



**EX PARTE COMMUNICATIONS & OUTSOURCING  
EPA’S “AGENCY EXPERTISE”: THE CASE FOR  
VACATING EPA’S GHG RULES DUE TO AN  
INCOMPLETE DOCKET & ABANDONMENT OF ANY  
PRESUMPTION OF EXPERTISE OR IMPARTIALITY  
 (“CHEVRON” DEFERENCE)**

*Emails Obtained under the FOIA by the Energy &  
Environment Legal Institute, with additional emails obtained  
by the Competitive Enterprise Institute and Jeb Harmon*

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## SUMMARY

The emails detailed in this report damningly illustrate the extent to which the U.S. Environmental Protection Agency (EPA) produced its New Source (Clean Air Act section 111(b) (NSPS)) and Existing Source Performance Standards (111(d) (ESPS)) for greenhouse gas (GHG) emissions, as a “captured” body allowing green pressure groups improper influence, which input was unlawfully kept out of the rulemaking docket, to the extent that the rules are *prima facie* unlawful even if the courts conclude EPA has the ability to so regulate.

Specifically, Michael Goo, then EPA’s Associate Administrator for the Office of Policy, was tasked with writing the initial memo on EPA’s options to impose these power plant regulations. Mr. Goo shared his draft options secretly, using his private email rather than his official EPA email, with lobbyists and high-level staffers at the Sierra Club, Clean Air Task Force and the Natural Resource Defense Council; also using Goo's non-official account, these lobbyists in turn told Goo how to draft or alter the policy that was ultimately implemented in the rules.

These emails demonstrate that, if EPA is to regulate as it seeks to do by these rules, the Agency must start over, proceeding lawfully, affording all interested parties the same access and full ability to comment on the information presented to EPA at all relevant times, and involving only officials unburdened by the unalterably closed minds of those who produced these rules.

EPA’s rules are illegal. In *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), the D.C. Circuit Court of Appeals opined that “[i]f actual positions were not revealed in public comments . . . and, further, if the Commission relied on these apparently more candid private discussions in framing the final . . . rules, then the elaborate public discussion in these dockets has been reduced to a sham.” Such secrecy is inconsistent “with fundamental notions of fairness implicit in due process and with the ideal of reasoned decision making on the merits.”

## **INTRODUCTION**

Emails documenting the activity alluded to above are laid out herein and attached, with many others all produced under FOIA. Some which help set the context include a request from EPA Senior Advisor Janet Woodka to Associate Administrator for the Office of Policy Michael Goo, in Spring 2013, asked “Got a personal email so I can do intro?” Goo responds, *in toto*, “Yep, altho maybe I need a new one. [REDACTED] Should I open another one today?” Woodka replied “That’s totally up to you. Not sure necessary for my peeps. But probably for others.” However many Goo used, key documents indicate at least one personal account was necessary, in his judgment, to author EPA’s GHG rule options with outside lobby groups.

Dozens of emails leave no doubt that moving select correspondence about EPA-related business to non-official email accounts was an understood, deliberate and widespread practice in the Obama EPA.

Clean Energy Group lobbyist Michael Bradley forwarded to Goo's Yahoo account a confession of sorts, an email he sent to senior Clean Air Act counsel Joe Goffman’s GMail account, asking Goffman to pass along a three-page argument on behalf of Bradley’s clients to Gina McCarthy because “I don’t have a private account for her and would prefer to not use an official email address.”<sup>1</sup>

This is similar to another express confession in a key email attaching a memo “I didn’t want to send in public”, according to the Sierra Club’s lobbyist John Coequyt, a confession that is implicit in each and every decision to move such correspondence ‘off-line’ using Goo's Yahoo.

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<sup>1</sup> FOIA also shows that Goffman, lobbyists and EPA officials used a Goffman GMail account for work-related correspondence; these emails are now the subject of an E&E Legal FOIA request similar to the request for Goo’s Yahoo emails that led to the bulk of the items cited in this report.

In addition to evincing an intent to withhold these records from congressional oversight<sup>2</sup> and FOIA requests (in key instances, well over two years—until late August 2013, approximately the time Goo prepared to separate from EPA<sup>3</sup>), these substantial inputs into EPA’s drafting process, including often voluminous attachments, were withheld from the rulemaking dockets.

All of this correspondence comes from EPA's incomplete, ongoing production from what Goo choose to turn over, at the end of his tenure with the agency. Goo also forwarded text messages to EPA's system—which EPA has begun to produce in obvious, partial form—in late October 2013 just before formally leaving his EPA position for the Department of Energy.<sup>4</sup>

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<sup>2</sup> Notably, EPA did not inform congressional requesters when it was given these Yahoo emails despite that they were relevant to recent requests regarding, e.g., NRDC influence.

<sup>3</sup> Departing officials must sign EPA forms implementing the Federal Records Act, “certifying to the best of their knowledge that all records were properly identified and saved into a recordkeeping system or that they were properly turned over to the Records Liaison Officer or records contact for that office.” “A separating Senior Official must complete EPA Form 3110-1, Employee Separation Checklist, and EPA Form 3110-49, EPA Records Management Checklist for Separating, Transferring and Separated Personnel, which ensures that all potential records (paper and electronic) have been properly identified and saved into a recordkeeping system or that they were properly turned over to a RLO or records contact.” Guidance, “Preservation of Separating, Transferring or Separated Personnel’s Records in Accordance with the Federal Records Act”, [www.epa.gov/sites/production/files/2015-03/documents/cio-2155-p-04.0.pdf](http://www.epa.gov/sites/production/files/2015-03/documents/cio-2155-p-04.0.pdf). “Each box below must be initialed by the employees” and supervisor: “**Electronic Documents & Records** on all media should be transferred to an EPA record keeping system including email... 1. Email records including accounts such as private/personal or secondary (group and/or special purpose email accounts”. (emphasis in original)

<sup>4</sup> A January 2016 partial production—screen shots of *portions of*—text message conversations shows Mr. Goo also corresponded by text instead of email, although we are aware of no text message of his ever being produced, previously, by EPA in response to a FOIA or congressional oversight request for, e.g., “correspondence” or “electronic correspondence”. E&E Legal had specified that EPA produce Goo’s Yahoo emails and texts after discovering his move to Yahoo for certain emailing.

Texting correspondents revealed to date include EPA colleague Alex Barron, a key collaborator on the GHG rules; Sierra Club lobbyist John Coequyt, a principal actor in the emails described, below; lobbyist Michael J Bradley; EPA has partially produced one text thread, from reporter Darren Samuelson now with *Politico*, requesting Goo to check his Yahoo account to examine some quotes Samuelson would like to use (oddly, EPA has produced no Samuelson/Goo Yahoo emails); and Conrad Schneider of the Clean Air Task Force, who led the committee Goo assembled, off-line, drafting the basis of EPA’s GHG rules outside of the official channels. Samuelson wrote the piece, run in the *New York Times*, presenting Goo as the poster-boy reflective of the “top-notch people” found throughout the “NRDC mafia” ensconced in policymaking roles during the Obama administration. Darren Samuelson, “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>. As such, Samuelson and any others with whom Goo corresponded on EPA-related matters on his non-official account are unlikely to find these of this account for EPA-related correspondence newsworthy.

## **EPA Greenhouse Gas Regulation — EPA's Work Group, extending Far Beyond EPA**

Notably, emails obtained under several FOIA requests, both by the Competitive Enterprise Institute (CEI) and E&E Legal, show great efforts to ensure that Goo, a former NRDC lawyer, was part of EPA's GHG team as it prepared to present the Administrator with EPA's options.

For example, an April 8, 2011 email from then-deputy Administrator Bob Sussman to "Richard Windsor" (then-EPA Administrator Lisa Jackson's false identity for EPA email purposes), stated: "As Gina [McCarthy] indicated she is putting together a workgroup that will initiate an intensive effort to develop options and supporting analysis. [REDACTED]"

In response, Jackson wrote, "Gina's list included Michael as patt [sic] of the team, didn't it?". Sussman, replied, "Yes it did. [REDACTED]" Jackson responded, "All good".

Goo then forwarded this correspondence to EPA colleagues Alex Barron and Shannon Kenny, as he was his regular practice with key emails in the process, as detailed, *infra*.

As with the rest of the Sussman email, EPA redacted the entirety of Goo's commentary to Barron and Kenny about his place on the team being secured, as "Deliberative".

With this accomplished, emails show that Goo in turn assembled his own workgroup, off-line on his Yahoo account. This ensured that pressure group lobbyists were inextricably part of Goo's important function in developing these options.

As the email exemplars detailed here indicate, these outside parties and several senior EPA officials—not only Goo—regularly proceeded as if the lobby groups and EPA were one and the same. Indeed, this seemed to be understood among green pressure groups (Goo suggested that NRDC's Hawkins publish an argument advancing EPA advocacy lines, and Hawkins did

so).<sup>5</sup> The decision to manifest this on a non-official account, kept from congressional oversight and FOIA and excluding much material from the GHG rules' dockets, reflects an awareness that the law does not share this view.

The group assembled by Goo included the entire NRDC climate team<sup>6</sup> and Goo's close ally John Coequyt, Sierra Club's Director of Federal and International Climate Campaigns.<sup>7</sup>

In addition to receiving volumes of these lobbyists' advice, consultant papers, edits, other collaboration and even hectoring for not possessing expertise on the issue (see *infra*; exposing the Agency's claim to *Chevron* deference—requiring not just expertise but independence and neutrality on the issue—to be baseless), Goo handed over as good as he received.

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<sup>5</sup> See e.g., NRDC email to Goo's Yahoo serving as Greenpeace's conduit to provide information "to people at EPA", and asking if Goo thought NRDC should brief OMB director Cass Sunstein "confidentially". Similarly, Goo also sent, e.g., Sierra Club internal EPA correspondence, simply requesting they "strip all identifying info if you circulate. Thx" (10/26/2013 Goo Email Coequyt. You can find a previous E&E Legal report detailing scores of emails to this effect [eelegal.org/wp-content/uploads/2015/07/EE-Legal-GHG-Collusion-Report-Final.pdf](http://eelegal.org/wp-content/uploads/2015/07/EE-Legal-GHG-Collusion-Report-Final.pdf)).

This collaboration was so close that these same lobbyists would email Goo's Yahoo account to assure him that they were not the source for various media reports on "the inside game" (the phrase of close lobbyist confidante Bradley, representing rent-seeking energy industry parties, in one of many emails to Goo's Yahoo offering his assistance on same). 12/4/2011 Email from Michael J Bradley, lobbyist for the Clean Energy Group, to Goo's Yahoo account.

<sup>6</sup> Numerous emails reflect lobbyists sending Goo internal documents in addition to work prepared for, e.g., NRDC (see "ICF materials", *infra*). For example, "I'm sending this only to you, Hawkins and Doniger" (NRDC's Jonathan Lashof, Subject: Retire v. cofire, with an attachment by the same name), Lashof sending Goo NRDC's internal political analysis regarding GHG regulation (sent to "Climate Center Staff" with High priority), NRDC's Hawkins forwarding Goo his correspondence lobbying State's Special Climate Envoy Todd Stern (to which Goo replied with a request that the two coordinate lobbying strategies to ensure the White House supported what Hawkins, Goo et al. ultimately produced), Hawkins requesting Goo review draft commentary for NRDC's public advocacy in favor of EPA's rules, and Sierra's Coequyt sending Goo email correspondence of "Sierra's "Strategy-Team" (re: all, see *infra*).

<sup>7</sup> Illustrative of the Goo-Coequyt interactions and reliance, Coequyt emailing Goo to ensure that Goo could participate in a Sierra meeting on NSPS with EPA's Janet McCabe, because Coequyt could not make it — thereby seemingly assuring Sierra that its interests would be protected on both sides of the table. 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.

Goo provided “readouts” of his meetings with the Administrator on the GHG rules to Clean Air Task Force lobbyists—the ones attempting to educate Goo on basics such as keeping his units straight, what the relevant units are, and essentially grabbing the wheel with a “we’ve got this” approach.

These records, described below and attached in the same order in several files, are on their own sufficient basis to compel EPA to proceed anew through a proper rulemaking process.

**TIME PERIOD IMMEDIATELY PRECEDING MICHAEL GOO’S MAY 12, 2011  
OPTIONS MEMO TO ADMINISTRATOR LISA JACKSON**

On April 11, 2011, NRDC’s David Doniger sent Goo some colleagues' input on EPA’s budding GHG rulemakings, only to Goo’s non-official Yahoo account, with the Subject line “WRI draft” (that being a draft copy of World Resources Institute advice). Doniger asked, *in toto*, “Let me know what you think.” (The email does not indicate an attachment; see FN 6, *supra*) and, if EPA provided one associated with this email, it is not readily apparent).

On April 22, 2011, NRDC’s David Hawkins sent Goo input, only to Goo’s non-official Yahoo account, with the Subject line “ICF materials”, with no request or commentary apparently necessary. These materials were titled “ICF Projections - NRDC Base Case 2011-04-14\_E.xlsx, YAGTP4256\_NRDC\_Summary\_(of results)\_2011-04-20.docx”, and “ICF Projections - No Co2 Case 2011-04-14\_E.xlsx”. These documents, provided by EPA to E&E Legal, total 180 pages.

Later that same day Goo responded to this email “THANKS”.

As E&E Legal has already revealed, on April 29, 2011, Sierra’s Coequyt sent Goo and Barron an email with an attached XLS spreadsheet, Subject “Zombie’s” [sic]. “Michael and Alex, Attached is list of plants that the companies said were shelved because of uncertainty

around GHG regulations. If a standard is set that these plants could meet, there is not a small chance that they [sic] company could decide to revive the proposal.” E&E Legal has also revealed that, slightly over an hour later, Policy Office (Goo’s) Chief of Staff Robin Kime forwarded this to one Verna Irving, Subject “May I please have 1 copy of this email and tab 1 of the attachments, 3 hole punched? Thanks”.

We now also have other emails showing Kime making the same request for documents of apparent importance, such as a judicial opinion in a major case vacating an EPA rule (see, Email Robin Kime to Verna Irving, March 17, 2009, 2:03 PM, Subject “may I please have 1 copy of this email and the attachment, 3 hole punched? Thanks!”) and a heads-up of an ad, sent to several senior EPA officials in advance, which was the subject of a major ad buy by the American Lung Association (see, e.g., May 31, 2011, 10:22 AM, Subject “May I please have 1 copy of this email and the attachment, 3 hole punched? Thanks!!”). Sierra's "Zombie's" list of plants to be blocked by EPA's GHG standard made it into the Agency's deliberations, in the same fashion, almost verbatim, that other matters of importance were brought to senior staff attention.

EPA did not provide any emails indicating how Kime obtained this email, although she plainly did, and that transmittal would be responsive to the same request.

Later that day, Barron forwarded this information to Shannon Kenny (then Senior Policy Advisor to the Associate Administrator, now Principal Deputy Associate Administrator for EPA’s Office of Policy), Paul Balsarak (Deputy Director of Regulatory Policy In the Administrator's Office), Al McGartland (Director of EPA’s National Center for Environmental Economics (NCEE), which according to its website “inform[s] important policy decisions with sound economics”), and David Evans, an economist in McGartland’s shop (which was at the center of

the storm over and apparent smear of climate whistleblower Alan Carlin, which the *Wall Street Journal* called indicative of “the Obama EPA, and its new suppressing, paranoid style”<sup>8</sup>).

On May 5, 2011, as emails obtained by CEI show, Goo was preparing an options memo to present to the administrator within days. He apparently provided Conrad Schneider, Advocacy Director, Clean Air Task Force, with his Yahoo address because at that point Schneider initiated what became a prolific correspondence with Goo on the GHG rules, emailing him “test”.

Either by pre-arrangement or in one of life’s great coincidences,<sup>9</sup> Goo responded to Schneider one less than minute later, sending his “NSPS Option X” proposal as an attachment in .docx format to CATF, for its input before advancing the option to the Administrator.

One minute after that, Goo re-sent this Option, in the body of his email. It was not yet marked “Deliberative”. That only occurred the next day, after CATF edited the memo.

*Critically, as these exchanges make plain, the “NSPS Option” they were drafting was not limited to new source standards but addressed standards for existing sources as well, affirming that these violations corrupt both NSPS and ESPS rulemakings.*

These show Goo outsourcing “agency expertise”, which he plainly did not possess, to CATF. In fact, Schneider took Goo to task for this lack of expertise in his first response, later that day after reviewing Goo’s draft. Schneider began, “Michael - One thing right off to [sic] bat. Red flag: you need to keep your units straight. There are units, capacity, and generation

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<sup>8</sup> Kimberly Strassel, “The EPA’s Paranoid Style”, *Wall Street Journal*, November 12, 2009, <http://online.wsj.com/article/SB10001424052748703683804574532022758745200.html>

<sup>9</sup> Goo informed another correspondent, Clean Energy Group lobbyist Michael Bradley, that he did not regularly monitor his Yahoo account. Possibly that is why Bradley also texted Goo’s cell phone on work-related matters. Regardless, Bradley sent dozens of emails to the Yahoo account, lobbying Goo, and Goo’s responses, to Bradley, Hawkins and others, were generally by the next day and often within hours.

and they are all different. On page one of Option X, you say [excerpt omitted here]. That is not correct...Paul is counting the number and percentage of units right now.” This email was sent at 6:21 pm. Schneider sent the same admonition about Goo keeping his units straight in a 6:24 pm email which forwarded a colleague’s email noting, *inter alia*, “About **528 (49%) existing coal units having about 34% of existing capacity and 32% of recent coal energy generation would not be able to meet this standard**”.<sup>10</sup> (emphasis in original)

Notably, this lack of familiarity with the subject of the rule(s) was the subject of lobbyist chiding even after Goo had been part of EPA’s working group developing the ESPS and NSPS rules. Subsequent emails from Schneider indicate that there was indeed a team of at least four at CATF working on different elements of the Goo option, with at least four different EPA officials.

Schneider’s reply, about a half hour later, filled in the blanks of and heavily edited Goo’s draft NSPS Option X, copying CATF’s Jonathan Banks and Mike Fowler, Subject: “Comments on NSPS option X”.

The next morning, again using his Yahoo account, Goo sent his NSPS Options X memo to Sierra Club lobbyist John Coequyt. Subject, “nspis idea”, attachment “NSPS Option X V-J.docx”.

A half hour later Goo wrote Coequyt, keying off his original email thread but using a new attachment bearing the same title but this time attaching the replacement version reflecting

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<sup>10</sup> The same author who wrote this sent Goo further information, directly, about twenty minutes after that, Subject “Very rough estimate of coal units that have some gas co-firing capacity.” (Joe Chaisson, “who has led Clean Air Task Force’s (CATF) research and technical work since its founding in 1996” [joe100@gwi.net](mailto:joe100@gwi.net)). Chaisson wrote, *in toto*, “May have better take on this tomorrow.” On May 9, Chaisson again sent Goo similar information, Subject “More info on coal units with gas-cofiring”, stating the input was “From David Schoengold”, promising, “More analysis to come tomorrow”. (According to this [website](#), “Schoengold co-founded MSB Energy Associates in 1988 to provide planning and analytical services and litigation support to groups with an interest in public utility policy.”)

CATF's input. Goo wrote, *in toto*, "sorry dont [sic] use the one in the message use the updated one in the attachment and let me know if you can't open the attachment". It seems that Goo had recognized his mistake of sending *his* version to Sierra Club, which wouldn't do and which mistake he remedied by sending CATF's edited version as his (rather, EPA's) own.

*Having received CATF's rewrite of his fundamentally flawed "NSPS Option X", Goo's new draft, as rewritten by CATF, was labeled "DRAFT DELIBERATIVE".*

This represented the basis for EPA staff tasked with developing options to present to the Administrator.

Between the time of sending his original Options Memo and the corrected, CATF-edited version, Goo responded to CATF's Chaisson's comments. These were to the effect that Goo's draft did not cover all coal plants; CATF's analysis and proposal aimed higher. Goo replied "so it would be for the entire coal fleet—we would have to rewrite it..." (ellipses in original)

By this point CATF had become so enmeshed in the rules' development that it felt comfortable asking Goo to send specific EPA deliberations it wanted. On May 11, 2011 Schneider wrote Goo, Subject "Unit efficiency approach?", to note, *inter alia*:

"Joe [Chaisson] will have some more data on gas co-firing to you shortly. **In the meantime, can you send me a short description of the latest unit efficiency concept that is being seriously considered.** I know Lorie (Schmidt, EPA Associate General Counsel for Air and Radiation; "In her current position, she heads the Law Office within EPA's Office of General Counsel that is charged with providing legal advice to the agency on the development, implementation and legal defense of all Clean Air Act regulations.") presented one last week. As we have been discussing the concept of a unit efficiency standard internally among the crew at CATF, the concern has been raised that, if done incorrectly, such a standard might

inadvertently end up extending the lives of coal units...Can you send enough detail on what people are thinking that we can analyze the policy? We will hold close". (emphasis added)

To date EPA has not provided E&E Legal with a response by Goo to this request.

At 5:33 pm on May 13, 2011, Goo wrote to Administrator Lisa Jackson, providing her "a short briefing memo from me regarding the status of the workgroup efforts to design a greenhouse gas NSPS for electric generating units." Attachments "LPJ NSPSfinal.docx", "nspspptf.ppt".<sup>11</sup>

EPA asserts that this attachment is the internal deliberative work product of the agency, to withhold it.

Goo then forwarded this correspondence to EPA colleagues Barron and Kenny.

#### **PERIOD IMMEDIATELY FOLLOWING GOO'S OPTIONS MEMO TO JACKSON**

During the critical May-June drafting period, green-group influence on EPA's GHG rules continued via Goo's off-line Yahoo account, again not copying his EPA account as required.

Correspondence following Goo's May 12, 2011 delivery of the options, developed mostly by CATF but with Sierra Club review, picks up (in records produced to date) on May 17. Then CATF's Schneider wrote to Goo only at his Yahoo address (again, not forwarded to EPA's system until late in 2013), beginning with "I know you said that the NSPS briefing for the Administrator is today. Here is the latest on our development of a "function" for use in a EGU NSPS rule."

Schneider proceeded to detail work done by CATF contractor NorthBridge, which multi-page presentations he subsequently provided to Goo. He said "Bruce is working these factors into a function" producing certain rates of coal consumption over thirty years "beginning with

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<sup>11</sup> Another email, dated May 12, 2011 with Goo collaborators Alex Barron and Shannon Kenny suggest the latter document was titled, in earlier drafts, "Electric Utility Generating Units\_ab 1410512.pptx".

the rule's initial compliance date." He further detailed their plans and how to proceed, in consideration of Goo's thoughts as well. Schneider concluded, "We should have the initial function next week and initial diagnostic results the following week."

Later that day (more precisely, early the next day, at 1:50 am, May 18, 2011), then-Assistant Administrator for Air and Radiation (OAR), now Administrator Gina McCarthy emailed Goo, and senior GHG-rule aides Joe Goffman and Lorie Schmidt, opening with, "Folks, below is the kind of short email that I send to the Administrator following option selection. Feel free to provide feedback or language changes... And by the way - thanks for a very good briefing today (I mean yesterday)." This affirms the Goo/CATF/Sierra memo was for "option selection".

EPA withheld the remaining four paragraphs of this message as "Deliberative".

Goo then forwarded this correspondence to EPA colleagues Barron and Kenny.

On May 20, CATF's Schneider wrote Goo at his Yahoo account, not copying Goo's EPA email account but including CATF colleagues Chaisson and Banks, providing "the latest from NorthBridge on the NSPS "function" approach", saying it has been refined and that Chaisson would have more analysis the next week.

The next day, Schneider wrote to Goo's Yahoo, to note "I wanted to give you some brief reactions from CATF staff to your read out from the meeting with the Administrator." CATF thereby affirms its place in the meeting, at Goo's invitation, as the GHG rules which it was helping Goo draft were being presented to and deliberated with the Administrator.

Schneider continued:

"By separate message, I sent you our latest thinking on the "algorithm." Contact Joe or Jonathan if you have questions in my absence. Joe says that we should have some diagnostic for you next week. The algorithm should be able to work with any target rate (including your

2100 [NB: that refers to a standard of CO2 emissions produced per MWh of electricity]. Hopefully, we'll have some more information on fas co-firing next week as well. Joe is working with Alex Barron on that. With respect to OAR's idea for new source NSPS — 1850 now and 350 in 2025, my folks LOVED it (Assuming it also applies to gas plants). We believe that we can help EPA build a strong record in support of setting the 350 standard in 2025...Let's discuss how we can support... We don't like Bob Sussman's idea of intra-company trading to meet the 111(b) standard (unless it is limited to your demonstration concept). We can discuss. Am also looking into some of the legal issues implicated by all of this and we'll be back to you about that. Talk to you next week when I'm back in the office."

Goo replied, *in toto*, "thanks conrad. I am anxious to hear more".

EPA has not provided the aforementioned "separate message".

Schneider's email also affirms Barron's involvement in this aspect of developing the rule on which he was also a key Goo collaborator, as well as further affirms the specific roles outside lobbyists played in Goo's option development.

On May 23, Joe Chaisson sent Goo the promised analysis, at Goo's Yahoo address. It references an attached spreadsheet. If EPA provided this, is not immediately obvious (EPA productions do not take pains to associate attachments with their accompanying emails).

On May 31, 2011, Sierra Club lobbyist John Coequyt sent Goo's Yahoo account an email, Subject, "Memo", with an attachment titled "111d Memo 5.30.doc". 111d is shorthand for the Existing Source rule. He writes, "Attached is a memo I didn't want to send in public."

This two-page memo, with the header "Standards of Performance for Existing Sources", provides an analysis which concludes, "EPA can therefore establish a performance standard for existing plants that is not achievable by any plant nearing the end of its "remaining useful life" as defined by EPA." Again, this affirms the corruption of the ESPS as well as the NSPS rulemakings.

This memo provided the critical legal underpinnings for how EPA could justify the plan Coequyt's organization was pushing.

It was two and one-quarter years later that Goo forwarded a copy of this record, from Coequyt, to his email account on EPA's system, in August 2013. Nonetheless, only two hours after receiving this Goo sent other senior EPA staff Alex Barron, Shannon Kenny and Paul Balsarak<sup>12</sup> a document entitled "Nsp's new source options". Attached was a document titled nsp'snewsources.docx. EPA withheld this version, in full, as being the Agency's internal deliberations. Goo wrote, "Hey guys—I [sic] wrote up the attached for circulation to gina, scott and the bobs—REDACTED."

On June 8, Dan Lashof of NRDC wrote to Goo, and his NRDC colleagues David Hawkins, and David Doniger, Subject "Retire v Co-fire", with an attachment by the same title in Microsoft Word format. "Michael—This is a pretty basic analysis, but it makes me even more concerned that a coal-only standard is not likely to achieve significant emission reductions. I'm sending this only to you, Hawkins and Doniger. Attached and pasted below."

On June 9, 2011, CATF's Schneider emails Goo at Yahoo, Subject , "I think you are going to like this!", with the message, "Call me to discuss."

Soon thereafter Schneider sends Goo a PDF presentation totaling 14 pages, Subject, "PLEASE USE THIS VERSION", stating "Michael,-This version fixes a mislabeled slide. Please use it instead." This referred to voluminous attachments from CATF's consultants.

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<sup>12</sup> Balsarak is deputy director of regulatory policy in the EPA Administrator's Office. He also is (and was) chairman of the board of an EPA program, The Green Power Partnership, which encourages organizations to buy green power. He may be the Paul that Schneider referred to in his May 5 chiding of Goo for not having the "agency expertise" required for *Chevron* deference.

On June 30, using his EPA email account, Goo sends colleagues Deputy Administrator Bob Perciasepe, Sussman, McCarthy, and General Counsel Scott Fulton Subject “Utility GHG NSPS”, copying Schmidt and Goffman, “NSPS Team: In preparation for our meeting this evening, I wanted to offer a list of issues within the Utility GHG NSPS that may merit further discussion.” The memo continued for nearly three pages, all of which is redacted as deliberative.

Like other emails among EPA colleagues obtained under FOIA, with Goo using his proper email account, this email affirms Goo’s lead role in drafting EPA’s NSPS.

His role continued, as did that by the green-group lobbyists he had assembled to help him draft the options which served as the basis for the Agency’s GHG rules. Other emails produced to date by EPA include, e.g., Schneider emailing Goo’s Yahoo on November 14, 2014, Subject “NSPS”, writing, “Does this hit the sweet spot (See 11/14 presentation, attached)? 10-12% reduction in CO2 for the same cost as Utility Air Toxics. To late? Call me.” Schneider attached 30-plus pages of new papers produced for it by NorthBridge, “GHG NSPS Abatement Options”, October 27, 2011, and “GHG Standard Options under 111(d): Supplementary Materials on Re-Dispatch Approach”, November 14, 2011.

On November 18, NRDC’s Hawkins sent Goo, at his Yahoo account, “draft 11(d) specs”, with the attachment “Specs nov 18 2011.docx”. This provided NRDC’s counsel on the rule.

On December 9, 2011, Goo responded to Hawkins’ draft, public advocacy piece in support of the GHG rules for which he sought Goo’s advice. Goo wrote “Glad you are on the case and yes that part is wrong and lets talk about this more when you get back—maybe a report or two or something in january showing that there is no new coal being built might be helpful... thx.” In February, Hawkins dutifully placed “What New Coal Plants?” in the Huffington Post.

## **2012-2013**

This behavior continued as EPA's rules proceeded through OMB approval (whether with NRDC's Doniger briefing OMB Director Sunstein "confidentially" as he suggested, or not, EPA productions do not yet show). Notable correspondence exemplars include emails to and from Goo's Yahoo account with CATF's Schneider in November 2012. Then, advising Goo "how to move forward on CO2 emissions from existing coal plants", Schneider wrote:

"I want you to be aware of some new analysis that CATF has recently completed with the NorthBridge Group that would help shape your thinking... We've all been looking for the "sweet spot" on this issue... We think we've found such a sweet spot and want to share our analysis with you, Alex [Barron] and whoever else needs to see it as you are composing your thoughts and recommendations... Bruce Phillips (from NorthBridge) and I can be down at your convenience to run you through the policy, which we've designed to meet as many of your criteria regarding CO2 emissions reductions [...including] identifying companies with coal-fired generation that are economic winners under the policy (lots). We've heard the need for the last one from the WH several times — they really want some companies with coal generation on board. Pre-election, we were already beginning to reach out to those companies we've identified as winners in order to gain their support. Many of the companies we've spoken with are interested, several are very interested. Now, they are now [sic] calling us. So, in sum, we'd like to meet with you and (as appropriate) your team, confirm that these design criteria are still applicable, show you our policy and economic analysis, and get your thoughts. Please let me know how you would like to proceed."

That was November 10, 2012. The next morning, Goo responded, from Yahoo, "Thanks for reaching out. Let's set something Up For Next Week." Schneider replied offering times, to which Goo responded on "OK cool. We will get back to you."

EPA has not yet provided whatever followup came afterward.

## **CONCLUSION**

The *ex parte* issue is directly relevant to if at the same time fundamentally different from any other issue in the litigation over EPA's GHG rules. It offers documentary evidence going to the heart of the way this administration has engaged in rulemaking, not just for the Clean Power Plan or for GHGs. The Administration has outsourced the executive powers to groups that have private agendas and invited them to draft rules or the bases of rules which the entire country must live under. This is not permissible under our system.

These emails document both a series of abuses and a long-running violation of procedural due process requirements which serve as a brake on the unfettered power of agency rulemaking. 42 U.S. Code § 7607, which codifies the Clean Air Act, like the Administrative Procedures Act, requires that agencies create a public docket of material relevant to a rulemaking before a rule goes into effect, and allow a notice and comment period, during which all effected parties can read the material and raise objections and concerns.

When agencies seek to make rules like EPA's ESPS and NSPS, attempting to fundamentally remake the entire national electrical grid, behind closed doors, the necessity of these due process protections for effected parties to participate on equal footing is clear. Such abuses make a sham of the notice and comment process. It is akin to shadow-boxing, with all those who are effected unable to effectively comment, being denied knowledge of what was truly going on behind the closed doors. This, portrayed as one driven purely by science and expertise was in reality driven by special interest groups operating behind the scenes.

The D.C. Circuit has noted that the most important data and information must be made available to the public for scrutiny at the proposed rule stage. *Ass'n of Data Processing Serv.*

*Orgs. v. Bd. of Governors*, 745 F.2d 677 (D.C. Cir. 1984). Here it clearly wasn't. Those engaged in the notice and comment period were denied critical information that would have allowed them to communicate concerns about the rule to the agency. Without this information, without equal ability to participate or to legitimately engage with the agency on a rule designed to substantially impact them, all those effected were denied their due process rights.

Activist regulators will continue behaving in this way, demonstrated here to be understood behavior at least at EPA, unless chastened by the courts, imposing consequences for such abuses. This will not occur unless some party makes a full-throated argument about this.

This issue, if allowed to be aired before the court, should rightly result in it sending the rule back to the Agency, which would then be compelled to repurpose the rule only after properly disclosing all the critical contacts it had with outside parties while the rule was being developed and making the key documents in these contacts available to the public to review.

Some of the challenges to EPA's GHG rules ask the D.C. Circuit to find the Agency lacks the authority to issue these rules. It is important to also demonstrate to the court that, whether or not EPA is allowed to regulate, it did so unlawfully.

The *ex parte* issue allows the court to find that the rule as it stands was not issued properly, without having to decide the more highly complex and politically charged Clean Air Act issues and without having to define the limits of the EPA's power under the CAA. It provides a rationale for sending a rule back to the Agency for being the product of predetermined, unalterably closed minds who proceeded unlawfully to obtain the desired end.

None of these communications was docketed in the public record when the NPRM was released for comments, even though they resulted in a Rule carefully calibrated to shut down

coal power plants. Commenters could not have known that the Rule was drafted through *ex parte* contacts with environmental groups with whom Mr. Goo once worked. Such secrecy is inconsistent with fundamental principles of due process, fair notice, and accountable government. The December 2015 criticism of EPA by the General Accounting Office, for improper “covert propaganda” and “grassroots lobbying” practices in violation of federal law, in connection with another rule, pales in comparison to this surreptitious rule-writing campaign.

These revelations are compelling evidence of a rulemaking process so egregiously afoul of our laws’ requirements that EPA should be forced to start anew, in compliance with the law. Further, the same revelations affirm that EPA’s claim to deference grounded in its expertise — the basis on which so many agency overreaches have been permitted to stand — should receive no respect from the courts. EPA deliberately outsourced this expertise, which the principals drafting the rule did not possess, and did so in illegally closed fashion, outside of public scrutiny.

As such, E&E Legal has asked the D.C. Circuit Court of Appeals for permission to file a supplement to the Petitioners’ Opening Briefs in the litigation over EPA’s Clean Power Plan (E&E Legal v. EPA, 15-1398, consolidated into 15-1363). Even based solely upon the extent of the violations of law which E&E Legal expose in this Report, it is fair to conclude that not all parties in Washington, DC, or the policy world, support E&E Legal’s concerns over transparency into *ex parte* contact between outside parties and federal agencies or whether such abuses should serve as the basis for vacating a rule. Addressing such concerns regardless of what lobbying interests desire is, of course, one reason public policy organizations exist, and is the reason E&E Legal entered that case to begin with.