market essential to its protection, and to secure the constitutional and other fundamental rights of citizens.

### **I. What This Report Builds Upon — E&E Legal FOIA Revelations So Far**

This report follows and builds upon a September 2014 E&E Legal report, Improper Collusion Between Environmental Pressure Groups and the Environmental Protection Agency As Revealed by Freedom of Information Act Requests.<sup>2</sup> This examined documents produced pursuant to several FOIA requests by E&E Legal and the Free Market Environmental Law Clinic (FME Law), most of them compelled only after the Obama Administration’s Environmental Protection Agency (EPA) forced the groups to file litigation, as well as other records obtained by the Competitive Enterprise Institute (CEI). The report educated the public and policymakers on the relationship between EPA and various special interest groups. More importantly, while this EPA claims to be pursuing a common-sense agenda, its own emails reveal a clear understanding — often sneeringly expressed, both internally and among outside activist allies — that its agenda is ideological and geared towards fulfilling Obama's famous vow to “bankrupt” coal, and make

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<sup>2</sup> Available at <http://eelegal.org/wp-content/uploads/2014/09/EE-Legal-FOIA-Collusion-Report-9-15-2014.pdf>. Herein “2014 Report”.

renewable energy “finally...profitable”, neither of which are legitimate purposes of government.<sup>3</sup>

This report shows that the fruits of this agenda are also illegitimate for being the result of unlawful collusion.

Specifically, emails revealed in this report show the influence on EPA by pressure groups, the same groups from which EPA obtained numerous senior officials.<sup>4</sup> Other work has revealed the involvement of other groups from which EPA staffed up its GHG regulatory team; the Natural Resources Defense Council (NRDC) helped EPA write its rules by providing technical assistance and supportive modeling; the Environmental Defense Fund assisted in propping up EPA’s claims of legal justification. No work to our knowledge claims any one group is responsible for the rules, and this report does not claim that the principal lobby exposed herein, the Sierra Club, was responsible for producing them, either. These rules are the embodiment of a team effort, if unlawfully so, where the assistance of ideologically aligned parties went beyond a helping hand, to collusion, working off-line, obviously and even on occasion expressly to keep this collusion away from the prying eyes of the public or congressional oversight.

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<sup>3</sup> “[W]e need to ultimately make clean, renewable energy the profitable kind of energy.” Remarks of President Obama - As Prepared for Delivery Address to Joint Session of Congress, 2/24/2009. Available at: [http://www.whitehouse.gov/the\\_press\\_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress](http://www.whitehouse.gov/the_press_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress). On the eve of the vote on the “Cap and Trade” bill, he reiterated it, “The list goes on and on, but the point is this: This legislation will finally make clean energy the profitable kind of energy.” A Historic Energy Bill, Address by President Barack Obama, June 29, 2009. Available at: <http://www.whitehouse.gov/blog/A-Historic-Energy-Bill>. In his first speech before the United Nations General Assembly, he reaffirmed “We will move forward with investments to transform our energy economy, while providing incentives to make clean energy the profitable kind of energy.” Obama’s Speech to the United Nations General Assembly, September 23, 2009, Available at: <http://www.nytimes.com/2009/09/24/us/politics/24prexy.text.html?pagewanted=all>. In his 2013 State of the Union Address, he explicitly stated that the purpose was to, “Speed the transition to more sustainable sources of energy.” Remarks by the President in the State of the Union Address, February 12, 2013. Available at: <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address>.

<sup>4</sup> See e.g., September 20014 report, pp. 53 - 66. See also e.g., Darren Samuelsohn, 'NRDC mafia' finding homes on Hill, in EPA”, *New York Times*, March 6, 2009, (<http://www.nytimes.com/gwire/2009/03/06/06greenwire-nrdc-mafia-finding-homes-on-hill-in-epa-10024.html>).

The responsible party for this is EPA, and it is EPA that must account for it: the public cannot be legally subjected to rules written in this unlawful manner, but EPA instead must begin with non-conflicted staff in a constitutionally proper rulemaking process in which all parties are afforded the same substantive and procedural due process.

That is simply not how this EPA operates. The 2014 report detailed how various environmentalist pressure groups agendas have unprecedented access to and influence upon their former colleagues and other ideological allies who are now EPA officials. Today EPA serves as a virtual extension of these groups and neither EPA nor the groups recognize any distinction between them. Further, as also detailed in our September 2014 report, certain officials have glaring conflicts of interest yet were rushed into jobs simply to impose the agenda they had long advocated as outside activists, precisely the opposite of the behavior called for by conflicts policy, and contrary to Executive Order 12674.

These groups and EPA have long denied a “war on coal”, now acknowledged by establishment political news outlets to the point of profiling the well-coordinated pressure campaign as well as the relationships and dynamics of those on the front lines.<sup>5</sup> This report details new evidence obtained by E&E Legal and others which further expands upon the special role and undue influence these relationships provide, the very sort of influence the Obama administration once disavowed. We show here how this sort of improper influence and collusion in pursuit of a shared ideological agenda extends beyond EPA circulating spreadsheets of:

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<sup>5</sup> See e.g., Michael Grunwald, “Inside the War on Coal”, Politico, May 27, 2015, which opens “The war on coal is not just political rhetoric, or a paranoid fantasy concocted by rapacious polluters. It’s real and it’s relentless. Over the past five years, it has killed a coal-fired power plant every 10 days.” <http://www.politico.com/agenda/story/2015/05/inside-war-on-coal-000002>.

individual power plants Sierra Club wanted to be blocked under any new EPA GHG standards<sup>6</sup> (a list that EPA staff printed out for their briefing materials<sup>7</sup>), reflecting a Sierra Club SO<sub>2</sub> analysis sent to Goo's private email account,<sup>8</sup> or mines that Sierra Club wished to block.<sup>9</sup>

Notably, EPA only released these spreadsheets — having been produced by third-party special pleaders to lobby the Agency, they are not subject to any conceivable privilege — after litigation, and even then would not release them without additional, extended delay.

A key example relevant to this report's revelations is Michael Goo, poster child for the *New York Times/Greenwire* story on the “Green Mafia” strategically placed throughout government and at relevant times head of the EPA Office of Policy — “a job that answers directly to Administrator Lisa Jackson”.<sup>10</sup> Also described as one of the administration's “cool kids” and “rock stars”,<sup>11</sup> this former Natural Resources Defense Council (NRDC) lobbyist was the Sierra Club's principal liaison and advocate within EPA, through John Coequyt, a top Sierra Club lobbyist running what EPA emails acknowledge is Sierra's “anti-coal campaign.” This

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<sup>6</sup> Email, From: John Coequyt, To: Michael Goo, Alex Barron, Subject: Zombies, 4/29/2011.

<sup>7</sup> Email, From: Robin Kime, To: Verna Irving, Subject: May I please have 1 copy of this email and tab 1 of the attachments, 3 hole punched? Thanks, 4/29/2011.

<sup>8</sup> Email From Josh Stebbins forwarded to Michael Goo, Subject: Sahu Spreadsheet - please send to all, 10/19/2012.

<sup>9</sup> See e.g., February 20, 2009 and February 23, 2009 emails from Sierra Club's Ed Hopkins to Amelia Salzman of EPA with attached spreadsheet of permits Sierra wanted blocked, forwarded on to then-Senior Policy Counsel Bob Sussman, who responded in typical fashion by asserting that EPA shares the greens' concerns, and “Something should be done quickly.” Words were soon followed with action as, mere weeks later, the White House announced its “permitorium” on relevant mining activities. National Mining Association, NMA Exposes EPA's "Virtual Moratorium" on Coal Permits, Oct. 31, 2009 (<http://www.nma.org/index.php/nma-mining-week12/october-31/336-nma-exposes-epa-s-virtual-moratorium-on-coal-permits>). See discussion of Mr. Sussman's record on such special pleading, *infra*.

<sup>10</sup> Darren Samuelsohn, “EPA beefs up policy shop with Hill aide”, *Politico*, January 20, 2011, <http://www.politico.com/news/stories/0111/47921.html#ixzz3hIEixolh>.

<sup>11</sup> Robin Bravender and Katherine Ling, “Cool kids' jump to Moniz's new policy shop”, E&E News, November 12, 2013, <http://www.eenews.net/stories/1059990330>.

relationship was such a special and useful pipeline into the Agency that when Coequyt was on vacation his Sierra Club team pleaded with EPA friends for updates on the grounds that his absence left them feeling out of EPA's loop.<sup>12</sup>

As E&E Legal previously documented, Coequyt worked to ensure Goo participated in meetings of importance to Sierra which Coequyt's schedule wouldn't permit him to attend — thereby seemingly assuring Sierra that its interests would be protected on both sides of the table<sup>13</sup> — while Goo serially met with Coequyt at the Starbucks just across from EPA, thereby avoiding entering his name in the visitors log,<sup>14</sup> and ensured his colleagues paid particular attention to Sierra's concerns and materials.<sup>15</sup>

Piecing together related facts revealed in recent productions, from discrete litigation nonetheless revealing parts of a whole, E&E Legal clearly establishes the illegal nature of EPA's imminent GHG regulations. The abuses by EPA leadership extend to writing the rules with environmental lobbyists on private email accounts that Goo previously used when formally working for the environmentalist movement, and which his colleagues continued to use when they sent, e.g., "a memo [they] don't want to send in public". Goo, too, turned to that account to

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<sup>12</sup> See Email, From: Lena Moffitt (Sierra Club) To: Michael Goo, Subject: Have a second to talk NSPS? 07/29/2011. "Wanted to check in with you to see where things stand. We've been a bit out of the loop over here with John on vacation."

<sup>13</sup> Email, From: John Coequyt, To: Michael Goo, Subject: NSPS Meeting with Green Group and Gina. 1/13/2012; see also 1/31/2013 email from Coequyt to Goo about 2/06/13 meeting between Sierra and EPA's Janet McCabe, asking if Goo will attend.

<sup>14</sup> See e.g., Email, From: Robin Kime To: John Coequyt Subject Re: Michael, 8/29/12; Email, From: Michael Goo, To: Alex Barron, John Coequyt, Subject: Update: Meeting w/Coequyt & Joanne- See Notes, 5/14/12; see also numerous other such emails in the 2014 Report.

<sup>15</sup> Goo's activities with outside groups are so substantial that they are the subject of congressional oversight requests to EPA, the Department of Energy and Goo in his personal capacity, as well as further E&E Legal requests for records production, several of which remain inexplicably unsatisfied.



float options by (at least) the Sierra Club lobbyist for the rules he was drafting, to the exclusion of parties actually impacted by the agenda, not merely emotionally invested in it.

Simply put, this evidence confirms that EPA must scrap the rules about to be finalized, for New Source Performance Standards (“NSPS”, under Clean Air Act section 111b), and its Clean Power Plan (CAA section 111d, for existing plants). It may regulate, but it must do so lawfully. EPA must initiate and proceed *in accordance with the law*, which means with a new process free from conflicts of interest, worthy of public confidence and legal legitimacy, giving all stakeholders an equal voice in the process.

Also, the new process should be in pursuit of goals that are clearly identified and explained, not collusive methods to achieve politically unpopular goals through alternative means — for example, these rules adopted in the name of somehow arresting “climate change” admittedly will have no detectable impact on the climate, yet will contribute to express goals of a) bankrupting coal, b) making electricity rates skyrocket, and c) finally making renewable energy profitable. These are not legitimate purposes of government and, absent some public good, are simply key components of the naked transfer of wealth to politically selected interests that these admissions make plain is the intention.<sup>16</sup>

Congress, the general public and if necessary the courts must ensure that regulations that are the product of this approach of collusive, ideological and behind-closed-doors activism as described in this report, do not stand, but instead require that any such rules are redone under a legally acceptable process.

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<sup>16</sup> This is not permissible. See e.g., *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013).

## **II. Institutional Bias and Specific Unlawfulness — New Evidence Undermining the Legal Legitimacy of the EPA’s GHG Rules**

### **A) Institutional Bias — the Culture that Created the Unlawful EPA Rules**

Regulators are required by law to pursue their tasks fairly, with an open mind and untainted by bias.<sup>17</sup> EPA emails show that its officials, and the institution, most assuredly do not. Despite a growing list of misfeasance, in no instance was this more true than when developing its costly GHG rules with ideologically aligned pressure group lobbyists (not covered in this report, but in a future effort, is the influence of a small group of energy industry players whose lobbyist was given a special seat at the table in the same process). Indeed, as discussed, *infra*, the collusion detailed in this report is of the same variety but more egregious than what seemed to the EPA’s low-point in colluding with environmentalists to obtain a pre-determined outcome, its high-profile veto of the Pebble Mine permit. That abuse appears at this writing to be on the verge of being nullified by the courts for the same reasons the facts set forth, herein, demand that EPA’s GHG rules be stayed and/or rejected.

Since the 2014 report, E&E Legal has pried many hundreds of relevant emails out of EPA in several requests and lawsuits. The record we have obtained is not complete, of course, but reflects only those records responsive to our search terms and that EPA, or its now-departed activist-staff, decided to produce. Which raises the important fact that EPA continues to improperly withhold certain obviously important information with no conceivable legal justification.

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<sup>17</sup> Where an agency has demonstrated beyond doubt that it has closed its mind on an issue, its rules may not stand. See e.g., *Teva Pharmaceuticals USA v. Sebelius*, 595 F. 3d 1303 (D.C. Cir. 2013)

For example, EPA still has not produced a an options memo Michael Goo sent to the Sierra Club, using his Yahoo email account, that by his description suggests ways he might write the GHG rules. This memo was sent the week before Goo produced the NSPS GHG rule for EPA internal review and presentation to the Administrator, in May 2011. At that moment these became EPA records, yet Goo handed these emails over to EPA — apparently selectively — in August 2013, which produced them to E&E Legal in a 906-page “Remaining Files” release, in February 2015. E&E Legal notes the parallels between this pattern of behavior and that by former Secretary of State Hillary Clinton that is now the subject of inspectors general inquiry.

Mrs. Clinton’s use of private emails at the State Department is by no means the only example of unlawful, intentional evasion of federal record-keeping and transparency laws — laws imposed to ensure the integrity of governance and specifically of the record of regulatory agencies exercising their authority. The list of offenders recently grew longer, when E&E Legal uncovered private email accounts being used at EPA.

Following up on E&E Legal revelations, in late May 2015, House Science Committee chairman Rep. Lamar Smith (R-TX) wrote to the EPA and Department of Energy (DoE) seeking private-account emails of a former key staffer for both agencies, the aforementioned Michael Goo.<sup>18</sup> EPA had not properly responded to E&E Legal, though what it did provide was sufficient to reveal unlawful behavior in writing the costly, looming GHG rules and trigger congressional oversight.

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<sup>18</sup> May 14, 2015 letter from Lamar Smith to Michael Goo.

Uniquely, Chairman Smith also wrote to Goo, currently ensconced on Capitol Hill as a Democratic lawyer, in his personal capacity. Remarkably, this development on a Spring Friday has escaped media coverage so far.

In all three letters Chairman Smith emphasized Goo's correspondence with Sierra Club lobbyists on his non-official accounts (Goo used more than one personal email account professionally while at EPA, and therefore presumably also while at DoE), or text messages. Importantly, no texts (or other real-time correspondence, such as instant messaging, which EPA also provides officials, yet does not preserve) had until this Spring, under pressure initiated by CEI, ever been turned over either to Congress or to a private, FOIA requester seeking "correspondence, "records", or "electronic" records. Agency officials have increasingly turned to private accounts and text messaging, and not turned these communications over when asked despite that all of these typical search parameters cover private-account mail and texts.

All of the Chairman's letters requested the parties preserve and collect certain Goo correspondence; to Goo he wrote,, "[i]t is reasonably foreseeable that the Committee will request documents from you at some point during its oversight of the aforementioned allegations" of going off-line to craft EPA rules unlawfully with Sierra Club and other lobbyists. He requested that Goo "preserve all ... "electronic records" **created during your time at EPA and DOE, from 2011 to 2014**, that can be reasonably anticipated to be subject to a request for production by the Committee." (emphases in original) This cautioned Goo to take all reasonable steps to avoid loss or destruction (providing a litany of imaginable varieties), stop any such routine practices that might be underway including by his friends at "third party groups", whom he also

should “Exercise reasonable efforts to identify and notify” that their copies of such records should be preserved, as well.

It should come as no surprise that neither EPA, DoE nor Goo have been completely forthcoming with the Chairman, or E&E Legal, to date (for example, EPA claims it is finished producing records, but assert this about a production that is demonstrably incomplete). Notably, Mr. Smith has shown a willingness to use a chair’s new prerogative to subpoena records from the chair, without a committee vote, as necessary.

In the interim, until more fulsome cooperation is obtained, whether voluntarily or through compulsion, a useful parallel is being developed with the assistance of the federal courts.

EPA also is further dragging out the public and legal reckoning called for by other withheld content, for example redacted discussions dated September 6, 2013 by key officials about the arguments for its GHG rules provided them by David Doniger of the NRDC. These were offered to EPA by Doniger — and studiously passed along and attended to in substantial, but entirely redacted, detail — as EPA officials scrambled to perfect the Agency’s formal case for their rules (the correspondents include another former green-group lawyer, Joe Goffman, who is its top lawyer on turning the GHG rules Goo was tasked with writing into reality).

What we know from the limited language of the emails that EPA has released, awaiting appeal or litigation when it finally completes productions, are that EPA is withholding Doniger’s “strong argument” for EPA regarding its ability to [REDACTED](it’s fair to presume from the context that this reflected what Doniger and Goffman want to do with these rules); an argument on a specific, if withheld point that “we thought had some value to consider”; what “he cared about”; what they told him that re-assured him about (a withheld point); what “reasonably

reassured” him about (a different withheld point); and what Doniger was “least reassured about” (that being the first withheld point, EPA’s follow through on the possible ability to do what these aligned minds wanted it to do). Also, Doniger was “almost undoubtedly going to continue to call Joe” about (something redacted).

None of this is properly withheld as privileged, yet all of it is, in an obvious delaying tactic, as the Agency’s internal “deliberative process”. It plainly is no such thing, but instead sets forth conversations shared with a third party, one of the lobbyists most influential in helping EPA craft the specifics of its global warming agenda, even according to the *New York Times*.<sup>19</sup>

Additionally, EPA failed to produce even these (obviously improperly) redacted emails to Congress despite that they were captured by an official oversight request for documents. This, too, is part of a pattern.

Delaying access to these records has proved to be EPA’s strategy. For example, the damning Goo emails were buried in EPA’s final production, over two years of productions in a particular case, though the date stamps indicate that EPA had them almost the entire time it was producing records (even if Goo withheld them from EPA for over two years before that, until preparing to depart for the Department of Energy, confronted with EPA’s separation form and the required attestation that he held no “Email records including accounts such as private/personal or secondary” account mail). That the emails on their face suggest that Goo did not produce everything he was required to seems to have triggered no curiosity on EPA’s part. The Agency is just not that interested in letting the public see how it operates, however improperly it does so.

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<sup>19</sup> Coral Davenport, “Taking Oil Industry Cue, Environmentalists Drew Emissions Blueprint”, *New York Times*, July 6, 2014, [http://www.nytimes.com/2014/07/07/us/how-environmentalists-drew-blueprint-for-obama-emissions-rule.html?\\_r=0](http://www.nytimes.com/2014/07/07/us/how-environmentalists-drew-blueprint-for-obama-emissions-rule.html?_r=0).

These records are detailed, *infra*, and are extreme manifestations of the personal, ideological stake of EPA officials in imposing the environmentalist pressure industry's agenda.

An initial problem these correspondence raise is the appearance of an impermissible, unalterably closed mind of the officials charged with writing the rules at issue in this report. For example, E&E Legal has obtained correspondence among EPA Region 10 (Pacific Northwest) employees, copying senior Air Office official Janet McCabe (who E&E Legal has learned also continued to use her pressure-group email account for EPA business, in violation of federal law and policy). The emails discussed a Washington State measure to eliminate coal-fired power generation by 2025, commenting that this brought them "one step closer" to their goal.<sup>20</sup>

The same email thread included EPA officials taking credit for "creating the environment" in which state legislators could impose ever tougher regulations on the coal industry, a telling boast by lower-level EPA employees to superiors. Another EPA official in the Region circulated a *Washington Post* story to a group of regulators and environmental activists to alert them that the "Pacific Northwest could play crucial role in how coal companies can sell their coal if it isn't being burned in U.S."<sup>21</sup>; this was not an employee of the Water Office tasked with how (whether) EPA permits mines, but an air regulator worried that U.S. coal producers might still find markets overseas. Her boss, Region 10 Administrator and Obama appointee Dennis McLerran, made a point of informing his management team that "coal export terminals [are] a big issue for region 10<sup>22</sup> — although EPA has no more formal role in their permitting

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<sup>20</sup> Email from Dennis McLerran to Dick Albright, April 13, 2011.

<sup>21</sup> Email from Madonna Narvaez to many, April 16, 2013.

<sup>22</sup> Email, From: Jeff Hunt, to several, 4/18/2012, Subject: mgt team notes — 4/18.

(that's the Army Corps of Engineers' job) than it does in permitting the Keystone XL pipeline that, emails show, Michael Goo among others sought green-group help to block.

Higher up, as correspondence obtained by CEI shows, then-Administrator Lisa Jackson used her Richard Windsor false-identity email address<sup>23</sup> to write Bob Sussman (formerly Advisor to the Center for American Progress, then Senior Policy Counsel at EPA). Responding to a media report that coal plants were on the rise, Jackson simply responded: "Sigh."<sup>24</sup> This is not an expression of disappointment at a violation of the extensive regulatory standards for coal, but the perfectly legal building of coal plants which EPA plainly sought to stop, whatever the law or public rhetoric says.

This goal appears to be both widely shared within the Agency supposedly regulating U.S. industry without bias or predetermined outcomes, and the subject of shared jokes among EPA activists and their colleagues in the environmentalist pressure industry. When current Administrator Gina McCarthy told an industry gathering that coal would still maintain its present market share in the year 2035, Sierra's Coequyt forwarded this apparently dishonest assessment to his closest allies at EPA — Goo and Alex Barron — to share his concern that McCarthy's pants were on fire.<sup>25</sup>

Also, the above-noted empathy former Senior Policy Counsel Bob Sussman showed Sierra Club does seem to have been Sussman's (and often EPA's) typical response to environmental lobbyists in the shared "war on coal". Other examples suggesting this include

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<sup>23</sup> CEI also discovered that Mrs. Jackson used her Verizon email account to correspond about EPA's agenda with Sierra Club president Michael Brune.

<sup>24</sup> Email from "Richard Windsor" (Lisa Jackson) to Bob Sussman, 8/27/2010, Subject: Re: From Greenwire — COAL: Traditional plants are on the rise in U.S.

<sup>25</sup> Email from John Coequyt to Michael Goo, Alex Barron, 08/16/2012.



how, after being informed by Sierra Club of its concerns about a certain set of coal-plant permits, already granted in North Carolina by relevant state officials after environmental review, Sussman passed along to colleagues that “David believes the [State’s] analysis is questionable technically”, asking, “Are we engaged in looking at the Cliffside permits? Might we want to take a look at the MACT applicability analysis... (EPA improperly withheld what Bookbinder told Sussman, but it slipped through in a later production).<sup>26</sup> By the end of that month EPA wrote to North Carolina’s state regulators, citing technical concerns and requesting modifications to the permit, attributing their concern to “questions and uncertainties associated with the unit’s operating assumptions”.<sup>27</sup>

When presented with “followup information from our meeting with Sierra Club on power plant permitting”, Sussman replied, “Thanks Beth. yes, we should definitely have a follow-up discussion.”<sup>28</sup> When Sierra Club and another green group it lobbies/sues EPA with, EarthJustice, suggested to him that EPA stop invoking a statute of limitations defense that was making settling lawsuits filed by Sierra and its allies more difficult, soon enough EPA stopped invoking that defense on behalf of the taxpayer.<sup>29</sup> Additionally, in the early days after the collapse of legislative efforts to give EPA the authority to regulate GHGs, and as EPA decided how it might do so anyway in ongoing plant permitting processes, senior aide Beth Craig asked other staff, “Is it possible for you all to put together a short summary of the arguments that the Sierra Club

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<sup>26</sup> Email From Bob Sussman to several, copying Jackson consigliere Lisa Heinzerling, 4/03/2009, Subject: David Bookbinder— Cliffside Plant.

<sup>27</sup> See, April 30, 2009 letter from Acting Regional Administrator A. Stanley Meiburg to Dee Freeman, Secretary, North Carolina Department of Environment and Natural Resources.

<sup>28</sup> Email, From: Bob Sussman To: Beth Craig, 3/24/2009, Subject: Re: Power Plant Information.

<sup>29</sup> See e.g., Email, From: James Pew of EarthJustice To: Bob Sussman and David Bookbinder of Sierra Club, 3/16/2009, Subject: Meeting on deadline issues.

made on why GHG are currently regulated under the [Clean Air Act]? Gina [McCarthy] would like to get a copy.”<sup>30</sup>

The evidence strongly suggests that the Sierra Club’s concerns are EPA’s concerns, leaving no discernible light between the two. A Vulcan mind meld with select lobbyists is incompatible with the open-mind our laws require of regulators. Actions that flow therefrom, and doing the bidding of aligned lobbyists, is simply not impermissible.

These activists migrate among groups as frequently as they spin through the revolving door to the Obama administration, and the improper treatment of pressure group work as if it were EPA’s extends beyond Sierra Club. One recent revelation from a separate E&E Legal FOIA request demonstrates this in absurd relief. In September 2013, Dan Weiss of the Center for American Progress reported to the aforementioned Joe Goffman that the *New York Times*’ Matthew Wald was going to write a story questioning EPA’s now-demonstrated false claims about a key component of its GHG rules. Specifically, Wald had grasped that the condition precedent to EPA’s NSPS, that “carbon capture and sequestration” or CCS is demonstrated to be commercially viable, may not in fact be satisfied (as E&E Legal has pointed out in formal NSPS comments, apparently prompting EPA to drop its express reliance on the technology, CCS in fact is such a failure as to have been demonstrated to not be viable).

Weiss asserted, “Wrt Wald (who could probably build his own power plant), the issue is to make the most compelling case possible that CCS is “adequately demonstrated.” I was sent a list of CCS projects by one of your colleagues yesterday, but what is needed is a table that lists the project, company that owns it, location, level of co2 capture, and most importantly — pct of

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<sup>30</sup> Email From: Beth Craig To: Patricia Embrey, Jeffrey Clark, 8/05/2009, Subject: Fw: Clean Air Act Title V Petition — Big Stone.

completion/estimated start date. Links to the projects would be useful to [sic]. It could be sent to reporters who want to dig deeper into the question...”, followed by further assessment of strategy toward building EPA’s stronger case and working the press. Weiss closed by writing, “Anyway, my 2 cents based upon what I am hearing from reporters other than Matt.”<sup>31</sup>

Goffman — who rotated into EPA after having pushed the agenda for the Environmental Defense Fund<sup>32</sup> — was at the time Senior Counsel for the office putting the rules out, and the man EPA charged with finalizing these rules. Consistent with all else described in this report, he then promptly (precisely five minutes later) forwarded this assessment as his own, in a new email, having cropped out Weiss, asserting that it was what *he* was hearing from reporters, and *his* 2 cents.<sup>33</sup> The greens’ assessment is the Obama EPA’s assessment, and bothering to purport some distinction does indeed seem to be a wasted effort.

Further demonstrating EPA’s tirelessness in fighting to withhold information from the public, however improperly, the version Goffman claimed was his own was largely redacted — if not fully enough to hide that the claims were apparently forwarded verbatim.

## **B) Lawless Rulemaking — GHG Rule Abuses Mirror, Exceed Pebble Mine**

That same morning that Chairman Smith sent the above-described letters, *Wall Street Journal* columnist Kim Strassel detailed a similar pattern of EPA misbehavior as it has unfolded in federal litigation.<sup>34</sup> This involved EPA’s veto of the Alaska Pebble Mine permit, the fruits of

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<sup>31</sup> Email, From: Dan Weiss, To: Joe Goffman, September 30, 2013, 3:00 PM, Subject: RE: nice picture!!

<sup>32</sup> Jean Chemnick, “Clean Air Act guru returns to shape power plant rule”, E&E News, January 22, 2014.

<sup>33</sup> Email, From: Joe Goffman, To: several, September 30, 2013, 3:05 PM, Subject: Intel on Wald.

<sup>34</sup> Kim Strassel, The Greens Back Door at the EPA, *Wall Street Journal*, May 14, 2015 (<http://www.wsj.com/articles/the-greens-back-door-at-the-epa-1431645574>).

unlawfully collusive action with striking parallels to EPA's misbehavior in producing its GHG rules, a scheme which appears to be on its way to judicial rejection.

There, EPA colluded with activists, once again grounded in a predetermined outcome, to shut down an individual project that would employ hundreds of people directly and many more indirectly. The nearly identical collusive behavior is simply taken to a larger scale with the Goo/Sierra Club scheming: the key distinction between Pebble Mine and what this report details is that, while the latter began by specifically targeting a spreadsheet list of individual plants to be blocked with EPA's GHG standards, these sweeping regulations ultimately extend far beyond that, or a single (if major) economic development project in one region, but to the entire country.

The similarities extend all the way down to the colluding EPA activist drafting the "Options Memo" with environmentalists, using a private email account.<sup>35</sup>

According to records produced in court, EPA colluded with green groups and their lawyers to veto a permit for the Pebble mine. Just as it has the authority to regulate many emissions from electricity generation — lawfully — EPA is authorized to protect the waters of the United States, if it follows required procedures designed to ensure a fair, unbiased process. Just as it wants to "bankrupt" coal and finally make renewable energy profitable, EPA wanted to avoid granting Pebble's mine permit. To arrange for this, EPA ensured a petition was filed by native American tribes, then argued that this — not the regulators' ideology — forced EPA to act.

Former Clinton administration official and lawyer Tom Collier, who had just taken over the project, filed a lawsuit questioning the EPA's veto authority, another complaint demanding

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<sup>35</sup> Emails from Michael Goo to John Coequyt, May 6, 2011, Subject: nsps idea.

hidden EPA documents, and yet another claiming the EPA flagrantly violated a federal law requiring officials to work with outside players in a public and structured way—not in secret.

Collier also sought EPA documents related to the veto by submitting disclosure requests to related agencies. The National Park Service recently came through with a smoking gun: a nine-page “Options Paper” for the Pebble Mine showing that EPA intended to veto the mine a full year before it began its watershed assessment. The only question was timing.

Emails show that in drafting the options paper EPA staff collaborated with Jeff Parker, an environmental activist and attorney who works with mine opponents. In June 2010, as EPA was revising its draft options paper, Mr. Parker emailed EPA biologist Phil North and EPA lawyer Cara Steiner-Riley. In a message with the subject line “options paper,” he suggested how best to craft a veto. More suggestions followed, some of which made it into the final options paper.

As Pebble summed it up in a letter to the Agency’s inspector general: “EPA gave anti-mine activists an opportunity to review, comment, and shape the strategy EPA would pursue to block development of the mine. Then, having decided that it would proceed to block the mine using a [pre-emptive veto], EPA sought to cloak its actions by recruiting the very same anti mine activists to ‘petition’ EPA to initiate those [veto] proceedings.”

EPA Region 10 Administrator Dennis McLerran (the same regional administrator who earlier professed his region’s interest in tackling efforts to export coal, the domain of the Corps of Engineers), alleges that these improprieties “occurred at a very junior level of staff.” So far the Pebble case’s judge seems unimpressed by EPA’s claimed distinction between junior and senior staff given that, even before these documents came to light, the federal district court in Alaska ordered EPA, in November, to temporarily stop all veto work.

**The material facts of the Pebble Mine collusion perfectly track what this report exposes, including as well a series of overlapping relationships in addition to EPA’s trick of using personal email accounts for certain discussions with environmental activists on a draft options memo. The material distinctions are issues of scale, and that the GHG rule collusion inarguably involved principals, at the highest Agency levels.**

The sole other distinction is that the Pebble Mine collusion has already been aired publicly and in the courts, obtaining a level of recognition of the impropriety and the likelihood that the product of EPA’s collusive behavior will be overturned because of EPA’s unlawful conspiring with green activists and lawyers, without the required open mind, but taking action (to block a mine) for shared ideological reasons.

Which brings us to the importance of the Goo/Sierra Club correspondence, showing the same outcome properly awaits EPA’s GHG rules, for the same reasons that EPA’s veto of the Pebble permit now appears doomed.

Michael Goo, much like the EPA attorneys involved in the Pebble Mine veto, has a background working for green groups and there is no indication he abandoned that agenda while serving in various roles in the Obama Administration. Starting out as EPA’s senior policy advisor, then becoming the Department of Energy’s policy advisor, then moving over to counsel the House Energy and Commerce Committee Democrats, Goo has at every step been involved in advancing the progressive agenda on climate change.

That Michael Goo has an agenda, however, is not inherently problematic despite raising questions about whether he had an “unalterably closed mind” to new or contrary evidence. Such a refusal to listen to evidence contrary to policy preferences, if demonstrated, would invalidate

regulations. What is problematic is that Goo has consistently colluded on his agenda with ideologically aligned lobbyists, deliberately using back channels instead of his official email addresses, hiding some of those records from FOIA and avoiding oversight until he prepared to depart, and even then apparently never turning over other records.

Before beginning work at EPA to implement its most expensive regulatory agenda ever, Goo was employed for an environmentalist pressure group where he had every right to use a private email address to conduct his business affairs. Yet after beginning work at EPA, Goo remained in contact with his former NRDC colleagues using the same Yahoo address (and another). We know that these conversations often implicated EPA business, despite EPA rules requiring the use of official email accounts. Goo took the initiative on his Yahoo email account to contact environmental activist and head of Sierra Club's Beyond Coal campaign, John Coequyt, regarding NSPS and EPA's draft options memo, and to work on both GHG rules in this fashion. His collusion with Sierra Club, at minimum, has led EPA to circumvent the ordinary process of public notice and comment, and preserving the integrity of the regulatory and otherwise the federal record.

On May 6, 2010, Goo used his Yahoo account to email Coequyt.<sup>36</sup> This email, with the subject line, "nsps idea", floated an "NSPS Option" by Sierra. NSPS, or EPA's New Source Performance Standard, is EPA's first GHG rule and, in its draft form expected to be finalized any day (as of this writing), effectively bans construction of new future coal-fired power plants in the U.S. Again using Yahoo, Goo superseded this email with a second, saying "sorry dont use the

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<sup>36</sup> Email, From: Michael Goo (Yahoo) To: John Coequyt, May 6, 2011 9:54 AM, Subject: nsps idea.

one in the message use the updated one in the attachment and let me if you cant open the attachment” (spelling and punctuation in the original)<sup>37</sup>.

Notably, even though Goo shared this “options memo” with the Sierra Club, by still refusing to release it EPA implicitly claims either that the memo is protected from disclosure to the public — an implausible argument, having already shared it with an outside lobbyist — or else that Goo now refuses to produce it to EPA as he was legally obligated to do (he is ensconced presumably safely behind the dais as a Democratic committee lawyer on Capitol Hill, though Chairman Smith suggests that will not protect him from subpoena). E&E Legal and Chairman Smith have outstanding requests for this memo.

Even without the memo itself, however, the evidence already obtained raises questions about the fairness and due process at EPA, its personnel having plainly developed its rule with select, politically favored and ideologically aligned activists. By this process, Sierra Club had access to and privately influenced government documents even before others at EPA did.

Outside lobbyists, including Coequyt, also elected to use Goo’s Yahoo account to correspond on EPA matters. Later that same May, 2011, Coequyt wrote Goo suggesting “Standards of Performance for Existing Sources” — the Existing Source Rule or “Clean Power Plan” expected to be finalized with or immediately after EPA’s NSPS. Coequyt confessed in the text of the email, “Attached is a memo I didn’t want to send in public.”<sup>38</sup> The attached memo explained how “EPA can therefore establish a performance standard for existing plants that is not achievable by any plant”.

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<sup>37</sup> Email, From: Michael Goo (Yahoo) To: John Coequyt, May 6, 2011 10:25 PM, Subject: nsps idea

<sup>38</sup> Email From: John Coequyt To: Michael Goo (Yahoo), May 31, 2011, Subject Memo.



Even putting aside the propriety of sharing deliberative records with outside groups, Goo was precluded by agency regulation from using this private email address to conduct public business; the same impediments the collusion presents for NSPS given his unlawful behavior with Sierra Club also attach to EPA's Clean Power Plan as a result of similar, off-line collusion which Goo also chose to keep from EPA, the public or Congress for over two years (and, apparently, continues to keep other records from all parties to this day, not an unexpected outcome when parties choose non-official accounts for official correspondence and why it is not permitted).

EPA cannot claim privilege for many or most of its records relating to these rules now, having shared work and developed the rules secretly with select activists while drafting them. Worse for EPA, the fundamental requirements of due process mean the rules must be scrapped and produced, if at all, through a process offering equal access and participation to all. The product of this unlawful collusion cannot stand.

Optimistically, the House Science Committee will somehow learn whether these emails represent all such correspondence. The available context suggests that it is unlikely both that this is all of it, or that oversight will manage to obtain the rest. Whether others have been altered, lost or destroyed is an open question the Chairman raised in his letter to Goo. The fact of using this private account, quite plainly intentionally (that is, including and serially at Goo's initiation), context suggesting not all records have been turned over, EPA's resistance to turning over more that we know exist, and other factors described herein suggest that we will never see the entire, relevant record created "off-line". The absence of a truly complete public record that can be

scrutinized by the American people and by the courts again suggests that EPA's rules must be produced anew, through a clean, open, and lawful process.

As is the likely outcome in the Pebble Mine case, these revelations should cause a court to overturn EPA's unlawful actions. EPA must be compelled to prepare any rules in pursuit of its global warming agenda anew, without conflict, in an open and transparent manner providing such insider treatment to none. The taxpayers, our economy and the law demand nothing less.

One reason is that even when crafting rules that will ultimately fall, whether the rule is struck down by the courts or proves unimplementable due to its own inconsistencies, the EPA and the green groups seem to be increasingly emboldened by the knowledge that they achieve their ends despite the regulatory failure. The EPA can shutter planned projects, existing facilities, coerce the flow of investment dollars and direct long-term decision making using the threat of future regulation instead of proceeding with what is doable and proper through a legal process. This is a dangerous incentive for an activist bureaucracy which, with its green-group allies, is plainly seizing,

In his letter to the DC (federal) Circuit Court of Appeals, West Virginia Attorney General Morrisey — explaining the States' position, that translates to private actors — recently reminded that Court “serious concern” recently raised about the Agency's closed mind on these rules, also noting that EPA's actions reveal its objectives of the “‘sham’ rulemaking” have a “goal: to ensure that States sink unrecoverable resources into preparing State Plans [under the CAA], while delaying judicial review for as long as possible under the cover of a sham comment period.”<sup>39</sup>

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<sup>39</sup> Letter from West Virginia Attorney General Patrick Morrisey to United States Court of Appeals for the District of Columbia, Re: West Virginia v. EPA, In re Murray Energy (consolidated), April 24, 2015, <http://www.ago.wv.gov/publicresources/epa/Documents/WV%2028%28j%29%20Letter%20-%2014-1112%20%28file%20stamped%29.pdf>.

EPA and its allies are achieving their shared aims through the mere threat or uncertainty of it prevailing, no matter how great or revolutionary the (apparent) overreach.

By means that this report shows are unlawful and grounds for blocking their rules — in several years, when the courts get to the matter — this “sham rulemaking” is already forcing States, communities and companies to forego economic investments and waste resources spent on other projects in order to comply with ruinous regulation that may not be legal or may never even be promulgated. They spend more money to achieve less. They idle facilities. They put our infrastructure at risk. All due to an unlawful gambit that should in the end likely be overturned but not before the desired outcome is achieved.

The impacts of these rule makings — to “bankrupt” a politically deselected industry, make electricity rates “necessarily skyrocket” and “finally make renewable energy profitable” — were grounded in ideology and politics and telegraphed as intentional. What E&E Legal shows is activist regulators trying to win by proposing, no longer just by succeeding.

This is known as “anticipatory regulation.” The Goo emails confirm that EPA's rules are a “sham” way to get that bad investment, even though it knows the process and its fruits are *ultra vires* (facially illegal). That is their plan.

## **Conclusion**

E&E Legal’s September 2014 Interim Report showed that EPA was working with outside green lobby groups on a common regulatory agenda, often with deliberate secretiveness and unlawfully. Since then, E&E Legal has obtained many thousands of pages of EPA, State Department, SEC, DoE and state records documenting the breadth of this collaboration further, if not completely. With EPA’s GHG rules going final (as of this writing) any day, it is critical to

inform the public of the emails detailed in this report as they show EPA has developed these costly public policies with outside interests, and efforts to obscure or even hide the content of discussions with those same groups.

Most important, E&E Legal has obtained proof that EPA's GHG rules are the product of unlawful collusion and are themselves therefore unlawful. Congress, the courts — or EPA, in a moment of rationality — should stop these rules from taking effect. Otherwise the (intended) anticipatory harms of this sham rulemaking will be imposed upon millions of Americans causing years of damage before the ultimately illegal agency rulemaking is overturned.

EPA is a regulatory agency tasked with protecting the environment. EPA can regulate greenhouse gases thanks to the Supreme Court in its *Massachusetts v. EPA* decision. It is not compelled to do so, and it remains prohibited under the law from regulating with an “unalterably closed mind”, for the purposes of completing a “naked transfer of wealth”, or to do the bidding of ideologically aligned pressure groups.

Just as Pebble Mine has shown a federal court evidence of collusion compelling reversal of agency action, what this report reveals about EPA's GHG rules confirms they are the impermissible fruit of an illegal process. The tide must be turned on EPA's collusive actions. EPA cannot be permitted to collude with outside groups to advance a shared agenda, or bury records which illustrate the nature of the agency's decision-making process.

Pebble Mine was targeted through a secret, ideologically driven collusion between green groups and their friends inside the EPA. The courts seem unlikely to allow this to stand. The emails obtained by E&E Legal and revealed in this report make plain that EPA similarly worked with activists to target not just specific power plants or specific mines, but the entire coal

industry, colluding with these activists with no evident regard for the harms such unlawful rulemaking visits upon a nation uninterested in this ideological agenda. It is an agenda that has been rejected every time it has been attempted through the proper democratic process, at the national level. It is precisely that rejection which has led to the behavior described herein. Regardless, this report sets forth similar collusion that the courts also should not allow to stand.

When President Obama stands with EPA Administrator Gina McCarthy in coming days, as expected, to announce these rules, he will do so with these truths having been revealed, and the campaign to block this lawlessness having begun.

As has already been raised in another federal court, in this same context and in recent days, it is time for our system to cure itself of a dangerous and perverse incentive for ideologues with regulatory authority to achieve their desired agenda, unlawfully, simply by announcing it. It is time to limit the harm they can cause in the time between announcing that their agenda will become the law of the land, and the time the courts put a stop to the agenda for the illegal means in which it was imposed.