



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

**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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UPDATED WITH NEW EMAILS: September 20, 2016**

(This updates E&E Legal’s February 22, 2016 Report to reflect a long-delayed September 2016 EPA production including new “offline” coordination with media & Congress. Updates in bold.)

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.

Michael Goo, then EPA's Associate Administrator for the Office of Policy tasked with writing the initial memo on EPA's options to impose these power plant regulations, 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.

Goo expressly described his Yahoo account to EPA's "industry validator" lobbyist as a "channel" for "offline chats", leaving no doubt about the unlawful intent behind its use. Reporters, who chose not to write about this revelation, were using it too.

These emails demonstrate that 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." They are inconsistent "with fundamental notions of fairness implicit in due process and with the ideal of reasoned decision making on the merits." EPA must start over, affording all parties the same access and ability to comment, and this time involving only officials unburdened by such "unalterably closed minds".

INTRODUCTION

Emails produced under FOIA document the activity alluded to above and herein are at EELegal.com, as are with many others **as well as text messages — which EPA is only now, and even then only on occasion and in response to specific demands, turning over under FOIA though they are as much “records” as emails.** For context consider 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 accounts Goo used — **and we now know that at least his colleague, senior Clean Air Act counsel Joe Goffman, used both AOL and GMail accounts for EPA-related correspondence, including with select lobbyists** — key documents indicate he used at least one personal account 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.

Consider a text message from *Politico* reporter Darren Samuelsohn, instructing Goo to check his Yahoo account, to approve/be the unattributed source for characterizations about Obama environmental policymaking. EPA just now produced those emails; it’s possible Goo actually suggested the quotes he was asked to approve, if not in any record EPA turned over to E&E Legal. Other reporters used what Goo calls his “offline channel” for EPA-related correspondence, as well. So did industry lobbyists. Clean Energy Group lobbyist Michael Bradley forwarded to Goo’s Yahoo account a confession of sorts, an email he

sent to 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."¹ **EPA's late September 2016 production of nearly 500 pages included numerous pages of Yahoo correspondence with Bradley and Bradley's colleague Carrie Jenks; the correspondence was a two-way street, via which Goo provided documents which he oddly styled as "need to know" — requesting the need for deletion, after knowing — and in which he calls his Yahoo account a "channel" for "offline chats".**

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.

These admissions by lobbyists, and now Goo and even reporters — among the most aware people on earth about FOIA's requirements — all reveal a desire to break the rules in order to keep EPA-related correspondence "offline".² Significantly, Democratic congressional staff also turned to Goo's Yahoo account to coordinate with him on key matters, circumventing federal requirements. Goo, to his credit, forwarded these to EPA.

In addition to evincing an intent to withhold these records from, e.g., congressional oversight³ as well as the inquiring public (in key instances, for well over two years—until

¹ 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.

² See September 18, 2011 email from Goo's Yahoo account responding to lobbyist Michael J. Bradley, "if you want to have an offline chat just let me know you are using this channel."

³ 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.

approximately the time Goo prepared to separate from EPA⁴), these substantial inputs into EPA's drafting process, including often voluminous attachments, were withheld from the rulemaking dockets.

This of course has consequences for the relevant rules — if a court is willing to hear the evidence. In the case of EPA's NSPS for greenhouse gases discussed at length in this report, EPA successfully objected to the D.C. Circuit considering this evidence of improper *ex parte* communications and collusion as bases for overturning the 111d rule (that case is scheduled for argument on September 27, 2016); however, E&E Legal has ensured the court will hear the evidence at least as relates to the 111b rule regarding existing sources (also discussed herein and the subject of much of the illicit collusion).

All of the correspondence cited in E&E Legal's first version of this report, released in February 2016, came from EPA's incomplete, tortuous production from what Goo choose to turn over, generally at or near the end of his tenure with the Agency. As noted herein with e.g., text messages, it seems likely that Goo did not turn over every record that did at one time exist, whether or not they had still existed at the time he turned over what he did. EPA has now produced more if still only a very few text messages, forwarded by Goo to EPA's email system. Some of these texts have been produced in obviously partial

⁴ 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. "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)

form, though whether actual responsibility for that lies with EPA or Goo is unclear.⁵ As such, the following addresses further, instructive if also sometimes apparently partial text message threads.

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*.

⁵ A January 2016 partial production—screen shots of *portions of*—text message conversations shows Mr. Goo corresponding by text instead of email, although we are aware of no text message of his ever having been produced by EPA, previously, in response to a FOIA or congressional oversight request for, e.g., “correspondence” or “electronic correspondence” (which cover texts). 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; **Goo references that he was texting with lobbyist Tom Lawler in a September 25, 2011 email in which he says “ok i will call number on text message”; EPA produced just two text messages with another “green mafia”, revolving-door type (see https://www.epw.senate.gov/public/_cache/files/386eb25d-b723-4ffd-9fcf-218425a33191/epw-staff-report-obama-carbon-mandate.pdf) named Nat Keohane, then with the White House and soon (again) Environmental Defense's Nat Keohane: a June 5, 2012 evening text from Goo telling Keohane, “Laura Vaught [EPA Associate Administrator for the Office of Policy] very up to speed on this. She thinks we work from behind the scenes only. She will call you. You can call her [REDACTED]” (EPA did not produce the rest of the thread setting forth what it is Vaught was on top of that Keohane should work with her on); and a June 6, 2012 text from Keohane, “Hi Michael, it's Nat. Can you give me a quick call if you are available now? Thanks.”**

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).⁶ 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.

⁶ 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).

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 Bradley to Goo's Yahoo account.

The group assembled by Goo included the entire NRDC climate team⁷ and Goo's close ally John Coeuyt, Sierra Club's Director of Federal and International Climate Campaigns.⁸

New evidence of just how closely Goo worked with Coeuyt emerged in EPA's long-delayed September 2016 production. EPA produced text messages, if only two printed pages worth covering 28 months which — for reasons not limited to the complete absence of any Coeuyt responses — seem unlikely to represent the complete record between parties with such an obviously close professional relationship.

Regardless, those produced include e.g., Goo telling Sierra Club's lobbyist on December 7, 2011, "What up. See u soon" followed by "This is to assure u guys."

On December 15, 2011, apparently responding to a Coeuyt call to his cell phone, Goo texted, "Hey. In a meeting. Do I need to step out?"

A similar Goo inquiry appears dated October 3, 2012, again apparently in response to a missed call, "I am with lpj [Lisa P. Jackson, EPA's then-Administrator]. Re decision on naaqs urgent?" Seemingly anxious that he missed Coeuyt's call, Goo then texted again fourteen minutes later, "Dude. Urgent?", immediately followed by "Or pocket dial".

⁷ 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 Coeuyt sending Goo email correspondence of "Sierra's "Strategy-Team" (re: all, see *infra*).

⁸ Illustrative of the Goo-Coeuyt interactions and reliance, Coeuyt emailing Goo to ensure that Goo could participate in a Sierra meeting on NSPS with EPA's Janet McCabe, because Coeuyt could not make it — thereby seemingly assuring Sierra that its interests would be protected on both sides of the table. Email, From: John Coeuyt, To: Michael Goo, Subject: NSPS Meeting with Green Group and Gina. 1/13/2012; see also 1/31/2013 email from Coeuyt to Goo about 2/06/13 meeting between Sierra and EPA's Janet McCabe, asking if Goo will attend.

Again, EPA did not include any Coequyt response, either to this or to any of Goo's entreaties.

The next message among what EPA produced is dated April 8, 2013, "Call me if u can before 230. Not urgent if you don't but possibly helpful." As with all of this Goo outreach, if Coequyt responded in writing no record of it remains, at least with EPA.

In between those December and October messages was one more, addressing a then-ongoing rulemaking by EPA to regulate methane emissions from oil and gas drilling operations. Sierra Club sued demanding the rule, and EPA wanted an extension of time to provide a particular response. "If you want the oil and gas nsps to give fracking a free pas, as OMB would like then don't give us the extension. If you want any hope of regulation of fraction then give us more time to try and remove the gun from our head and talk sense into OMB dickheads. Call in am." As always, EPA's production included no Coequyt response to Coo's text.

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.

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". **Later, with the September 2016 long-delayed production, we see Goo having arranged for further Barron assistance to these advocates.**

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”⁹).

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

⁹ Kimberly Strassel, “The EPA’s Paranoid Style”, *Wall Street Journal*, November 12, 2009, <http://online.wsj.com/article/SB10001424052748703683804574532022758745200.html>.

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,¹⁰ 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 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**

¹⁰ 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.

units having about 34% of existing capacity and 32% of recent coal energy generation would not be able to meet this standard”.¹¹ (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, “nspc 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 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.

¹¹ 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). Chanson 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.”)

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”.¹²

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 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

¹² 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”.

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. **As detailed, below, EPA’s September 2016 production confirmed — expressly, “recapped” — a conversation about Goo speaking with CATF’s foundation donors to ensure that support for these very same consultants, and for his proxy Schneider’s valuable role in Goo’s EPA work, kept flowing. This would be a thoroughly improper crossing of ethical boundaries.**

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 Balsarak¹³ a document entitled "Nsps new source options". Attached was a document titled nspsnewsources.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.

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

¹³ 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.

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.

That evening, Schneider sent Goo a document he titled “Utility Cash on Balance Sheet Analysis” that he had raised already to Goo. It confesses that “We are weaving this into a story about the ability of power companies to adjust to the EPA regs”, arguing in short that with low interest rates, demand being flat as a result of a stagnant economy, and cash on the utilities’ books it was an ideal time for the federal government to compel them to build “replacement generation”. Indeed, Schneider even claimed that such an edict would provide economic stimulus, reprising the wishful thinking that the *Wall Street Journal* had only recently captured as, “In other words, the government should harm an industry and force it to ruin working assets so maybe other people can clean up the

mess.”¹⁴ If Schneider questioned why growth remained flat despite massive, similar efforts at “economic stimulus” and “green jobs” already imposed, he does not mention it.

In the same message, Schneider then goes into some detail about “the idea we’ve discussed about preceding an NSPS proposal with some sort of process”, to “create the impression that EPA has taken shareholder advice in formulating the rule in the worst case”. “The only downside to this” — with Schneider’s proposed timing expressly being organized around the 2012 election, and the desire to avoid a legal process that would “potentially slow you down too much” — “is if the R candidate campaigns in coal country saying that Obama has a “December surprise” in store to kill coal.”

If Goo had any objections, or other thoughts, he/EPA did not produce them.

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 EPA NRDC’s counsel on the rule.

On December 6, 2011, Hawkins wrote to Goo’s Yahoo account to tell him what reporter Dawn Reeves at Inside EPA is telling him about the NSPS, as for some reason it was important to let Goo know, *in toto*, “We are not commenting”.

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. Go 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.

¹⁴ Editorial, The EPA’s War on Jobs, *Wall Street Journal*, June 13, 2011, <http://www.wsj.com/articles/SB10001424052748703818204576206662079202844>.

2012-2013 “OFFLINE” WORK ON EPA’S GHG RULES NOW BEFORE THE D.C. CIRCUIT

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 provided nothing further.

However, in September 2016, after briefs had been filed in the 111d rulemaking litigation and with oral argument imminent, EPA produced 492 pages, most of which it had

withheld to date. These included extensive further correspondence with Schneider and Bradley on Goo's Yahoo email account, some of which is noted, above.

Other relevant correspondence, for example, includes a November 26, 2012, email from Schneider thanking Goo for arranging a meeting with EPA's Alex Barron and the White House to promote the duo's shared 111d proposal. "Alex has already followed up with me and the WH has asked for some more information"; Schneider hoped to now "strategize about possible ways forward" with Goo. Clearly, the proposal to date reflected just such improper collaboration. "As you could tell, we've tailored our proposal according to the specifications we've heard from you guys and the folks at the WH."

Schneider also referenced supportive industry, which might be positioned to pass through costs to consumers and also make money on the deal. This is called "rent-seeking". "We met with several coal[-fired electricity] generators on our "winners" list after our meeting with you and are scheduling more meetings for later this week." Schneider concluded, "Let me know when would be a good time to talk, otherwise god knows when I'll bother you on your cellphone!"

This process enabled by Goo then came up in a very troubling email from Schneider, "recapping" their conversation mapping out further steps *to ensure CATF/Goo agenda and help CATF raise money* for its role that, plainly, included playing a major role in developing EPA's flagship proposal, "offline", on a senior official's Yahoo email account.

First, very late in the day (technically, early in the morning) after Schneider's followup discussed above on EPA and White House meetings facilitated by Goo, Goo emailed, "yep-lets [sic] talk. Just give me a call or text on my cell [number omitted] Im [sic]

in an all day retreat tomorrow with the administrator but there may be some moments to talk.” Later that day, Goo emailed Schneider again, “Hey dude. Saw you called. Stuck in a retreat. Will call you in a while. Thanks for calling”.

That weekend came the damning “recap” by Schneider of his telephonic collaboration with Goo, revealing their shared mission’s extension beyond EPA’s rules, to securing the activist group’s financial vitality:

“Hey Michael—Thanks for making what time you could to talk yesterday. Here’s my recap. Please let me know if I’ve got anything wrong or if you have anything to add.

Next steps with EPA:...” This involved CATF meeting with named EPA officials, after which, “if they are not openly hostile, you facilitate a meeting with Bob P[erciasese, Deputy Administrator] and us to present our analysis.” (*emphasis added*) (Another email from Schneider to Goo, dated January 17, 2013, discussed further followup with Perciasese, who recommended the parties “reach higher into the WH” and requesting further joint strategizing).

The final point, number 5, is “We keep you apprised of our progress with outreach to coal[-fired electricity] generators.”

The next two breakouts are “What we want EPA to do”, and “Next steps with WH”.

Then Schneider’s “recap” asserts that he and Goo crossed a new ethical line, with Schneider summarizing their conversation about “How you can help CATF with funders:

“1 We can tell foundation program officers that we are engaged in discussions with highly-placed officials in the Obama administration regarding viable pathways forward on 111(d). That we have presented our redispach policy proposal to EPA and the WH and there is significant interest ...

2 CATF’s outreach to coal-fired electricity] generators could be very valuable to this process (helping create the political “space” for EPA to issue a meaningful rule) and is unique among environmental NGOs.

3 CATF needs substantial funding to maintain the engagement with EPA and coal generators both in terms of support for staff time but also consultants (e.g., NorthBridge, ICF) as well as the jobs study (on net employment impacts of [several EPA anti-coal rules] that IEc/INFORUM is performing for us and the benefit-cost (i.e., health benefits of reduced coal generation) and SCC analyses we are performing to show that the policy is cost-effective

4 I can tell foundation program officers to call you for: (a) for your take on the prospects for moving a 111(d) rule; and (b)”.

Schneider closed with further thoughts, and that “we’ll need to engage with OGC [EPA’s Office of General Counsel] to see if they think something like this can be countenanced under section 111. Be interested in your thoughts about this.” It is notable that this group assumes access to legal advice from EPA’s Office of General Counsel.

Again, if Goo objected to any of this, as invited by Schneider in the event it did not accurately reflect their conversation, either he or EPA did not produce such objections. It is worth noting that E&E Legal received at most what Goo turned over to EPA; it may be he failed to forward to EPA his responses back to Schneider. The public record offers no indication that Goo complied with requests from the House Science Committee to testify and produce records, which would have addressed and possibly resolved those issues.

Notice also the role of the foundations underwriting this green-group advocacy, and

the understood priority of theirs in seeing and directing resources to ensuring this staunchly ideological “climate” policy outcome. As the Bloomberg Philanthropies officer’s email and Goo’s “dickheads” text re OMB and fracking show, we do know Goo shares not just ideology but also close relationships with such donor-group officers.

By its own language the script for the collusion going forward undercuts any rhetorical hand-waving to the effect that there was no followup to such musings. The email was itself follow up to the plan. *It is expressly a “recap” of the parties’ agreement.*

Clearly, the documents EPA has produced show and Goo’s acknowledgment of the account as an “offline channel” confirms that Goo was willing to break the rules; however, nothing in the productions received by E&E Legal to date reflect that he would confirm something like this in writing and much suggests a sense that these still were public records warranting caution. So the absence of evidence there is far from evidence of absence.

What may be most important is what Schneider’s “value added” remark refers to, which is what E&E Legal’s report first published in February 2016 demonstrated: CATF wrote what was in fact the core of EPA’s GHG regulations options memo. It is evidence of this that the D.C. Circuit refused to hear in its September 27, 2016 hearing on the 111d rule, after EPA objected. It will, however, hear this evidence in the 111b litigation.

The more we learn about how EPA operated the more the Agency’s objection to the court considering these realities is shown to be self-servingly improper, and the necessity of considering these abuses in determining the rules’ lawfulness becomes more obvious.

Also, the email’s closing paragraphs discussing a role for Goo to help a green pressure group obtain funding for its advocacy, from his position as a senior EPA policy appointee, is entirely consistent with the rest of the scripted, if purportedly “offline”,

coordination. It is however entirely inconsistent with Goo's obligations as a federal government official, which include:

- * **Employees shall put forth honest effort in the performance of their duties.**
- * **Employees shall act impartially and not give preferential treatment to any private organization or individual.**
- * **Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.**
- * **Employees shall not engage in outside employment or activities - including seeking or negotiating for employment - that conflict with official Government duties and responsibilities.**
- * **Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.**
- * **Employees shall satisfy in good faith their obligations as citizens, including all financial obligations, especially those imposed by law, such as Federal, state, or local taxes.**
- * **Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in the Standards of Ethical Conduct. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.¹⁵**

¹⁵ Fourteen Principles of Ethical Conduct for Federal Employees (Executive Order 12674); see e.g., <http://energy.gov/hc/ethics-fourteen-principles-ethical-conduct-federal-employees>.

This is also true about emails sent to Goo after his move to the Department of Energy was announced. Two emails in particular stand out, one from a former Harry Reid aide turned industry lobbyist — and, now, Goo’s employer — and another from one of those foundation officers with whom Goo shared an agenda. Both emails show these advocates seizing on Goo’s move to encourage him to use the new position to promote their agenda priorities he helped facilitate while at EPA; they also show a very willing Goo.

On October 24, 2013, former Reid staffer Chris Miller, now a lobbyist with AJW Associates (which then hired Goo),¹⁶ wrote, “Hey Master Goo — I’m looking forward to hearing about what you're going to do at DOE and when. Here’s the issue that I think DOE can and should be helping with...if you make them. Would definitely help me/the outside campaign working to support the NSPS/EPA regulatory authority.” (ellipses in original)

Miller was writing in response to a new item about a troublesome Federal Energy Regulatory Commissioner raising alarm that FERC was ignoring the EPA rules’ threats to electrical grid reliability (an obviously serious implication, other public records productions show that reliability was an issue that Democrat politicians had their consultant Hart Research specifically poll the public on, to determine assess the possible need to assuage such significant and, as grid authorities warn, legitimate concerns).

The agreeable Goo responded, *in toto*, “Totally the right thing to work on.”

On November 14, 2013, Peggy Duxbury, formerly of the left-wing Hewlett Foundation and by this time Bloomberg Philanthropies¹⁷ wrote to Goo, “Eager to chat

¹⁶ See <https://about.me/cmillerajw>.

¹⁷ See e.g., “Bloomberg to Wire Millions to EDF to Support Fracking Project”, August 16, 2012, <http://www.corporatecrimereporter.com/news/200/bloombergedf08162012/>.

about your new role, and how DOE might be able to help with other agency climate efforts. Seems like you would have some good ideas about this.” Goo responded, “Sounds good!”

“INDUSTRY VALIDATOR” LOBBYIST USES GOO YAHOO ACCOUNT TO LOBBY

E&E Legal’s original report in February 2016 revealed that one of Goo’s correspondents was Clean Energy Group lobbyist Michael Bradley, who also texted Goo’s cell phone on work-related matters, in addition to repeatedly using the Yahoo account to lobby Goo. We also now know that Goo used his Yahoo account to provide Bradley and his firm what he inexplicably called “need to know” EPA documents, with burn notices.

Goo used the account to provide the lobbyist other intelligence. For example, in response to a Bradley email with the Subject line “Highly Confidential,” he wrote “So apparently there is one more meeting with Cass this morning at 10 am with EEI and Cass. Not sure if letter actually went.”¹⁸ Cass is Cass Sunstein who ran the White House Office of Management and Budget’s Office of Information and Regulatory Affairs, or OIRA, who NRDC indicated to Goo they are able to brief — that is, lobby — “confidentially”; OIRA housed the “dickheads” Goo referred to in his correspondence with Coequyt.

In another email, Bradley tells Goo via Yahoo about CEG efforts to work around “EEI Tactics”, discussing plans “to spin the results as somewhat favorable. I will send you the press statement tomorrow...It would be useful if we could touch base tomorrow to discuss how to best manage these dynamics.” In yet another, titled “EEI”, Bradley writes Goo via Yahoo to inform him that “EEI will be attempting to set up a meeting with you to go through the list of 316(B) revisions they are looking for”, that he would get an email

¹⁸ Edison Electric Institute, an electric utility industry association which actually pushed EPA’s GHG rules, though also on several relevant issues the nemesis of Bradley’s client Clean Energy Group, whose membership was often a splinter group within EEI, though not on the occasion of this email.

from an Exelon lobbyist requesting the meetings and that “I want to be clear that the EEI reps do not represent the CEG perspective on 316(B).” Bradley referenced some intelligence he had obtained from the White House confirming a Goo suspicion about EEI’s intentions, setting forth his own plans for dealing with this, and otherwise improperly coordinating with Goo on an “offline channel” to undermine less-connected lobbyists on a rule for which all ratepayers — who are not represented at all in these talks — foot the bill.

In an email the next day Goo responded expressing only his gratitude. Other, related emails show further machinations and intrigue involving a topic about which developments then took a more serious turn — a Notice of Data Availability (NODA) regarding a controversial regulation of cooling water intakes that actually is viewed as responsible for many electricity generating plant closures, known as “316(b)”. In one other email, Bradley wrote Goo with a thoroughly inaccurate “Subject” line about the email about an EPA rulemaking Bradley needed help with, “Personal” (rather than the previous “Highly Confidential”). The text put the lie to the Subject line with, e.g., “below are the key concerns that we have with the NODA”, “We would recommend that the NODA”, and “Please let me know if you have some time to meet/talk on 1/10 or 1/11”.

More concerning, on May 31, 2012 Goo forwarded to Bradley’s colleague at Michael J. Bradley Associates, Carrie Jenks, two NODAs sent to him minutes before by EPA’s Balsarak. Goo was careful to first send the documents to his Yahoo account before forwarding them on to his lobbyist friends within two minutes, into which account he promptly logged in. He cautioned, “Pls delete the noda on stated preference upon receipt. both docs on need to know basis” (ellipses in original) (Balsarak wrote in sending the

documents “Obv. NODA 1 is titled “NODA_1” and is the flexibility changes. NODA is the stated preference and is titled “NODA_2””).

It is not immediately apparent how “need to know” federal documents can include select, rent-seeking (their clients stand to profit) lobbyists with whom one remains in contact using a self-described “offline channel”. With a burn notice — if an official believed the lobbyist in fact “needed” to know, why did he also need to destroy the evidence?

Regardless, Jenks dutifully responded within one minute, “Will do. Yes. Thank you.” Two hours later Jenks wrote again to Goo to note that “The NODA is up on the web so that’s what I am circulating widely now to CEG. Thanks for your help earlier.” Well, what are political appointees whose ideological agenda aligns with business interests for?

REPORTERS WHO DIDN’T SEE NEWS IN GOO’S YAHOO ACCOUNT WERE USING IT

E&E Legal’s first version of this report released in February noted that, “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”. It also noted that “EPA has partially produced one text thread, from reporter Darren Samuelsohn [Politico], requesting Goo to check his Yahoo account to examine some quotes Samuelsohn would like to use (oddly, EPA has produced no Samuelsohn/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. Samuelsohn 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 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>.”

It is no longer true that EPA has provided no Goo/Yahoo-Samuelsohn emails; in fact, it provided (almost exclusively) those which the aforementioned text message tipped off. Other emails just produced show E&E News, then Politico, reporter Robin Bravender used Goo’s Yahoo account to correspond about EPA-related matters, as well. Neither reporter found the remarkable revelations about Goo’s use of a Yahoo account to conduct EPA business newsworthy when E&E Legal broke them. Bravender did co-author the piece cited in E&E Legal’s original report on this issue, “‘Cool kids’ jump to Moniz’ new policy shop” (E&E News, November 12, 2013, <http://www.eenews.net/stories/1059990330>).

On January 25, 2012, the day Samuelsohn instructed Goo to check his non-official account, Goo provided him the requested quotes for his story; the reporter asked if he could attribute the claims he, apparently, drafted up to include in his piece to “*a former house democratic aide* if that works for you.” Goo said “Sure”, but asked, “maybe say former Senate democratic aide”, which Goo’s bio suggests was five gigs ago and the Senate the governmental branch in which he worked the least.¹⁹ This effort at detachment from the quote makes a certain amount of sense given his apparently tenuous relationship to the sentiments offered up for his approval to not be attributed to him. Samuelsohn thanked Goo “for the quick turnaround” and suggested the pals do lunch soon.

Goo concurred. The correspondence Goo/EPA provided under FOIA does not pick back up until June, when Samuelsohn sought “any deep background/insight on Cass S[unstein]”, now that Samuelsohn had “the White House beat”. There is no indication that

¹⁹ <http://ajw-inc.com/michael-goo/>

Goo offered such details as e.g., that NRDC claims it is able to brief the OMB director “confidentially”. That would seem to be newsworthy, but then so would a senior policy aide using an unsanctioned account to correspond on work-related matters. Whether or not with reporters. News, like ethics and legal obligations, seem to be in the eye of the beholder in Washington.

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.

While the odds are dramatically less in favor of one candidate prioritizing this activity, regardless of who wins the November 2016 presidential election the transition team should immediately set about to document just how widespread the abuses documented above ran, demand the public record be complete, and remedy whatever wrongs they find.

Consider Hillary Clinton's inner circle at the State Department: only the non-lawyer Huma Abedin signed the required separation agreement when leaving State; lawyers Clinton and Cheryl Mills refused, according to documents obtained by CEI in FOIA litigation. These forms of course require attestation, under penalty of law (for those subject to such things), that no copies of agency correspondence have yet to be transferred to the formal recordkeeping system from sources like personal computers, thumb drives, phones, hard drives or email accounts. Clinton and Mills were nonetheless permitted to draw their last paycheck and enlist in benefit programs. Still, we see the prospect of falsely attesting to such things at least gives pause, if not always compliance and sometimes evasion, instead.

Still, just with the record already compiled — government-wide if only thanks to FOIA and, typically, litigation — it is clear that the next administration has an obligation to use all measures available to them to ensure to the best of its ability it has in its possession all records that the public rightly owns, and to right any wrongs in the regulatory process which those records reveal. Such as those documented, above.