



September 16, 2022

The Honorable Thomas R. Carper
Chairman
Committee on Environment and Public Works
United States Senate
Washington, DC 20510
Via Email to: Greg_dotson@senate.gov

The Honorable Shelly Moore Capito
Ranking Member
Committee on Environment and Public Works
United States Senate
Washington, DC 20510
Via Email to: Elizabeth_Horner@senate.gov

Dear Chairman Carper and Ranking Member Capito,

As the Committee on Environment and Public Works takes up the nomination of Joseph Goffman to serve as Associate Administrator for the Office of Air and Radiation (OAR) at the U.S. Environmental Protection Agency (USEPA), I write today to ensure that the Committee knows what public records reveal about an issue both of critical importance and highly relevant to Mr. Goffman's possible service in that role.

"OAR is responsible for administering the Clean Air Act."¹ As such, if confirmed to be Associate Administrator for OAR, Mr. Goffman will be intimately involved in Agency decision making on all aspects of the Clean Air Act's National Ambient Air Quality Standards (NAAQS) program. This includes making decisions on a priority of his in recent years, using the NAAQS to regulate greenhouse gases (GHGs). But Congress has never authorized the CAA to be a nationwide decarbonization law, and past admissions by leading environmentalist officials affirm this would represent a radical reinvention of the Act, by bureaucratic fiat.

Mr. Goffman's involvement in plans to reinvent NAAQS and the Clean Air Act in this way is a matter with which Energy Policy Advocates is very familiar thanks to its long track record of open records requests (and litigation, as is far too often necessary) at the state and federal level. However, we also note that Mr. Goffman did not disclose, during his onboarding process in the Biden Administration,² his role in consulting with extant- and prospective-plaintiff state attorneys general (AGs) who filed suit against the Environmental Protection Agency the day before President Biden's inauguration to, records strongly suggest, force the expansive use of NAAQs. Mr. Goffman therefore has also failed to recuse himself from deliberations on this critical issue during his tenure at USEPA.

¹ <https://www.epa.gov/aboutepa/about-office-air-and-radiation-oar>

² From productions under a federal Freedom of Information Act request (EPA-2021-003933),

We refer you to an Amicus Curiae brief we filed in a case involving an apparent, hoped-for sue-and-settle by certain state attorneys general, toward regulating GHGs through a “back door” of a revised secondary NAAQS for ozone (in *State of New York et al. v. Environmental Protection Agency* (D.D.C. 21-1028, available at https://govoversight.org/wp-content/uploads/2021/07/21-1028_State-of-NY-v-EPA_Brief-for-Amicus.pdf).³ This brief details a ‘Plan B’ that activist AGs turned to after receiving counsel that a direct approach of a carbon dioxide (CO₂)/CO₂-Equivalent (GHGs) NAAQS was unlikely to survive.⁴

This plan to reinvent NAAQS as a backdoor decarbonization regime was both economically and politically risky because of its radicalism. When word circulated early in the Obama-Biden administration that that administration might seek to impose a GHG NAAQS, President Obama’s first EPA Administrator, Lisa Jackson, rejected a climate NAAQS as not “advisable.”⁵ One prominent environmentalist group attorney, also seeking to quell controversy over the prospect, said “hell will freeze over before there’s a NAAQS for CO₂.”⁶ The idea was downplayed because the economy would certainly freeze over *after* such a move.⁷

But Mr. Goffman did not share former EPA officials’ reluctance to reinvent this old law in a new and radical way. After the October 2019 initial consideration of a direct GHG NAAQS, and after consulting with Mr. Goffman, an attorney, in his position held immediately prior to joining the Biden administration and parties Mr. Goffman referred the AGs to, the AGs arrived upon the idea of a back door GHG NAAQS through a secondary ozone NAAQS. This was followed by the filing of *State of New York et al., v. EPA*, on the last day of the Trump administration. Now, in the wake of the United States Supreme Court’s most recent *West Virginia v. EPA* opinion, No. 20-1530, we see largely the same group of AGs preparing for litigation over “whether the federal government can or must take action to address climate change under the NAAQS provisions of the Clean Air Act.”⁸

³ Mr. Goffman also was working in the Agency as a member of the Biden Administration transition team prior to and when suit was filed on January 19, 2021.

⁴ Public records, and a privilege log in litigation under Michigan’s Freedom of Information Act (FOIA), indicate that these plaintiff AGs discussed the prospect of suing to force a listing of carbon dioxide (CO₂)/CO₂-Equivalent (GHGs) as a criteria pollutant, toward obtaining a GHG NAAQS, in October 7, 2019. This would prompt a CO₂ equivalent or GHG equivalent NAAQS, herein “CO₂ eq”, GHG eq”.

⁵ Robin Bravender, “EPA chief signals opposition to Clean Air Act curbs on GHGs,” E&E News, December 8, 2009, <https://www.eenews.net/stories/85407>.

⁶ *Id.*

⁷ A climate NAAQS, whether or not obscured within a “secondary ozone NAAQS”, would require massive central regulation of nearly all aspects of economic life, essentially a perpetual “Lockdown Economy”, requiring truly massive reductions in energy use emissions.

⁸ Relevant excerpts of August 17, 2022 deposition of Steve Novick, “Special Assistant Attorney General” in the Oregon Department of Justice, in *Energy Policy Advocates v. Rosenblum, et al.*, Circuit Court for the County of Marion (OR), 20CV38257, available at <https://govoversight.org/wp-content/uploads/2022/09/OR-DoJ-Novick-on-GHG-NAAQS-litigation.pdf>. See also July 28, 2022 letter to USEAP Administrator Michael Regan,

All of this played out as a result of Mr. Goffman's consultation with these AG offices, which is documented in public records.⁹ It is now proven that as of October 2019, the *State of New York, et al.* plaintiff-attorneys general, led by New York, were consulting with Mr. Goffman on these issues.¹⁰ These activist AGs specifically sought to develop strategies for regulating GHGs through the NAAQS, replacing and expanding the Obama Administration's "Clean Power Plan" which was stayed in 2016 by the United States Supreme Court in *West Virginia v. EPA*.

Public records released by the New York Office of Attorney General show that these AGs consulted with Mr. Goffman specifically because they sought "people who have made the case for using NAAQS" to regulate GHGs.¹¹ On this issue, it appears Mr. Goffman long ago made up his mind.¹²

According to the USEPA's response to our FOIA request number EPA-2021-003933, we can state with confidence that Mr. Goffman did not disclose these consultations in his filings with the Biden Administration to assume his current position with USEPA. He therefore also failed to recuse himself from consideration of how the Agency responds to, e.g., *State of New York et al v. EPA*, or in Agency deliberations on whether to impose a "front door" or back door" NAAQS (through a secondary ozone standard, see Amicus Brief as well as "Biden's 'Back Door' Climate Plan," *Wall Street Journal*, March 17, 2021, <https://www.wsj.com/articles/bidens-backdoor-climate-plan-11616020338>). It is our belief, grounded in these public records, that Mr. Goffman cannot properly have any role in such deliberations.

The consideration of Mr. Goffman's nomination presents an opportunity for the Committee to review EPA's conflicts and pertinent disclosures pertaining to this matter of

https://www.doj.state.or.us/wp-content/uploads/2022/07/Multistate-NAAQS-Letter-to-Regan_2022-07-28.pdf.

⁹ Energy Policy Advocates also possesses public records from Mr. Goffman's tenure at Respondent EPA during the Obama administration showing a long history of coordinating with Petitioner New York Attorney General and environmentalist groups, together, to advance the cause of GHG regulation.

¹⁰ Energy Policy Advocates also possesses public records from Mr. Goffman's tenure at USEPA during the Obama administration showing a long history of coordinating with Petitioner New York Attorney General and environmentalist groups, together, to advance the cause of GHG regulation. As such, Energy Policy Advocates also notes that Goffman was working in the Agency as a member of the Biden Administration transition team prior to and when New York filed suit.

¹¹ We detail these findings and link to the records in an Amicus Curiae brief in *State of New York et al. v. Environmental Protection Agency* (D.D.C. 21-1028, available at https://govoversight.org/wp-content/uploads/2021/07/21-1028_State-of-NY-v-EPA_Brief-for-Amicus.pdf).

¹² In the context of this knowledge revealed in public records, see also Joseph Goffman and Laura Bloomer, "Disempowering the EPA: How Statutory Interpretation of the Clean Air Act Serves the Trump Administration's Deregulatory Agenda," <http://eelp.law.harvard.edu/wp-content/uploads/Draft-CWU-Symposium-Paper-Goffman-Bloomer-For-Upload.pdf>.

seeking to reinvent the Clean Air Act as a nationwide decarbonization statute, possibly in undisclosed and/or unethical coordination with outside litigants and other parties.

Sincerely,

A handwritten signature in black ink, appearing to be 'RS', followed by a long horizontal line that loops back under the signature.

Robert Schilling
Executive Director
Energy Policy Advocates

cc: Members of the Senate Committee on Environment and Public Works